

# Legal Issues in School Volunteer Programs

---

by Ingrid M. Johansen

*Part IV is the final installment of this series on legal issues in school volunteer programs. The first three parts discussed liability issues in public school volunteer programs. Part IV focuses on methods of avoiding harm in school volunteer programs.*

THIS SERIES HAS BEEN DIRECTED at those local school boards that have not developed and implemented official volunteer policies—that is, the vast majority of North Carolina school boards. As Part I discussed,<sup>1</sup> a policy is official, for the purposes of this series, if it is developed by a body within the local school system that has the authority to implement and enforce it (most probably the school board itself); if it is written and communicated to relevant parties; and if it is, or is intended to be, consistently applied at each school within the system's jurisdiction. A *volunteer policy* is one that provides mechanisms for screening volunteers, guidelines for training and supervising them, and possibly rules concerning how to handle harms that occur in the volunteer program. This last element is sometimes called *secondary prevention*.<sup>2</sup>

These elements of a volunteer policy—screening, training and supervision, and rules for secondary prevention—are directed toward different goals. Screening helps prevent dangerous or unqualified individuals from gaining access to school facilities and people, and,

by increasing the likelihood of a good match between the volunteer and the position, decreases the risk of injury the volunteer poses while on school premises. Training and supervision erect barriers against the occurrence of negligent or intentional harms once volunteers are on school premises. A program of secondary prevention creates rules for handling harm when it does occur, reducing the likelihood that harm will be compounded or repeated.<sup>3</sup>

There is little statutory or case law dealing directly with volunteers, and even less dealing directly with school volunteers. Part II of this series explained that the general legal duty of school boards that use volunteers in their schools is to exercise reasonable care (that level of care a reasonable person in similar circumstances would exercise) in selecting, training, and supervising volunteers.<sup>4</sup> In other words, boards will be held to a negligence standard. What this general legal duty requires in terms of actual volunteer policy cannot be stated with any specificity; the most that can be said is that a policy will be judged by the totality of circumstances. Part IV gives some examples of how a volunteer policy might reasonably be applied in different circumstances.

---

The author, a research fellow at the Institute of Government, would like to thank Laurie L. Mesibov for contributing the idea for this series; Pamela W. Bailey, coordinator of volunteer programs for the Chapel Hill-Carrboro schools, for sharing her knowledge and experience; and Robert P. Joyce for providing valuable editorial assistance.

1. Ingrid M. Johansen, "Legal Issues in School Volunteer Programs, Part I: Liability for Volunteers Themselves," *School Law Bulletin* 28 (Spring 1997): 1.

2. John Patterson et al., *Child Abuse Prevention Primer for Your Organization* (Washington, D.C.: Nonprofit Risk Management Center, 1995), 41.

---

3. *Id.* Secondary prevention operates on the thesis that someone who mistreats children will repeat his or her misconduct—with the same child or with other children—unless or until prevented from doing so.

4. Ingrid M. Johansen, "Legal Issues in School Volunteer Programs, Part II: Direct School Board Liability," *School Law Bulletin* 28 (Summer 1997): 1.

## Part IV: Policies for Minimizing Risk in School Volunteer Programs

Most North Carolina school boards do not have official volunteer policies, so this article begins by examining considerations preliminary to their development. It then discusses suggested elements of official volunteer policies, focusing on the screening component and concluding with a discussion of what makes a policy “reasonable.” The article looks at the issue of “volunteer rights”—both legal and practical—and concludes with a discussion of the potential benefits of an official volunteer policy.

### Preliminary Considerations

Should a board of education develop an official volunteer policy at all? Yes, for the practical and legal reasons outlined throughout this series. It is inescapably true, however, that opposition is likely and the rewards, in the near term, will be intangible.

### Opposition to Development of Policy

Boards that in the past have given their schools broad discretion in using volunteers may be reluctant to develop and implement an official volunteer policy. Reluctance (and outright opposition) is likely to focus on three arguments:

- North Carolina schools do not have a problem with volunteers causing harm (or suffering harm) during their school service (“if it ain’t broke, don’t fix it”).
- Development and implementation of a volunteer policy is too costly, both in terms of human and monetary resources.
- Volunteers will be deterred from providing service to schools if they are required to submit to screening, training, and other requirements.

There is some truth to each of these arguments, but they are ultimately unpersuasive. The first argument contains truth in that most volunteers who provide school service are qualified individuals with good motives who cause no harm during school service. But

this truth does not refute two important points. First, the fact that there are not widespread reports of school volunteers causing harm does not mean that there are no harmful incidents. Harm caused by school volunteers to students is, like other forms of harm to children, quite likely to go unreported. Children often do not report maltreatment at the hands of adults (and sometimes do not even recognize it as such). Parents may try to keep maltreatment quiet to spare their children further upset. And school personnel who do learn of such maltreatment may not make it public because of parents’ wishes, or a desire not to stir up trouble in the community, or fear of looking bad. Harms have occurred, however. Public school personnel, who often wish to remain anonymous when relating such stories, have told of volunteers who sleep with students while chaperoning overnight functions, prospective volunteers who have been asked to leave other volunteer positions for inappropriate sexual behavior with children, and other similarly chilling tales.

Second, even were we to accept, for the sake of argument, that no harm has been caused or suffered by school volunteers in North Carolina, past performance is no guarantee of future safety. The experience of organizations that use volunteers to work with youth gives generous cause for concern. The Boy Scouts of America, Big Brother/Big Sister, church groups, and other school districts<sup>5</sup> have all been sued for harms caused by (or to) volunteers.<sup>6</sup> These organizations, in response, have developed policies for screening, training, and supervising volunteers. Public schools are one of the few remaining institutions that do not routinely use such policies. Given this state of affairs, it seems highly likely that a prospective volunteer with bad motives would apply for a position at a public school.

5. *Teters v. Scottsbluff Pub. Sch.*, 567 N.W.2d 314 (Neb. Ct. App. 1997) (school district sued for injury suffered by volunteer chaperone on property owned by district); *Wolfe v. Dublin Unified Sch. Dist.*, 65 Cal. Rptr. 2d 280 (Cal. Ct. App. 1997) (school district sued for injuries student suffered in accident involving car driven by volunteer); *Swearingen v. Fall River Joint Unified Sch. Dist.*, 212 Cal. Rptr. 400 (1985) (school district sued for student injuries from accident that occurred while she was riding in car driven by volunteer).

6. See Johansen, “School Volunteer Programs, Part I,” 2, n.10.

The second argument, that development and implementation of a volunteer policy take time and money, also holds some truth. It takes as much time and money as is necessary to make the program reasonably safe. Ultimately, if a board cannot afford to make that expenditure it probably cannot afford to have a volunteer program. Harm caused by a volunteer inadequately screened, trained, or supervised can cost the school astronomical sums in legal fees and damage awards and—just as important—can cost school personnel the goodwill and support of their community. To focus solely on the certain costs of developing and implementing a volunteer policy to the exclusion of the potential costs of not doing so is shortsighted.

Finally, it is also true that putting into place a program for screening and training school volunteers will deter some people from volunteering their service. This deterrence is not all bad, insofar as it may reach people who are appropriately deterred—for whatever reason.

*Example 1:* A school publishes the following position description in its newsletter: “Needed: volunteer to transport third graders to and from sports camp on Wednesday afternoons. Volunteer must have own car, insurance, and good driving record. School will check driving record of all applicants.” This published position description will allow volunteers with poor driving records to screen themselves out.

*Example 2:* A new member of the community is seeking volunteer work that involves children. The following ad piques his interest, until he reaches the last sentence: “Volunteers needed to establish one-on-one, long-standing, supportive relationships with at-risk children. Significant time and emotional commitment required. Interested applicants must consent to criminal history background checks.” Before moving to this community, the prospective volunteer had been serving time in prison for child abuse.

Of course, good volunteers may also be deterred.<sup>7</sup> If schools take pains to explain the rationale behind their policies, however, most volunteers will understand that the policy is not a sign of suspicion about them but a prophylactic measure designed, primarily, to protect the children they are interested in serving. Child abusers or other individuals who may be inappropriate school volunteers do not wear signs on their foreheads. It is necessary to have a policy and to apply it consistently and evenhandedly. This being said, most volunteers will

7. *But see* John Patterson et al., *Staff Screening Tool Kit* (Washington, D.C.: Nonprofit Risk Management Center, Washington, D.C. 1994), 27. While losing some potential volunteers may be an inescapable cost of a volunteer policy, organizations that do have such a policy often report no significant drop in service.

not serve in positions so risk-laden that they require the kinds of screening mechanisms or the degree of training that might deter them from serving.

## Liaison Organizations

In the end, it may be that a cost-benefit analysis leads a board to conclude that the development and implementation of a volunteer policy is too costly. The board must then consider the potential cost of ignoring the risk posed by unregulated volunteer programs. If this risk cannot reasonably be ignored (which is the thesis of this series), then the use of volunteers—in all but the most innocuous and heavily supervised activities—must stop. In short, the board has three choices: implement a volunteer policy; put a halt to the use of volunteers; or make use of volunteers from another organization that does screen, train, and supervise volunteers.

Especially for volunteer positions that require in-depth screening, a board may be wise to use the services of volunteers from a separate organization that does screen, train, and supervise volunteers, rather than implementing its own volunteer policy. Put another way, the board may want to structure its relationship with volunteers in such a way as to avoid creating the existence or appearance of a master-servant relationship. The board would still, of course, have the responsibility to determine that the liaison organization uses reasonable mechanisms to weed out unsafe or incompetent volunteers<sup>8</sup> and would want to make sure that its relationship with the liaison organization (associational rather than supervisory) is made clear to parents, students, and volunteers. Additionally, for outside volunteers who perform most of their services in the school or around school personnel, the liaison organization should maintain clear-cut responsibility for selecting the volunteers, possibly for assigning them, and for keeping tabs on them. All of this is important so that the board does not effectively become the master of the volunteer.<sup>9</sup>

8. *See, e.g., Swearingen*, 212 Cal. Rptr. 400 (1985), cited *supra* note 5.

9. *See* Ingrid M. Johansen, “Legal Issues in School Volunteer Programs, Part III: Vicarious School Board Liability,” *School Law Bulletin* 29 (Winter 1998): 2. An example of a successfully structured relationship of this kind, at least according to one commentator, is the relationship between the city of New York and the volunteer anticrime group the Guardian Angels. In a memorandum of agreement between the two entities, the city recognized the Guardian Angels as “an independent, autonomous citizens [sic] group,” and stated that they were not city employees. The city retained no right to impose criteria on the group for selection of its members and, although the group agreed to keep city police informed of its planned patrols, the city played no role in scheduling them or monitoring them. Comment, *Municipal Liability for Torts Committed by Volunteer Anticrime Groups*, 10 FORDHAM URB. L.J. 595, 627–28 (1982).

*Example 3:* The Smiley County Elementary School determines that it does not have the time or resources to reasonably screen, train, and keep up with after-school mentors for at-risk kids and receives a waiver from the board to seek mentors through a liaison organization. The principal of Smiley Elementary makes contact with the nearby office of Big Brother/Big Sister and determines that the organization has a fully developed regimen for screening, training, and supervising its volunteers and would be able to provide mentors for many of the school's children. Smiley's guidance counselor then sends out letters to parents of appropriate students stating that their child has been recommended for participation in the Big Brother/Big Sister Program (an independent service organization). The letter explains that the school has no role in screening, training, or supervising the mentors. It merely establishes the link between the child and the mentor and, on occasion, will provide relevant information about the student to the mentor and may also provide space on school premises for mentor-student activities.

This activity should satisfy the board's legal duty to make reasonably sure that it is not hooking its students up with unsafe or unfit individuals, while avoiding legal responsibility for screening, training, and supervising them.

## The Decision to Proceed

If a board decides to develop a volunteer policy, several questions arise. First, who should be involved in developing the policy? An indispensable participant is a person or body (whether it be the board or—at the level of the individual school—the principal) who has the authority to develop rules and regulations governing volunteer use. Members of school-based committees, PTA leaders, and other parents who are involved in school activities are also desirable participants, if for no other reason than that, as volunteers, they have a very direct interest in how the policy develops and will be more likely to comply with it if they have been involved in its creation. Further, they have valuable hands-on knowledge of how the volunteering process works. Since most North Carolina school boards do not have an official volunteer policy, it also makes sense to take advantage of people and organizations who have developed and used one. Many nonprofit organizations—especially those serving vulnerable populations—have highly developed programs for the use of volunteers and could provide useful information. Other school districts, either within or without the state, may have programs in place; the Chapel Hill–Carrboro (N.C.) City Schools (CHCCS) system has such a policy. A board also might consult insurance agents not only about liability insurance coverage but also about areas of potential risk in

the volunteer program. Finally, the board attorney or other lawyer with knowledge of school law issues should—if not made a direct participant in the development process—at least review the resulting policy.

Second, should the district have one policy to which all schools must adhere, should it allow deviations, or should it just require that each school have a policy and say nothing further as to content? The last option does not seem feasible given that the board will ultimately be held responsible if a school's policy is found unreasonable, but there is certainly room for a board to establish a basic policy while leaving implementation decisions to the school.

Finally, what should the chain of authority be in implementing and enforcing the volunteer policy? Who should have ultimate power to decide whether a volunteer is an appropriate candidate for a position? Should the authority rest with one volunteer coordinator in each school, with the individual supervisor within the school, with a separate agency set up to run the school volunteer program, or with an administrator outside the school? Because a volunteer policy is only as good as its implementation, it makes sense to have a designated person in charge of monitoring compliance with the policy at each school.

Once a board has established a body to develop the policy, it can begin to focus on the discreet elements of an official volunteer policy: screening, training, supervision, and secondary prevention.

## Elements of an Official Volunteer Policy

### Screening

Screening alone is not a sufficient safeguard against harm in volunteer programs, but it is an important element, especially for volunteer positions without extensive school supervision; it is also the part of a volunteer policy that is most likely to draw fire from both administrators and volunteers. Because screening may reveal private and, at times, negative information about its subject, it raises serious concerns about “volunteer rights”<sup>10</sup>—primarily the right to fair treatment (nondiscrimination) and the right to privacy (and the related right to be free from defamation).

10. See *infra* p. 14.

The following screening mechanisms are just suggestions. None of them are mandatory. Much of the discussion of screening mechanisms is based on the author's experience in working with the volunteer screening work group of the Chapel Hill–Carrboro City Schools.<sup>11</sup>

### *Position Descriptions*

Because screening is reasonable when it addresses the qualities relevant to a particular position, job descriptions are the bedrock of the screening process. Position descriptions might include some or all of the following information: the volunteer's duties; setting in which the duties will be performed (for example, library, classroom, playground); number of students with whom the volunteer will work; when the volunteer is needed (days of week and time); training and orientation required; other necessary qualifications; and the name of the person responsible for supervising the volunteer.<sup>12</sup>

While developing position descriptions is, strictly speaking, preliminary to the screening process, it is an important element of the process. Identifying the characteristics of a given volunteer position helps clarify the risks the position carries (both to the volunteer and to those served by the volunteer) and the qualities that will make a candidate for a position a safe and competent volunteer. "Risks posed" and "qualifications needed" are the two factors crucial in determining what kind of screening is reasonable for a given position.

In determining the risk a position poses, two things must be considered. The first is the risk that inheres in the position itself, usually due to the use of some kind of dangerous instrument—for example, a car or power tools. The second is the risk that arises from the vulnerability of the person served by the volunteer—in the school context, most often this person will be a child. When the people served are children, some of whom may be disabled, the risk of harm is greater than

when the people served are adults. When the position is one in which the volunteer will spend time alone with a child, the risk of harm increases. Necessary qualifications can be both professional (for example, knowledge of algebra) and personal (for example, ability to interact with a child in a way that respects the child's maturity level, culture, and traditions).

Job descriptions serve important functions both before and after a volunteer has been placed in the school. Before placement, the description allows potential volunteers to decide whether they have the skills and qualities needed for the role, culling the pool of applicants and thus saving school personnel time spent screening. Including in the description a list of required background checks (reference checks, for example, or checks of driving records, criminal history, or credit, when relevant) furthers this culling, eliminating people who are unwilling to go through these checks, for whatever reason.

After placement, job descriptions help everyone keep track of a volunteer's duties. A volunteer who knows what is expected is less likely to behave inappropriately than one who does not. School officials will also have a well-defined basis for evaluating a volunteer's performance, suggesting improvements or changes thereto, and, if necessary, removing the volunteer from the position. Given that many school volunteers are parents of students in the school, being able to point to the description and tell a parent-volunteer that he or she has been failing to perform this duty, or has been performing that duty without authorization, may reduce the awkwardness of an inherently uncomfortable encounter. Finally, as we saw in Part III,<sup>13</sup> having clearly defined duties may help a board avoid vicarious liability if a volunteer injures someone while acting outside the scope of his or her duties. The board may point to the description and justifiably claim that the injury did not occur while the volunteer was performing a task in furtherance of the business of the school.<sup>14</sup>

### *Applications*

Potential volunteers who believe their qualities match a job description should then fill out an application. Applications may be more or less comprehensive, again depending on the position to be filled and also,

11. During the 1996–97 school year, the CHCCS, under the guidance of Pam Bailey (coordinator of volunteer programs in the system) and Kim Hoke (assistant to the superintendent), created a screening policy workgroup composed of school board members; parents; school counselors, principals, and teachers; PTA members; a representative of the State Bureau of Investigation; two attorneys with knowledge of school law; and other interested community members. The workgroup's assignment—in relevant part—was to recommend changes to a screening policy developed by the CHCCS board and to review the implementation of the policy in the schools within the CHCCS.

12. List adapted from CHCCS's "Volunteer Screening Policy, Regulation, and Sample Forms" (hereinafter CHCCS Volunteer Policy), "Role Description" form, page 10, dated May 25, 1997.

13. Johansen, "School Volunteer Programs, Part III," 1.

14. In this respect, it may not be a bad idea for a board to include a job description in each volunteer's file, with the volunteer's signature indicating understanding and acceptance of the role.

possibly, on the person seeking a position. A board might consider a honed-down application form for volunteers who are parents of current students or for volunteers who are “well known” to school personnel. The wisdom of such a policy is questionable on two grounds: (1) the mere fact that a person is a parent does not make that person a known quantity or a no-risk volunteer; (2) criteria for determining when a person is “well known” to school personnel (and to which school personnel) may be hard to define and may make the exception susceptible to easy manipulation. If the honed-down policy is applied only to low-risk roles, or the definition of well-known person is clear, such a policy might be an acceptable compromise between the desire to keep dangerous or unqualified persons out of the schools and the desire to avoid the administrative burden and potential offense to community members that screening requirements pose.

Basic application elements might include the following:

- Identification: name, phone number, current address as well as addresses from some years prior, with dates of occupancy.
- Qualifications: academic achievement, training courses with dates, certificates, and licenses.
- Experience, both paid and volunteer: dates of service, description of duties, organization to which service was provided, name of immediate supervisor with address and telephone number.
- Background and references: criminal convictions or serious motor vehicle violations; three personal or professional nonfamily references with address, telephone number, and nature and length of relationship.
- Disclaimer: a conspicuously placed note informing the potential volunteer, in plain language, that although the school district does not intend to gratuitously share the volunteer’s information with the public at large, the volunteer’s application and most of the information compiled about him or her is a public record under North Carolina law, open for inspection, and cannot be kept confidential (discussed on pages 15–17).
- Waiver and consent: the applicant’s certification that the information is true and accurate, authorization of the school system to verify

the information, and waiver of any right to confidentiality; specific list of procedures the applicant authorizes.

- Signature and date.

Other information, such as Social Security number, driver’s license number, or insurance information may be necessary if the volunteer is applying for a role that requires more extensive screening, such as criminal history record checks or driving record checks.

The application information provides the first chance to assess whether a volunteer’s skills and qualities meet the requirements of a given school volunteer role. It also provides the first chance to look for “red flags”<sup>15</sup>—pieces of information that do not necessarily disqualify an applicant from the running for a position but that do raise the possibility of some problem and thus bear further investigation. Red flags may appear in the way the volunteer has filled out the application—for example, inconsistent or omitted information—or in the content of the application itself.

*Example 4:* A prospective volunteer tutor completes an application form but leaves the space for “three non-family references” blank. One possible explanation for this omission is that the prospective volunteer did not know three persons who had good things to say about her, an obvious reason for denying her application. Another explanation is that she wanted permission from each of her references before she gave out their phone numbers, showing consideration and mature judgment. Further investigation (probably in the form of a conversation with the applicant) would reveal whether this red flag is a serious problem. Failure to investigate this omission, if the volunteer was placed in the school and caused harm, could certainly be found to be evidence of negligence.

*Example 5:* The application for persons applying for tutoring positions has a section entitled “addresses for the last three years, if different from current address.” A prospective volunteer fills this section with eight addresses in five different states. Frequent moves such as this, without explanation, may indicate that a person is fleeing some kind of financial or criminal trouble. On the other hand, it may turn out that the applicant’s spouse is working for a company that is setting up various branches throughout the nation, requiring the couple to move from location to location during the set-up stage.

Frequent unexplained moves are one of several red flags that organizations who serve children have identified. Others include the following: drastic changes in employment with unexplained gaps (possibly indicating

15. Patterson et al., *Staff Screening Tool Kit*, 13.

terminations, employers not listed out of fear, or periods of incarceration); criminal convictions or serious motor vehicle violations; overinvolvement in children's activities—to the exclusion of age-appropriate activities (possibly indicating an undesirable fixation on children); and history of drug or alcohol abuse.<sup>16</sup>

### Interviews

Interviews are valuable tools for getting a sense of a prospective volunteer's personality, but they can also give free rein to any prejudices based on personal appearance that an interviewer might have. For this reason it is important to interview from a written script, ensuring that crucial questions get asked and that interviews for the same position are consistent. Of course, not all interviews need to be full-blown investigations into a person's moral character. Some low-risk positions—for example, a one-time speaker in a science class—may require just a phone call or brief introductory meeting. Notes should be taken by the interviewer, recording impressions as well as objective information that emerged during the interview.

The first part of the interview should confirm the accuracy of the information from the application and investigate red flags. If the person is applying for a low-risk position, the interview may consist of little more than this confirmation. If the applicant is being interviewed for a position that entails more risk, of course, subsequent parts of the interview will delve deeper. Because one of the most significant risk factors a volunteer position can have is unsupervised time with children, many questions will be designed to identify any tendency on the part of the applicant to hurt children. Because questions of this nature are sensitive, a school counselor or social worker might be a good person to ask them. The CHCCS work group developed the following basic roster of questions:<sup>17</sup>

- Why do you want to volunteer in our schools?
- What type of volunteer role are you most interested in playing? (And further, with what age or type of child would you most like to work? Are there groups of children with whom you would not feel comfortable working? Do you prefer a one-on-one, small group, or classroom setting?)

- What qualifications and training make you appropriate for this role?
- Tell me a little about your interests, skills, and hobbies.
- What is your philosophy on discipline?
- Describe your temperament.
- What other information would you like to share about yourself?
- What questions or concerns do you have about being a school volunteer?

Notice that the questions are not leading—that is, they do not elicit “yes” or “no” responses—but allow the applicant to give as lengthy an answer as he or she pleases.

In addition to looking for indications that a prospective volunteer may not be appropriate to work with children, the interview probably should also screen for appropriateness to work on school premises more generally, looking for traits such as unacceptable personal prejudices.

- What experiences have you had working with members of different racial or ethnic groups?
- Have you had any negative experiences with a particular group?
- Have you ever worked or socialized with a person with a disability?
- How do you feel about being supervised by a woman/man (as appropriate)?
- What role, if any, do you think religion should play in the public schools?

### References

If a prospective volunteer is still attractive after the interview, and if the characteristics of the position make it reasonable to do so, further background checks should be conducted.

The most obvious background check is the reference. Reference-givers may be personal or professional colleagues or acquaintances from previous volunteer experience. Questions asked of reference-givers should attempt to confirm the accuracy of the information the applicant has given on his or her application and during the interview. Other questions should directly relate to qualities desired or to be avoided in the position. General clean-up questions should also be asked.

*Example 6:* A community member volunteers for the position of after-school mentor. He lists as one of his references his previous employer, the city parks and recreation department. The person checking this reference verifies the dates of employment and the volun-

16. *Id.* at 29 (list adapted from Patterson).

17. *Id.* at 38–45 (based on, among other things, materials adapted from Patterson).

teer's position with the department. She also asks role-related questions: Has the reference-giver ever seen the applicant interact with children? If so, in what circumstances (one-on-one, small groups, large groups)? How does the applicant interact with the children (disciplining them for misconduct, leading them on tours, teaching activities)? Her more general questions focus on the applicant's character: Does he exercise good judgment? Is he responsible, pleasant, mature? Clean-up questions include the following: Would you have the applicant work for you again? Do you know of any problems or conditions that might interfere with applicant's ability to work with children—substance abuse, mental or emotional illness, or history of child mistreatment? Is there anything else you think I should know about the applicant?

References may be checked over the phone or by letter. With a willing reference-giver, phone calls may be more effective. They are quicker and can be more candid and thorough—follow-up questions can be asked immediately. Also the tone or rhythms of a person's voice can be revealing. Some reference-givers will not, however, respond to a reference request unless they receive written consent from the subject of the reference.

Other reference-givers, especially if they are former employers (and particularly if they have negative information), may be reluctant to give information to the school even if they know the volunteer has given consent to the reference.<sup>18</sup> This reluctance stems from an aversion to an incompletely understood risk of being sued for defamation, breach of privacy, or related things. These issues will be discussed below. It may be that these reference-givers will reveal only limited information—such as confirming position title and date of employment. Though this information is not very informative, it can confirm or disaffirm that the volunteer is a truthful person.

### *Other Background Checks*

For the few high-risk school volunteer positions, it may be reasonable to check sources of background information such as criminal history and driving records in addition to references.

Criminal history records come from different sources, with correspondingly different requirements for obtaining and handling them. The most straightforward way of investigating an applicant's criminal history is to check with the clerks of court in various counties where the person has lived, worked, and so on. Certified copies of conviction records from the clerk's office are public records and can be used with confidence in making volunteer placement decisions. Of course, this method may require a fair bit of legwork. There are private companies that will check these records for schools, for a cost of approximately twelve dollars.<sup>19</sup> Records obtained this way (as opposed to records obtained from the State Bureau of Investigation) are based on name only, so if a prospective volunteer had been charged or tried under another name, these records would not show up in the search. In addition, it is possible that records for another person with the same name might also show up.

Another method for obtaining criminal history information on a prospective volunteer is to request the State Bureau of Investigation (SBI) to conduct a search of computerized criminal records systems maintained by the state government. A state statute authorizes the SBI to provide a criminal record check on persons who have volunteered to provide direct care to any organization, whether for-profit or nonprofit, that provides services to children.<sup>20</sup> Although no schools have yet used this statute to check volunteer records, it seems that if a school can verify that the volunteer in question is applying for a role in which he or she will be spending time alone with a student, the statute's criteria have been met. Schools seeking such records need to have an access agreement with the SBI (basically agreeing to abide by the SBI's rules and regulations concerning the handling and confidentiality requirements of the records that the search produces). The SBI must have the volunteer's consent, complete name, race, gender, date of birth, and Social Security number to conduct the search. The cost of a search ranges between \$10 (for a name search)<sup>21</sup> and \$14 (for a fingerprint-based search).<sup>22</sup>

18. A new law passed by the General Assembly might help mitigate the reluctance of employers to give references to schools: It essentially codifies the law of defamation and provides qualified immunity for employers and former employers who give information about a present or former employee's job performance to prospective employers. SL 1997-478 [N.C. GEN. STAT. §1-539.12 (hereinafter G.S.)]. Immunity would not apply in situations where the employer gives false information about the employee that the employer knew, or should have known, was false. Although schools are not, strictly speaking, prospective employers, their interest in the reference is often just as pressing, and the statute could be interpreted to provide immunity to employers who give them references.

19. The Chapman Corporation [(800) 206-4054] is one such company, Edwards & Associates [(910) 786-1962] is another.

20. G.S. 114-19.3(a)(10).

21. The SBI will not guarantee that a name search has uncovered all criminal history on an individual, or that the search has not turned up history for another individual with the same name. Unlike the search conducted by the private company, however, the SBI search often reveals more than just criminal cases filed with the volunteer's name on them; SBI records may also reveal arrests, charges, and dispositions.

22. The SBI will guarantee the thoroughness and accuracy of searches conducted on the basis of fingerprints.

Records produced under any of these search methods cover state criminal history only, and it appears that, at this writing, there is no means for a school to gain access to national criminal history reports for prospective volunteers. There are special statutes authorizing national checks of applicants for employment<sup>23</sup> but none authorizing national checks of applicants for volunteer positions. And although the National Child Protection Act of 1993<sup>24</sup> does authorize and encourage states to grant organizations providing direct care to children access to state and national records concerning crimes against children—for both volunteers and employees—North Carolina has not yet extended this access to schools seeking volunteer history.

Driving records can be checked directly through the state Department of Motor Vehicles, with the volunteer's Social Security number, full name, race, and gender. The cost of obtaining a three-year driving history is currently \$5.

### **Conclusion to Screening**

If, after going through the appropriate screens,<sup>25</sup> the prospective volunteer emerges as a match for an open position, the school can take some comfort in the belief that the volunteer is a qualified and safe person to provide school service. The school may not, however, halt its efforts to minimize risk in volunteer programs at this point. Screening is only the initial step in risk minimization and cannot be 100 percent effective at keeping dangerous or incompetent individuals out of the schools. Schools must take additional measures to reduce the risk of harm once volunteers are in the school.

### **Training**

The training of volunteers is probably of limited use in reducing intentional wrongdoing by volunteers, but it can be of significant benefit in reducing harms caused by negligence. And training students, staff, and parents about what is appropriate volunteer behavior may help reduce the risk of intentional wrongdoing. Training does not necessarily connote an extensive program of education on each task a volunteer might perform, or on the potential danger to children from volunteers. As with screening mechanisms, the circum-

stances will dictate what, if any, training is required to make a volunteer program reasonable.

A pamphlet is one relatively easy and useful method of imparting necessary information to volunteers. The pamphlet might discuss school policies such as the need to keep student records confidential; the prohibition on volunteers inflicting corporal punishment or administering medicine; a zero-tolerance policy for any kind of inappropriate touching or any kind of racial, ethnic, disability, or gender discrimination, the proper response to suspected abuse or neglect of a student; or a rule against taking children off school property without the permission of parents and school personnel.<sup>26</sup> Other items might include emergency safety information and sources of assistance. An alternative to the pamphlet might be periodic orientations for all volunteers or prospective volunteers.

Of course, specific positions may require more specific training. Tutors may be required to demonstrate proficiency in—or complete training for—their designated subject areas. Volunteer coaches might be required to take a course in first aid. As a general rule, the higher the risk level involved in a position, the greater the need to determine that the volunteer who fills it is competent to perform it.

In training school personnel, students, or parents, the emphasis should be on familiarizing everyone with what is and what is not appropriate behavior to expect from volunteers, the guidelines volunteers are expected to adhere to, and the school's structure for handling volunteer discipline or complaints (that is, who is responsible for enforcement).

### **Supervision**

Supervision is another, and possibly the most directly effective, method of reducing the risk that a volunteer will cause or suffer harm once allowed access to school premises and persons thereon. If each school volunteer could provide services under the constant and direct supervision of school personnel, a volunteer policy probably would not need to include rigorous screening mechanisms or ambitious training requirements. Of course, if school personnel were involved in constant supervision of volunteers, they would have less time to perform their duties and much of the benefit of

23. G.S. 114-19.2; G.S. 115C-332.

24. 42 U.S.C. §§ 5119, *et seq.* (1995).

25. Other screening mechanisms are, of course, available, but they do not warrant separate discussion because of the small likelihood, and limited appropriateness, of their use in the public school context. Such mechanisms include drug and alcohol testing, home visits, and psychological testing.

26. To reinforce a volunteer's knowledge of such policies, the CHCCS workgroup developed a volunteer sign-in sheet that reiterates the policies and concludes with the following: "My signature below indicates that I have read and agree to abide by the policies of the Chapel Hill-Carrboro City Schools, including the above." CHCCS Volunteer Policy, 14.

having volunteers in the schools would disappear. In any event, many of the positions filled by volunteers in schools today involve off-site activities and after-school events that are not easily susceptible of steady supervision.

The board may want to adopt a rule that certain high-risk volunteer services be provided only in the company of school personnel. For example, if volunteers are used in the school sick room, a wise rule might be that they are never to be alone with students who need to undress. Another rule might be that volunteers who are not parents cannot be overnight chaperones unless school personnel are also along on the trip. Each volunteer, even those who are not in high-risk roles, should have a specifically named supervisor and should be made aware of the chain of command in case his or her supervisor is unavailable—or is part of the problem the volunteer needs to discuss.

Another, less direct, method of supervision consists of having volunteers sign in and out and wear name tags for identification. Name tags could be color coded to indicate to school personnel the level of screening the volunteer has been subject to, and thus, the kinds of activities the volunteer can appropriately engage in and the areas of the school building the volunteer can be allowed to go to.

For those volunteers, like mentors, who cannot be directly supervised by school personnel, the board must develop other methods of monitoring. For instance, an established schedule of meetings or “check-ins” with school personnel should be scheduled. The volunteer might be asked to keep a journal of meetings with the student, covering dates, times, and activities engaged in. School personnel should also check in with the student and the student’s parents to discuss the progress of the relationship.

Another aspect of supervision is more general: The board must make sure to supervise the implementation of the volunteer policy as a whole. This includes evaluating the effectiveness of its components, the compliance of each of the district’s schools with it, and the feelings of volunteers about it.

## Secondary Prevention

Secondary prevention is geared toward minimizing the risk that harm that has occurred within the volunteer program will be compounded or repeated. When harm occurs, school personnel should immediately investigate the circumstances surrounding the incident and document what the investigation consisted of, as

well as the steps taken to prevent a similar event from recurring. If the harm was a result of volunteer negligence, school personnel should make sure that the volunteer understands the duties of the position and is able to fulfill them competently. If the volunteer is allowed to continue in the position, he or she should be subject to periodic checks to make sure that the behavior that caused the harm is not repeated.

If the harm was caused by an intentional bad act by a volunteer, the volunteer should be let go. It is important to secondary prevention that the volunteer not be allowed to move on to another position in which he or she can commit the same kind of wrongful act. School personnel must be honest about the reasons for the volunteer’s termination if asked by a party with a legitimate interest.

## Designing the Policy

Which of the above elements to include in an official volunteer policy is discretionary. Once again a board is required only to take reasonable steps to make its volunteer program safe. The following section discusses the standards by which a policy’s reasonableness will be assessed and provides some examples.

## Reasonableness

A board has a legal duty to exercise reasonable care in selecting, training, and supervising volunteers. Assessing reasonableness is a balancing test, weighing the risks of a given position against the availability and cost of the mechanisms that were, or could have been, used to defray the risk. This inquiry, of course, is highly fact dependent. There are two components to the reasonableness inquiry: whether the policy is reasonable as developed, and whether it is reasonable as applied.

### Reasonable as Developed

The key to a reasonable volunteer policy is correspondence between the risk a position poses and the mechanisms used to address it.

*Example 7:* A volunteer classroom tutor becomes angry with a student for failing to keep on task and slaps him. The student sues the school board, claiming it was negligent in employing the volunteer. The evidence reveals that the board required no screening of prospective volunteers. The evidence further reveals that if the volunteer had been screened, the school probably would have discovered that just before applying for this position the volunteer had been terminated from his posi-

tion as a teacher in another state school district because of several violent outbursts directed at students. Other evidence reveals, however, that the board's policy requires that school volunteers provide their services under the direct supervision of school personnel at all times and that the supervision policy had been followed in this case. While the failure to screen led to the presence of an arguably dangerous volunteer on school premises, the supervision policy significantly reduced the likelihood that he would have the opportunity to cause harm to persons or property on school premises. A court probably would conclude that the decision to place more emphasis on supervision than on screening was a reasonable allocation of resources and reduced the likelihood of harm to a legally acceptable level.

*Example 8:* Before allowing volunteers to serve as coaches, the school board requires each of them to complete a ten-hour course covering basic first aid, principles of sportsmanship, and board rules on using school athletic equipment and fields. A volunteer who has completed this training may serve as a coach without further screening. A student's on-field injury is made worse by her coach's negligent application of a first aid technique. The student brings a suit against the board alleging that it negligently employed the coach. The student probably will not prevail. The board's policy was a reasonable method of ensuring that volunteer coaches were sufficiently schooled in the technical aspects of their jobs.

On the other hand, if the student were sexually assaulted by her coach in the locker room after a game, the student probably would have a better chance of success in a negligent employment suit against the board. The board's method of training the coach was reasonable to address the issue of technical proficiency, but other, personal characteristics (such as maturity, good judgment, and the absence of certain criminal convictions) are also necessary qualifications for the job. The failure to screen prospective volunteer coaches for some or all of these qualities is therefore probably unreasonable—especially in light of the amount of unsupervised time coaches spend with students.

*Example 9:* Pursuant to board policy, volunteers who help in shop class complete a lengthy training process in the use of power tools and never provide assistance unless the shop teacher is also in the classroom; they are not subject to any additional screening. During shop class a volunteer whips out a gun and, with the whole class at gunpoint, proceeds to rape a student. The county in which this school operates publishes a list of sex offenders who have been released from prison, and the name of this volunteer appears on that list. Whether it was reasonable for the board not to require schools to check volunteer names against this list is questionable. Given the ease and relatively small expense of such a procedure, and given the risk a known sex offender would pose on school premises, the failure to conduct at least this minimal screening procedure probably was not reasonable.

Boards are not required to be omniscient or perfect in the development of volunteer policies. They need only take the time to assess the risks posed by volunteers and determine adequate methods for addressing them.

## Reasonable as Applied

Simply developing a reasonable policy is not enough. The policy must also be reasonably applied. Keys to reasonable application are easy to remember: communication, consistent and uniform application, monitoring and enforcement, record keeping, and evaluation.

Communication must take place on several levels. The existence of the policy and its contents must be made known to each school. Within each school, personnel at all levels must be informed of their responsibilities, if any, under the policy and of the name of the person responsible for enforcing the policy at their school. Without such communication, the board cannot expect that its policy will be reasonably implemented. Finally, prospective volunteers should be informed of the policy.

The policy should be published—that is, written—and made accessible for reference to all relevant parties. The importance of having a written volunteer policy cannot be overemphasized. A written policy reduces the risk of confusion by being always available for reference. Essentially, an unwritten policy cannot be reasonably applied.

Application of the policy must be consistent (that is, the policy itself must be applied in every appropriate situation) and application of the policy's requirements must be uniform.

*Example 10:* The principal of the county elementary school has a new brother-in-law who wants to be a mentor to an at-risk child. Although the county board has developed a volunteer policy that requires fairly extensive screening (and some training) for volunteers who spend significant amounts of unsupervised time with students, the principal simply reviews the files of children who need mentors and assigns one of them to his brother-in-law. The principal leaves a note in the file saying that the student has been assigned a mentor. The principal is unaware that his new brother-in-law was once convicted for assault on a minor in a neighboring county.

Several months later the assigned student reveals to a school counselor that his mentor, the principal's brother-in-law, has been abusing him. If the student sues the board for negligent employment of the brother-in-law, he will probably prevail. Although the board had a presumably reasonable policy, it was not reasonably applied—it was not applied at all—in this

case. Had the policy been applied, the brother-in-law would probably have been prevented from assuming the volunteer position.

*Example 11:* Volunteers for the position of one-on-one tutor are required, under the volunteer policy of the county school board, to have a personal interview with the school counselor and to have their references checked. At a local high school, the counselor regularly skips the reference check if he is satisfied with the interview. If the board is later sued for negligently employing a volunteer who was placed after going through this incomplete process, a court might well find that the existence of a reference check requirement indicates that the board knew what was reasonable in screening an applicant but failed to require it of its schools.

Uniformity in the application of a policy's requirements is important, and so is relative uniformity in the way a volunteer's information is evaluated. The existence of position descriptions and screening, training, and supervision requirements necessarily means that some persons are not qualified for some volunteer positions within the schools. The process of deciding who is and is not qualified, while allowing some degree of "gut feeling" and personal judgment, should focus on the match between a prospective volunteer's skills and the demands of the position, not on irrelevant personal qualities.

For this reason, it behooves a board to make the policy as uniform as possible not only in terms of screening mechanisms employed but also in terms of criteria used in evaluating a volunteer's fitness for a role. Some of these criteria should consist of "automatic disqualifiers," such as convictions for crimes against children, sex crimes, crimes of violence, or drug-related crimes. Other criteria, of course, should relate to the qualities necessary for the specific position. The board may choose to set a "floor" for qualifications, below which a volunteer will not be placed in a given position. In choosing among candidates whose qualifications are above that floor, the board may (or may not) wish to enunciate "plus" factors—for example, past relevant experience, previous service to the school, a child in the school, new to the community.

Examples 10 and 11, above, raise the important issue of accountability and monitoring. That is, the board must make sure that there is at least one person at each school—preferably someone with authority—who is responsible for enforcing the requirements of the volunteer policy. Without such an authority figure, there is simply no way to assure that each school employee who uses a volunteer conducts the proper screening and training, or provides adequate supervision. Developing

a policy and then implementing it in a way that cannot be monitored or evaluated is not reasonable.

Another important aspect of monitoring the volunteer policy is record keeping. While record keeping does not per se contribute to the reasonableness of a policy's application, it does document evidence of that reasonableness. Maintaining records of the screening and training a volunteer has gone through provides evidence that the school not only had a reasonably safe volunteer policy but also applied it reasonably. In addition, keeping documents on which volunteers gave consent to certain background checks or waived their right to confidentiality (discussed below) can protect the board if a volunteer claims that some aspect of the required screening, or the later handling of information gathered during the screening, violated his or her right to privacy. Documents that contain affirmations from the volunteer that the information given on his or her application is true also help to establish reasonableness.<sup>27</sup> Finally, a signed document attesting that the volunteer has read and understood the description of the duties may protect the board from vicarious liability if it can be used to demonstrate that the volunteer was acting beyond the scope of his or her duties.

Documenting decision-making processes also can help show reasonable application of the volunteer policy. Record keeping may be important in decisions not to place a volunteer in the schools. For example, if a volunteer alleges that his or her rejection was the result of intentional discrimination, records showing that the volunteer's references were not good or that his or her skills did not match the job description can be useful. Record keeping may be even more important, however, in decisions to place—especially when the screen has revealed some negative information. Documentation of the decision needs to reveal that the negative information was considered and why, on balance, other positive information outweighed its effect.

The variability of the "reasonableness" standard may be unsettling to boards trying to develop a volunteer policy that will limit their potential liability and the risk of harm in their volunteer programs. The benefit of the standard's flexibility, however, is that boards may tailor their policies to require relatively minimal risk reduction efforts for volunteers—probably the majority of them—whose positions pose little safety hazard, and

27. See, e.g., *Stanley v. Brooks*, 112 N.C. App. 609, 613, 436 S.E.2d 272, 274 (1993), *rev. denied*, 335 N.C. 772, 442 S.E.2d 521 (1994).

The following table, developed by the CHCCS volunteer screening workgroup, is a useful example of how to coordinate the risks of a position with screening mechanisms.

Position Description	Screening Tools	Possible Examples*
<p><b>Risk Level 1:</b> Job takes place in highly public settings under supervision and involves little or no student contact.</p> <p><i>Descriptors:</i></p> <ul style="list-style-type: none"> <li>• Highly public setting</li> <li>• Unrestricted access—staff or adults can see volunteer at any time; in other words, always within unbroken view of school staff or multiple adults</li> <li>• No solitary time with students</li> </ul>	<ul style="list-style-type: none"> <li>• List of volunteer assistants, maintained by staff, or volunteer sign-in.</li> </ul>	<ul style="list-style-type: none"> <li>• Athletic concessions vendors</li> <li>• Resource speakers</li> <li>• Read-a-thon helpers</li> <li>• School-based committee representatives</li> </ul>
<p><b>Risk Level 2:</b> Job takes place in classroom under supervision.</p> <p><i>Descriptors:</i></p> <ul style="list-style-type: none"> <li>• Highly public</li> <li>• Unrestricted access</li> <li>• No solitary time with client</li> <li>• Always within sight of staff or multiple adults, but ability of staff or others to monitor volunteer’s interaction with students limited by other responsibilities or factors</li> </ul>	<ul style="list-style-type: none"> <li>• List of volunteer assistants, maintained by staff, or volunteer sign-in.</li> <li>• Prior dialogue/interaction with school staff or volunteer coordinator in person, in writing, or by phone.</li> </ul>	<ul style="list-style-type: none"> <li>• Classroom tutors</li> <li>• Classroom helpers</li> </ul>
<p><b>Risk Level 3:</b> Job involves direct contact with students under limited supervision by school staff.</p> <p><i>Descriptors:</i></p> <ul style="list-style-type: none"> <li>• Public setting at school</li> <li>• Unrestricted access: staff or other adults can enter/observe at any time</li> <li>• Could have solitary time with students, of short duration</li> <li>• May be outside of view of staff or other adults for brief periods of time</li> <li>• May involve access to confidential student information</li> </ul>	<ul style="list-style-type: none"> <li>• List of volunteers, maintained by staff, or volunteer</li> <li>• Sign-in</li> <li>• Position description</li> <li>• Application</li> </ul> <p>The following tools are also required but may be waived for individuals who have been active classroom volunteers and have the recommendation of school staff who know them well:</p> <ul style="list-style-type: none"> <li>• Interview</li> <li>• Reference checks</li> <li>• Criminal history checks (recommended for all volunteers with frequent regular solitary time with students)</li> </ul>	<ul style="list-style-type: none"> <li>• Sports coaches</li> <li>• Volunteer working with a group of students in a separate room</li> <li>• Sick room volunteers</li> <li>• One-on-one tutors working in a separate room</li> </ul>
<p><b>Risk Level 4:</b> Job allows unsupervised contact with student off campus.</p> <p><i>Descriptors:</i></p> <ul style="list-style-type: none"> <li>• Private setting in home and community likely</li> <li>• Access can be restricted by volunteer</li> <li>• Solitary time with student common-place</li> <li>• Likely to have frequent contact with student over extended period of time</li> </ul>	<ul style="list-style-type: none"> <li>• Role description</li> <li>• Registration/application</li> <li>• In-depth interview</li> <li>• Reference checks</li> <li>• Criminal history record checks</li> </ul> <p>Note: It may be appropriate to add other screens, such as home visits, TB tests, and driving history checks.</p>	<ul style="list-style-type: none"> <li>• Mentors</li> <li>• Field trip chaperones who share room with students other than own children</li> </ul>
<p><b>Special Roles</b></p> <p>Job requires volunteer to transport students or staff in own vehicle.</p> <p>Job requires volunteer to use or supervise students in the use of dangerous machinery or equipment.</p>	<ul style="list-style-type: none"> <li>• Volunteer driver registration</li> <li>• Evidence of valid driver’s license</li> <li>• Possible driving history check</li> </ul> <ul style="list-style-type: none"> <li>• Role description</li> <li>• Registration/application</li> <li>• Demonstrated competency in relevant area</li> </ul>	<ul style="list-style-type: none"> <li>• Driver for students</li> </ul> <ul style="list-style-type: none"> <li>• Shop class assistants</li> <li>• Volunteers who help students use kiln</li> </ul>

\* These examples are for illustration only. Risk factors inherent in each role may differ across schools. The position descriptions with their lists of risk factors, not the position title, should determine the level of screening a volunteer receives.

reserve the more rigorous efforts for that much smaller group of volunteers who do perform high-risk services for the school.

## “Volunteer Rights”

“Volunteer rights” is a vague concept. Volunteers do not have particular legal rights or protections accorded to them just because of their status as volunteers.<sup>28</sup> Volunteers, although resembling school employees in many ways, are not entitled to many of the legal protections from which employees benefit. For example, the personnel records of school employees are, by North Carolina statute, confidential documents;<sup>29</sup> similar records kept on volunteers are public. School employees (like other employees) are statutorily protected from employment practices that, even without discriminatory intent, have a disproportionate impact on a protected minority group. Although the law on this issue with reference to volunteers is far from clear, it appears likely that practices that have a disproportionate impact on a discrete group of volunteers probably are not prohibited. Thus, in effect, boards have much more legal leeway in their treatment of volunteers than in their treatment of employees.

A volunteer does, however, have the same legal rights as the average citizen. In the context of a school volunteer policy, the most relevant of these rights are the right to be free from intentional discrimination by the government on the basis of race, gender, age, or disability, and the right to privacy. Volunteers also have the right to bring an action if they feel they have been defamed. As the discussion below will show, however, in practice these rights provide volunteers fairly little in the way of legal protection.

Screening is the element of an official volunteer policy most likely to give rise to violations of volunteer rights. It is the most invasive of the elements and the information it reveals can be misused in a number of ways.

## Discrimination

School boards are prohibited from using their volunteer policies to intentionally discriminate against volunteers on the basis of race, gender, disability, age, or

religion.<sup>30</sup> There are several ways discrimination, or the appearance of discrimination, may arise in the context of screening. The screening policy may, of course, be developed with discriminatory intent.

*Example 12:* In the course of developing an official volunteer policy for the Cascasio County public schools, several board members raise concern about the growing number of Mexican immigrants in the county and the prospect that they may want to become involved in volunteer roles in the public schools. In response to this concern, the board enacts the following screening requirement: Only persons who have resided in Cascasio County, or another county within the state, for five years can serve as volunteers in county schools.

This requirement, given the discriminatory intent that motivated it, is legally impermissible.

Even where the policy is developed without discriminatory intent, it may be applied in a discriminatory fashion—another reason that developing uniform criteria for evaluating volunteer fitness for a particular role is important. And even a policy developed and applied without discriminatory intent may have an unintentionally discriminatory effect. That is, some of the screening mechanisms used, or some of the automatic disqualifiers established, may disproportionately eliminate members of a protected minority group from volunteering for school service. Though the legal precedents are not clear, it is possible that this disparate impact may constitute impermissible discrimination.<sup>31</sup>

30. U.S. CONST. amend. XIV. While there is no legal precedent directly on point, it seems likely that the broad language of the related civil rights statutes prohibiting gender, race, disability, and age discrimination in programs receiving federal funding [e.g., Title IX, 20 U.S.C. §1681 *et seq.* (“No person in the United States shall, on the ground of [sex, race, disability, age], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); Title VI, 42 U.S.C. 2000d *et seq.*; Rehabilitation Act §504, 29 U.S.C. §794 *et seq.*; Age Discrimination Act of 1975, 42 U.S.C. 6101] would apply to prohibit discrimination in public school volunteer programs.

31. Assuming that the statutes discussed *supra* note 30 would give volunteers who have been discriminated against the right to sue, the question remains whether these statutes reach disparate impact discrimination. The law, as it concerns Title IX, Title VI, and the Age Discrimination Act, is unsettled. *Compare, e.g., Cannon v. University of Chicago*, 441 U.S. 667 (1979) (no disparate impact under Title IX) and *Sharif by Salahuddin v. New York State Educ. Dep’t*, 709 F. Supp. 345 (S.D.N.Y. 1989) (disparate impact allowed under Title IX regulations); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983) (Title VI itself requires proof of discriminatory intent, but regulations incorporating a disparate impact standard are valid). It seems more likely than not that Section 504, however, does not require proof of discriminatory intent. In its most definitive statement on the topic to date, the Supreme Court said: “While we reject the boundless notion that all disparate-impact showings constitute *prima facie* cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.”

28. Aside, of course, from the qualified immunity granted them under the Volunteer Protection Act. For the purposes of Part IV, what is more to the point is that they have no particular rights or protections in the context of *becoming* volunteers.

29. G.S. 115C-319 through -321.

*Example 13:* A school district requires that an applicant for a volunteer position have a high school diploma to be eligible to perform school service. As a result of this requirement, during the 1994–95 school year, none of the eighty applicants for school service who were white were eliminated from the pool, but two of the twenty-five applicants who were Hispanic were disqualified. During the 1995–96 school year, the discrepancy between the white and Hispanic candidates disqualified was even greater, and during the 1996–97 school year, greater still. When a committee of concerned Hispanic parents brought the issue to the attention of the school board, the board refused to change its policy. The Hispanic parents filed suit, alleging that the board discriminated against them on the basis of their race and national origin during the volunteer screening and placement processes.

As mentioned above, it is not clear under existing law whether the Hispanic parents would have a viable claim.<sup>32</sup> Nonetheless, if one or more of a board's screening mechanisms reveal information that negatively affects a discrete group of potential volunteers disproportionately, the board should review why the mechanism was implemented and whether it is achieving its purpose. If, after reexamining the policy, the board determines that the mechanism does serve its purpose, the board should explain to the concerned parties what that purpose is and how the policy serves it.

## Defamation and Privacy

In screening prospective volunteers for employment in the public schools, the potential for uncovering embarrassing or damaging information is clear. Questions concerning whether an applicant has ever been investigated (or had an investigation substantiated) by social services for child maltreatment, has had a problem with drugs or alcohol within the relevant past, has ever been convicted of a crime, or is for some other reason an unfit or unsafe person to work with children are appropriate for most school volunteer roles. Negative or embarrassing information may also be compiled during evaluations of a volunteer's performance or during disciplinary or termination processes. Of course, volunteers have an interest in keeping such information

confidential—or at the very least, revealing it only to those who have a “need to know.”

This legitimate desire for privacy is in conflict with two important purposes of an official volunteer policy. First, if a board is serious about its policy of secondary prevention—that is, preventing harmful volunteers from perpetrating further harm—its policy should encourage sharing negative information about harmful volunteers with other organizations whose students or children may be harmed by the volunteer in question. Second, because the board wants to document evidence that it exercises reasonable care in its volunteer program, keeping records on most volunteers will be part of its policy.

Releasing negative information about a volunteer's performance raises the specter of a defamation suit. A volunteer's chance of prevailing in such a suit is very small, but the nuisance value of the suit may be significant. Defamation is a “false communication by one person about a second person that ‘tends to so harm the reputation of [the second person] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’”<sup>33</sup> A statement can only be defamatory if it is communicated.

*Example 14:* A community member applies to become a volunteer mentor at his local public school. After conducting an interview, reference checks, and a criminal history background check, the school social worker informs him that they do not have an appropriate match for him at this time. The applicant becomes angry and demands to know the “real reason” that he cannot serve as a mentor. Under this pressure the social worker reveals that the applicant's interview raised several red flags, including a seemingly unhealthy compulsion to engage in activities that involve young girls (to the exclusion of other, age-appropriate activities). The volunteer storms out of the school and later files a defamation suit.

The prospective volunteer has no defamation claim: the information was not communicated to anyone other than himself.

There are two significant defenses to a defamation claim and they would, in most cases, protect the board from liability. The first, an absolute defense, is truth.

*Example 15:* A volunteer tutor at an elementary school is found working alone with a student in a closed and empty classroom. She is informed that this is a violation of school policy and that if she is going to do one-on-one tutoring, she must do it in a room with the door open. After a second violation of the policy, the

Alexander v. Choate, 469 U.S. 287, 299 (1984). The Fourteenth Amendment does not reach disparate impact discrimination. Washington v. Davis, 426 U.S. 229 (1979). In any event, it seems likely that if a disparate impact claim is allowed under any or all of these statutes, volunteers' remedies would be limited to injunctive and declaratory, rather than monetary, relief.

32. If the parents do have a claim, the board, in response to a showing that its policy does disproportionately affect a protected group, will have to show a legitimate nondiscriminatory reason for the policy.

33. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, at 111 (5th ed. 1984).

school asks the volunteer to cease her volunteer services for the school. Several weeks later, a neighboring school calls to ask for information about the volunteer. The first school reveals that the volunteer was asked to leave for violating school policy about being alone with students in closed rooms—after being warned about it—and that she was not welcome to perform volunteer services for the school in the future. The new school decides not to place the volunteer in a position.

If the volunteer sues the first school for defamation, the board would not be held liable because the information revealed was true.

What if the allegedly defamatory statement is not objectively verifiable? That is, what if the statement is one of opinion rather than fact?

Example 16: A school counselor interviews a prospective volunteer for the position of after-school mentor. Ultimately, the school decides not to place the applicant in that position. A week later a nearby school seeks information about the applicant, who has come to that school seeking a similar position. The counselor reveals that the applicant was not offered the position of after-school mentor because during the interview he indicated—in the eyes of the counselor—an unhealthy interest in being with children and an under-involvement in activities that were appropriate for his age. The nearby school also denies the volunteer a position and, in the course of doing so, reveals what the counselor from the first school said about him. He sues the board for defamation.

The board probably would not be held liable for defamation in these circumstances because the statement of opinion does not seem to be based on personal knowledge of specific facts that are defamatory. The statement seems to be based on a more amorphous impression.

The other important defense to a defamation action is qualified privilege. Even if the defamatory statement turns out to be false, the board will not be held liable if the statement was made in good faith, if the person who made it was upholding a valid interest or pursuing a legal right or duty, and if the person who heard the statement had a corresponding interest, right, or duty.<sup>34</sup> So, in example 16 above, the board could assert (probably successfully) qualified privilege as to the counselor's statement that the volunteer was overly interested in young children. The statement was made in good faith (the counselor did not intend to harm the volunteer, only to protect students), to a party at another school with a legitimate interest in it (and to no other party), and was made to uphold the school's interest in keeping potentially dangerous people out of the schools.

34. *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979).

In contrast to a defamation action, an action for invasion of privacy might be brought when true information about a volunteer is revealed. As with the defamation action, the likelihood that such a suit would succeed is very small. Other repercussions—particularly the outrage of other volunteers and community members—could, however, be great.

With one exception, the records compiled on a given volunteer are not (and at present, *cannot be*) protected by a guarantee of confidentiality, because they are public records. North Carolina's Public Records Law<sup>35</sup> applies to the public schools and generally requires that all documents made or received by public officials and public employees in the course of their duties are public records open to inspection by anyone, unless some statutory provision makes them confidential. A prospective volunteer mentor whose application reveals that he was investigated by social services five years before on an abuse allegation has some cause for concern if he or she would like to keep this information (relatively) private. The one exception to the public records law would be a volunteer's criminal history report received from the SBI.<sup>36</sup>

A board need not have great fear of legal claims based on a breach of volunteer privacy. North Carolina courts have so tightly restricted the kinds of tort-based privacy actions they will recognize that there really is not a viable action for public disclosure of a private fact.<sup>37</sup> There is, in addition to the tort action, a "zone of privacy" in which personal, private information in which an individual has a reasonable expectation of confidentiality is constitutionally protected.<sup>38</sup> However, this right to privacy, as a general matter, suffers short shrift in the balance between the right of free speech and the public's compelling interest in newsworthy information.<sup>39</sup>

35. G.S. 132-1 through -9.

36. G.S. 114-19.3.

37. Of the four traditional tort-based privacy actions—misappropriation of plaintiff's name or likeness, disclosure of private facts, false light, and intrusion upon plaintiff's seclusion—North Carolina courts have recognized only the first, expressly rejected the second and third, and declined to rule on the existence of the fourth. In any event, the possibility of a volunteer bringing an intrusion upon seclusion action seems minimal given that consent presumably would have been obtained before any investigation was performed. *Phillips v. J.P. Stevens*, 827 F. Supp. 349, 352 (M.D.N.C. 1993).

38. *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990).

39. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) ("[I]n a society in which each individual has limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.").

Another reason breach of privacy actions are probably of little legal moment for a board is that volunteers will have consented to most screening mechanisms that might reveal personal information (for example, interviews, reference checks, investigations of criminal history, or driving record checks), and those who do not consent need only seek volunteer opportunities elsewhere to avoid losing their privacy. For consent to operate as a defense to a breach of privacy claim, however, it must have been informed: Consent is not informed if the volunteer is allowed to believe that only designated school officials will see the information. If the lack of confidentiality is not disclosed and the volunteer's private information is rereleased by the school, the consent will be negated: Although the initial breach of privacy was authorized, the second—publication—was not.

Thus there is really little, at this writing, that can be done to address the legitimate privacy concerns of prospective volunteers. In the short term, there is not much a board can do about the problem, aside from lobbying the legislature to expand the realm of confidentiality granted employee personnel records to cover records of certain volunteers.

The board should also be very clear up front about the fact that the school cannot keep confidential any information (other than criminal history gained under statute from the SBI) and should explain why this is so—before the volunteer has revealed private information.

## Summary

The term volunteer rights is probably more normative than descriptive. People who volunteer their services to the public schools should be treated with fairness and respect and their privacy should be respected. Persons who volunteer their services to the public schools are entitled to be free of intentional discrimination on the basis of race, gender, disability, and age; they may also, in some circumstances, be entitled to relief from parts of a volunteer policy that have an unintentional disparate impact on them. Volunteers have the right to file an action for defamation if a school releases false information about them to a third party in bad faith, but their likelihood of prevailing in court is minimal. Volunteers also have the right to privacy, with similarly little legal effect.

The phrase "volunteer rights" should probably mean more than the fairly empty basket of legal protections the term covers. Most people would agree that volunteers, as people who are willing to give their time

and skills without expectation of recompense, are entitled to be treated with a certain amount of respect. By the legal standard of reasonableness, a board's volunteer policy should impose requirements that are as stringent as those needed to address the risks posed by a position. By the practical standards of fair treatment, however, the policy should not impose requirements on volunteers that are unreasonably more stringent than those required by the risks of the position. More succinctly, volunteers should not be subject to screening that is more invasive than is justified by the risks they pose and should not be required to undergo training for skills their position does not demand. The legal standard that requires consistency and uniformity in the application of a policy's elements also satisfies the notion that volunteers should be placed in a position because their skills and interests are matched to it, not because of who they know, what they look like, or how they talk.

## Benefits

This article has dealt with grounds for opposing the development and implementation of an official volunteer policy in the public schools. Each of the criticisms and potential drawbacks mentioned is worthy of consideration. Ultimately, however, boards that wish to continue using volunteers must adopt some kind of reasonable policy governing the conditions under which they serve. Fortunately, volunteer policies may achieve many positive benefits.

Most obviously, and most importantly, requiring volunteers to meet specific criteria for specific positions can help to keep unsafe or inappropriate individuals off school premises and away from students and staff. Screening, in addition to training and supervision, also increases the likelihood that volunteers are placed in positions in which they are able to perform well and, as a result, are less likely to cause or suffer harm.

An official volunteer policy also reduces a school board's liability exposure. Fewer potential injuries means fewer potential lawsuits. And the existence of a volunteer policy may act as a deterrent to suits even when injury does occur. Because evidence of "due care" will be shown through careful application of a volunteer policy, persons injured may be less likely to bring suit. If a lawsuit is filed, the existence of an official volunteer policy will help protect a school board from liability by showing that it took reasonable measures to keep its volunteer program safe.

There are also other, smaller benefits that may flow from an official volunteer policy. The existence of job descriptions along with published screening requirements allows prospective volunteers to self-screen for a position and thus remove unfit applicants from the pool. Clear rules help people understand their duties and the limits of their roles; people work better when they know what is expected of them. Written rules, consistently applied, also make the ap-

plication of unpleasant requirements less onerous. When the principal's brother wants to be a mentor but objects to being screened, school personnel can explain that the policy requires the screening for every volunteer without exception. A policy that requires volunteers to meet specific criteria before assuming a position in the school can make the rejection of a particular volunteer seem less personal and arbitrary than it otherwise might. ■