

Legal Issues in School Volunteer Programs

by Ingrid M. Johansen

This article begins a four-part series discussing issues of liability in school volunteer programs and mechanisms for keeping harmful situations to a minimum. Part I discusses a volunteer's potential liability for harm he or she causes during school service. Part II, which will appear in the next issue of School Law Bulletin, will consider a school board's potential liability for negligent selection, supervision, and retention of school volunteers. Part III, in the fall, will discuss the prospect of vicarious school board liability for negligent harm caused by or to volunteers. Part IV, next winter, will conclude the series with suggestions for minimizing harm in volunteer programs.

VOLUNTEER INVOLVEMENT IN THE NORTH CAROLINA PUBLIC SCHOOLS is growing, yet few local school boards have official policies governing the use of volunteers in their schools.¹ 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 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. A *volunteer policy*, as the term will be used here, contains three essential elements: mechanisms for screening volunteers, guidelines for training and supervising them, and rules for handling harms that occur in the volunteer program.

Screening mechanisms designed to help prevent dangerous or unqualified individuals from gaining access to school facilities, employees, and students reduce the risk of injury in public schools using volunteers; so do guidelines on training and supervising volunteers. Rules for handling harm when it does occur—what one

author calls *secondary prevention*²—reduce the likelihood that harm will be made worse or repeated.³

An official volunteer policy not only reduces the risk of injury to participants in school volunteer programs⁴ but also reduces a school board's liability exposure. Fewer potential injuries mean fewer potential lawsuits; moreover, the existence of a volunteer policy may act as a deterrent to suits even when injury does occur.⁵ 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.⁶

An official volunteer policy should also help reduce a volunteer's exposure to liability. By increasing the likelihood that a volunteer will be qualified for a given position, understand the responsibilities and limits of the position, and be adequately supervised, the volunteer policy reduces the risk of injurious behavior by the volunteer. Yet volunteers offering services

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1. In North Carolina the Chapel Hill-Carrboro Board of Education has developed a policy on screening volunteers that could serve as a model for other school districts but to the best of this author's knowledge no other school board in the state has taken a similarly serious approach to the issue. Local boards are unquestionably empowered to promulgate and enforce such guidelines. See N.C. GEN. STAT. § 115C-36. (Hereinafter the General Statutes will be cited as G.S.)

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

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

4. Part IV of this series will address the risk-reduction benefits of an official volunteer policy more specifically.

5. That is, because evidence of "due care" will be shown through diligent application of a volunteer policy, persons injured may be less likely to bring suit.

6. School board liability issues will be addressed in Parts II and III.

to a public school need to understand their potential liability for harms that occur during the rendering of those services. Baldly stated, volunteers should know that if they damage school property or injure school personnel or students through the negligent performance of their duties, they may be held liable. A volunteer also may be held liable for any harm he or she inflicts intentionally.

PART I: LIABILITY FOR VOLUNTEERS THEMSELVES

A *volunteer*, as the term is used in this series, is a person who provides service to a public school without expectation of compensation and with the understanding that the school is under no obligation to continue accepting those services or to compensate the volunteer for them.⁷ In the proper circumstances, school employees or board members could meet this definition of volunteer: for example, a public high school teacher could help out at a bake sale at his or her child's elementary school. This discussion of volunteers generally will not, however, address employees and board members because in some cases determining whether an employee or board member was acting in his or her official capacity or in a voluntary capacity can be complicated by issues beyond the scope of this series.⁸

A volunteer providing services to *any* organization must be concerned about potential liability. Volunteers are no longer entitled to "charitable immunity" for harm caused during the services they perform,⁹ and even though many people have an instinctive aversion to the idea of suing someone who is performing a public

The cautionary tone of Part I of this series is not meant to frighten prospective volunteers away from service in the public schools or elsewhere; it is meant to alert them to some of the potential, if not regularly occurring, risks they face in providing such service. With this knowledge, prospective volunteers will be able to ask appropriate questions to help them determine whether a given volunteer opportunity is the one for them.

service free of charge, the number of suits against volunteers has increased in recent years. Many such cases have received extensive publicity,¹⁰ which only makes a continued increase in their number more likely.

As these suits increase in number, organizations frequently using volunteers may encounter difficulty obtaining or affording liability insurance that covers individual volunteers.¹¹ In addition to determining the extent—if any—to which an organization's liability insurance covers them, volunteers should also be aware of limitations in their own liability coverage. An individual's liability policy may not cover some actions undertaken as a volunteer, such as transportation that can be characterized as "commercial,"¹² and the coverage of such policies is generally limited to bodily injury and property damage.¹³ If the organization does not have liability insurance covering the volunteer, the volunteer should find out whether the organization will

7. See Lynn Buzzard and Susan Edwards, *Church Hiring and Volunteer Selection: A Risky Business* (Cary, N.C.: Baptist State Convention, 1995), 59, section C-4.

8. A related issue of concern to public school personnel administrators is the overtime compensation requirement that may apply under the Fair Labor Standards Act, 29 U.S.C.A. 201-219 (1978), when employees subject to that law "volunteer" their services.

9. In the not too distant past, the doctrine of charitable immunity shielded charitable organizations and their agents from tort liability. Rationales for the doctrine included the following: (1) that imposing liability would divert trust funds for purposes outside the donor's intent, (2) that the legal doctrine imposing liability on the master for the negligence of his or her servant should not apply to impose liability upon nonprofit charities, (3) that a beneficiary of a charity assumes the risk of charitable negligence, and (4) that donations to charities would be discouraged if the charities were held liable. Arkansas is the only state that still employs the doctrine of charitable immunity. Most other states rejected it through judicial opinion, but some states, including North Carolina, have abrogated the doctrine statutorily. See G.S. 1-539.9.

10. Lisa Green Markoff, "A Volunteer's Thankless Task," *National Law Journal* 11 (Sept. 1988): 1, col. 1; Gary Taylor, "Goodwill Must Pay \$5 M in Murder by Parolee-Employee," *National Law Journal* 9 (June 1987): 22, col. 1; David Rohn, "YMCA, Pool Victim Settle: 5 Year Old to Get \$4,000 a Month Initially," *Washington Post*, May 17, 1978, A4, col. 1; Kristen A. Goss, "Boy Scouts of America Win Victory in Sex Abuse Case; Jury Fails to Find Negligence by National Organization," *Chronicle of Philanthropy* 1 (Jan. 1989): 15, col. 1 (a well-publicized sexual molestation claim against the Boy Scouts, which sought \$430 million. At trial, the judge dismissed the punitive damages claim and the jury absolved the national organization of liability, while holding the local chapter liable for \$45,000 in compensatory damages); Thomas Health, "\$45,000 Award to Molested Youth Hailed as Victory by Scouts," *Washington Post*, Jan. 12, 1989, D1, col. 1; Damond Benigfield, "Who's Minding the Nonprofits?" *Texas Insuror* (Jan./Feb. 1987) (a sexual molestation claimant sought \$24 million). *Collected in* Charles Tremper, "Compensation for Harm from Charitable Activity," *Cornell Law Review* 76 (Jan. 1991): 401, 402, n.5.

11. Tremper, *supra* note 10, at 401, 416.

12. That is, many personal automobile insurance policies exclude coverage for liability arising from transportation for which a fee is charged. If a volunteer is reimbursed for the expenses of transportation, an insurer may interpret this as commercial transportation. *Id.* at 417, n.83.

13. *Id.*

indemnify him or her—that is, cover the costs of legal actions and damage awards—and if so, in what circumstances.

A person volunteering services to a *public school* has additional reasons to be concerned about liability. First, the kind of services a school volunteer performs—for example, driving students to school-related activities or coaching student teams—often entails an inherent risk of serious harm. This is not to say that the likelihood of causing harm during such services is great; rather, that if harm occurs, it may be serious. In addition, working with students carries its own risks. Minor children may be more vulnerable to injury than adults, and children with disabilities are often more vulnerable to injury than children without disabilities. When a volunteer causes harm to a student and is sued for it, certain defenses to and limitations on tort liability may not be available: the effectiveness of defenses such as consent (for intentional torts), assumption of risk, and contributory negligence is greatly reduced when the plaintiff is a minor, for instance.¹⁴ Finally, there may be some circumstances in which a volunteer is an attractive defendant. Although most volunteers will not have the “deep pockets” of the school district, if defendants holding official positions within the district are not susceptible to suit because of immunity, the volunteer may be the only accessible defendant.

Finally, a person volunteering services to a public school in *North Carolina* should know what the state’s law provides—and does not provide—in the way of protecting volunteers from liability. Although North Carolina is among the states that have enacted laws intended to give volunteers some degree of protection from tort liability, its steps in that direction have been quite minimal.¹⁵

Section 1-539.10 of the North Carolina General Statutes grants volunteers immunity from lawsuits in a very limited set of circumstances. First, for the immunity to apply, the volunteer must have been providing services under the auspices of a charitable organization.¹⁶ Several kinds of organizations that provide volunteers to public schools fall into the category of

charitable organizations covered by the statute,¹⁷ including PTAs and athletic booster clubs. The public school itself probably does not qualify as a charitable organization, falling instead into the category of governmental bodies.¹⁸ Thus a volunteer who provides services directly to the school without going through an intermediary charitable organization is not entitled to this statute’s qualified immunity. Second, though transportation is a service volunteers frequently render, the statute provides no immunity for injuries that occur while the volunteer is operating a motor vehicle. Third, the statute does not provide immunity for conduct that, though not willful, amounts to gross negligence. Gross negligence can be said to signify more than ordinary inadvertence or inattention but less than conscious indifference to consequences.¹⁹ Such a formulation may not give a volunteer a very good idea of how to mold his or her behavior. Finally, and most importantly, a fair reading of the statute reveals that it may not extend immunity even to cases of plain negligence. Under the statute a volunteer retains immunity only when acting in good faith and providing services that are “reasonable under the circumstances.” “Reasonable under the circumstances” is the legal definition of behavior that is not negligent. This statute, then, seems to grant volunteers immunity from suit when they least need it; that is, when they would not be liable for negligence anyway.

North Carolina has one other statute that bears passing mention: it, too, is relevant only to a small

ited Immunity from Civil Liability for Negligent Acts by Public School Volunteers,” had not passed the Senate and therefore was not eligible for enactment in 1997. This bill contains language essentially identical to that already contained in G.S. 1-539.10 except insofar as it specifically extends immunity to public school volunteers and the school officials and local boards of education for which the volunteers work. That is, it would extend immunity to volunteers who render services *directly* to public schools as well as volunteers who render services under the auspices of charitable organizations.

17. The definition of tax-exempt, charitable organization used in the statute comes from G.S. 105-130.11 and Section 501(c)(3) of the Internal Revenue Code (I.R.C.). G.S. 105-130.11(a)(3) lists the following organizations: cemetery corps and corps organized for religious, charitable, scientific, literary, or educational purposes, or for prevention of cruelty to animals or children, no part of the net earnings of which inures to the benefit of any private stockholder or individual. G.S. 105-130.11(a)(5) lists civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare. I.R.C. 501(c)(3) gives tax exemptions only to organizations that have a charitable purpose, operate in harmony with the public interest, serve a sufficiently broad public, and do not allow their resources to inure to the benefit of any private person.

18. This reading is supported by the fact that G.S. 1-539.10 appears to grant to the charitable organizations themselves qualified immunity from suit for the negligence of their volunteers. School boards already have governmental immunity and would gain no benefit from a grant of qualified immunity.

19. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984), 212, Section 34.

14. Joseph H. King, Jr., “Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to ‘Nerf (registered)’ Tiddlywinks,” *Ohio State Law Journal* 53 (Summer 1992): 683, 696.

15. In an article reviewing such statutes, one commentator singled out G.S. 1-539.10, 11 (granting volunteers of charitable organizations qualified immunity) as a statute whose protection was completely illusory. *Id.* at 707, n.116.

16. At the time of publication, Senate Bill 695, entitled “An Act to Provide School Volunteers, Local School Boards, and School Officials Lim-

number of persons performing volunteer services in schools. Also known as the Good Samaritan statute, G.S. 90-21.14 provides that any person rendering emergency health care to an individual who is in danger of serious bodily injury or death will not be held liable for injuries sustained by the person during the course of the emergency assistance unless the injuries were caused by gross negligence, wanton conduct, or intentional wrongdoing on the part of the person giving assistance. The statute also limits liability for a volunteer health care provider who gives first aid or emergency treatment to members of athletic teams without receiving compensation for the services. To qualify for the immunity granted by this statute, however, a volunteer who provides emergency health care to students apparently must do so only "at the request of or with the permission or consent of the board of education or its designees."²⁰

Statutory protection for volunteers, in the form of immunity, is minimal in North Carolina. Other forms of statutory protection are also lacking. For example, unlike Illinois, North Carolina does not require school districts to indemnify volunteer personnel against certain legal claims.²¹ Nor does North Carolina law require that school districts procure liability insurance for their volunteers. School boards are authorized to secure insurance to protect themselves against liability for physical or property damage caused by the negligent acts of their agents and employees,²² and the reference to "agents" in this provision indicates that boards may insure themselves against harm caused by volunteers. The provision does not, however, speak to insuring the agents and employees themselves. The provision that does authorize local boards to indemnify present or former board members and employees against civil and criminal actions does not specifically authorize the indemnification of agents.²³

20. G.S. 115C-307(c).

21. The Illinois law requires boards of education to procure liability insurance for the purpose of defending and indemnifying statutorily identified classes of school volunteers (including noncertificated personnel who assist in instructing students under the supervision of a teacher, noncertificated persons of good character who supervise nonacademic activities, and noncertificated personnel who provide specialized instruction on a regular or guest lecturer basis) against civil rights damage claims, constitutional rights damage claims, and death and bodily injury and property damage claims—including the costs of defending against these claims—when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the school board. 105 ILL. COMP. STAT. 5/10-20.20.

22. So long as the acts occurred within the scope of the agent's or employee's duties. G.S. 115C-42.

23. G.S. 115C-43.

Some North Carolina school boards do, nonetheless, provide liability coverage for volunteers. But volunteers need to check the scope of such policies' coverage. Most frequently, they cover only injuries that occur on school premises and exclude injuries that arise from the use and operation of motor vehicles.

Unless the school board has liability insurance or an indemnification agreement that covers volunteers, the bottom line is that a volunteer's potential liability for damage done while performing school service is no different than it is during any other activity he or she may engage in as an unaffiliated individual. Even if the volunteer is covered by the board's insurance, such coverage is likely to be limited.

Liability for Negligent Harms

A volunteer at a school clean-up day leaves a rake in the school yard, and a student trips over it and breaks her leg. A volunteer driving second graders to a field trip makes a brief stop along the way, and one of the children puts the car—which the volunteer has left running—into drive and crashes it into a tree. A volunteer accidentally leaves a stack of library books out on the playground, and rain damages them. Each of these incidents involves unintentional harm resulting from a volunteer's act, or failure to act. Can volunteers be held liable in such circumstances even though they are "only volunteers" and meant no harm?

The Negligence Action

A volunteer can be held liable if his or her behavior was negligent. Even though volunteer service is a gratuitous undertaking, a volunteer has a duty to exercise a reasonable degree of skill and care in performing it. In the words of one court, a defendant "cannot escape a duty of ordinary care simply because he is a volunteer, particularly where the welfare of children is entrusted to him."²⁴ Failure to exercise the degree of care for the safety of others (or their property) that a reasonably prudent person under like circumstances would exercise is negligence. A negligence action has four elements.

1. Duty. A volunteer who injures another person or that person's property will not be held liable for that harm unless he or she owed the injured person a duty of care. Volunteers have a duty of care for all people who

24. King, *supra* note 14 at 683, 691, citing *Castro v. Chicago Park District*, 533 N.E.2d 504, 508 (Ill. App. Ct. 1988).

foreseeably could be injured by their negligence. Some examples might help clarify the concept.

Example 1: A volunteer helping with a school clean-up day leaves a rake in the schoolyard. The next day at recess, a student trips over the rake and breaks her leg. The volunteer probably had a duty to remove the rake from the yard because it was reasonably foreseeable that a student (or a school staff member) would trip on it. On the other hand, if a burglar attempting to break into the school trips over the rake on his way to the schoolhouse door, the volunteer probably would not be held liable.

Example 2: A volunteer assigned to transport the members of the school basketball team home from a late evening game at a rural school leaves one student behind. If that student is hit by a car or attacked by a dog while walking home, the volunteer driver may be held liable because it was foreseeable that leaving the student in a deserted area late at night could lead to injury. If, on the other hand, the custodian at the school where the student was left behind suffers a heart attack when he comes across the student in a dark hall, the volunteer driver probably would not be liable because it was not foreseeable that the custodian would be injured by the student's having been left behind.

Although there is a general societal duty not to behave in a way that will foreseeably injure others, more clearly defined notions of duty may be derived from standards set out in statutes, regulations, or official policies. Many of the duties of teachers, principals, superintendents, and school boards are promulgated in this way.²⁵ At present school volunteers generally do not benefit from the guidance that such enunciated duties provide.²⁶ Once school boards begin implementing of-

25. See G.S. 115C-307 (teachers), G.S. 115C-288 (principals and supervisors), G.S. 115C-276 (superintendent), and G.S. 115C-47 (local boards of education).

26. There is one small exception to this lack of specific duty, and one possible exception, also quite limited in scope:

First, although G.S. 115C-400 specifically requires only school personnel to report suspected child abuse or neglect to the county social services department, G.S. 7A-517 imposes this duty on anyone who suspects or knows that a child is being abused or neglected. This duty applies only when the suspected abuse or neglect is occurring at the hands of someone with custodial responsibility for the child: thus there is no statutory duty to report abuse or neglect by teachers, coaches, club leaders, or other noncaretakers to social services. (Note that this does not mean that no action should be taken at all; only that action is not statutorily mandated.)

Because volunteers in the public schools will be working with children, they should be aware of this duty. Volunteers should also be aware that, while it is unclear what legal penalties (if any) they might incur for failure to report suspected or known child abuse, they will not be subject to legal penalties for reports that turn out to be unsubstantiated: so long as a report is made in good faith, the reporter is entitled to immunity from suit. G.S. 7A-550. A person reporting abuse is also entitled to have the report kept in confidence. G.S. 7A-544.

A volunteer who has reason to suspect that a child is being abused might want to discuss with appropriate school officials any procedures that

official volunteer policies, however, volunteer position descriptions will be an integral part of the program; these descriptions could then, in many circumstances, be used to judge whether a volunteer had a duty in a given context.²⁷ In the meantime, a volunteer who feels uncertain about his or her duties, or is uncomfortable with any of them, should ask appropriate school personnel for guidance.

2. Breach of duty. If a volunteer fails to behave in accordance with the duty owed to the person injured, the volunteer is said to be negligent. If the volunteer did not act as a reasonable person of ordinary intelligence, experience, and prudence would have acted in the circumstances, the volunteer has breached the duty of care. As the following example will show, determining breach is a very fact-specific process.

Example 3: A volunteer in charge of supervising students during a study-hall period leaves the room for five minutes. If the study hall contains students who have known behavioral problems that make them aggressive, the volunteer may be held liable if, upon returning, he or she finds that one student has knocked out several of another student's teeth. If, on the other hand, the study hall contains eighth-grade students with no known behavioral problems, the volunteer will probably not be liable if, during his or her absence, a student throws a pencil across the room and hurts another student's eye. A reasonable person would assume that eighth graders could be left alone for five minutes without causing one another serious harm.

3. Causation. If the volunteer's failure to conform to the appropriate duty of care causes someone or something injury, the volunteer may be held liable. Put another way, if the injured person can establish that the injury would not have occurred but for the volunteer's negligence, causation is established. Causation may be direct or indirect.

Example 4: A volunteer coach tosses a fifty-pound medicine ball to a first grader whose arm breaks when he tries to catch it; this is direct causation.

school personnel follow in reporting suspected abuse. Although a volunteer cannot go wrong legally by making such a report directly to county social services, following an established school reporting policy may make things go more smoothly.

For a thorough discussion of these and other issues concerning the reporting of child abuse and neglect, see Janet Mason, *Reporting Child Abuse and Neglect in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1996).

The second potential source of enunciated duties for a very small group of volunteers comes from G.S. 115C-307, the statute setting out the duties of teachers. That statute uses the term *voluntary teacher* in reference to several specific duties: maintaining good order and discipline, providing for the general well-being of students, teaching students, and entering into the superintendent's plans for professional growth.

27. Job descriptions will be discussed in Part IV of this series.

Example 5: A volunteer chaperoning a class of first graders on a trip to the zoo leaves the group standing outside the monkey cage while the volunteer goes to have a cigarette; during the volunteer's absence, a monkey bites off the finger of a student who has gotten too close to the cage. The volunteer's failure to supervise can be said to be a "but for" cause of the child's injury even though the monkey, not the volunteer, bit off the finger; this is indirect causation.

4. Damages. The final element of a negligence action is damage. Even if the injured person establishes duty, breach, and causation, he or she will not recover unless the volunteer's negligence caused actual injury or loss.

Defenses to the Negligence Action

A volunteer sued for negligence is not without defenses, but when the injured party is a child, the important defense of contributory negligence—which bars a plaintiff from recovering damages when the plaintiff's own negligence was at least a partial cause of injury—may be eliminated or significantly restricted. This is so because the law considers a child younger than seven incapable of negligence: the child simply is not mature enough to be held responsible for his or her actions. A child between the ages of seven and fourteen is presumed incapable of negligence, but that presumption may be refuted by evidence that the child failed to exercise the amount of care reasonably expected of a child of like age, discretion, knowledge, and experience under the same circumstances.²⁸

Liability for Intentional Acts That Cause Harm

As a general rule, a volunteer may be held liable for any intentional action he or she takes that causes harm to another person or to property—just as he or she could be in any other context.²⁹ The two most common kinds of intentional wrongs are criminal violations and intentional torts. Criminal violations will, one hopes, be rare in school volunteer programs, but if a volunteer does engage in such behavior, he or she can be prosecuted accordingly.

Intentional torts present slightly thornier issues: A volunteer grabs a student to stop her from running in the hall and bruises her arm. Can the volunteer be held liable? What if a volunteer injures a student while breaking up a fight? Can a volunteer be held liable for hurting a student who is coming at her with a knife?

The Intentional Torts Action

Intentional torts are acts that interfere with another person or another person's property. They include assault, battery, false imprisonment, trespass, and infliction of emotional distress. The elements of an intentional torts action are (1) an act by the volunteer (2) that was intentional and (3) caused injury.³⁰ The intent necessary for an intentional tort is merely the intent to do the act that causes the harm, not the intent to cause harm. So, for example, although the volunteer who grabbed a student to stop her from running in the hall had no intention of harming the student or bruising the student's arm, the volunteer did intend to grab the student's arm. That intent is sufficient for the intentional tort of battery. Volunteers should generally presume that if they commit an intentional tort and cause someone an injury, they will be held liable.

Battery

The intentional tort of battery deserves particular attention because of the likelihood of its occurring and the lack of clarity about when a volunteer might be justified in committing it. *Battery* is making unwanted physical contact with the person of another and, as the example above shows, it need not involve violent intent or serious injury. Not *all* unwanted physical contact is battery, however. For example, a volunteer who places her hands on the shoulders of a student who is out of line has possibly made unwanted physical contact with the student, but contact of this kind—contact that is reasonable and expected under the circumstances—does not constitute battery. More complicated issues arise when a volunteer makes contact with someone, usually a student, that clearly is battery but that seems justified under the circumstances.

There are three circumstances in which a volunteer might wonder whether it is appropriate, or permissible,

28. *Allen v. Equity & Investors Management Corp.*, 56 N.C. App. 706, 289 S.E.2d 623 (1982).

29. Even if G.S. 1-539.10,11 does extend immunity to volunteers for negligent acts (which seems questionable), it does not protect individuals who engage in intentional wrongdoing.

30. "Injury" is not strictly required, although if it is not shown, the plaintiff will recover only nominal damages—for example, damages in the amount of \$1.00. Of course, even if the volunteer is not ordered to recompense the complainant for damage to person or property, legal fees may be a significant expense.

to make unwanted physical contact with a student: (1) when a disturbance arises that threatens serious injury to persons or property, (2) when physical contact is necessary to maintain order, and (3) when a student is judged to be in need of discipline.

1. Quelling disturbances threatening serious injury to persons or property. Two or more students are fighting on school grounds. Does a volunteer who makes physical contact with a student while breaking up a fight commit a battery for which he or she would be liable? The answer to this question is not clear, but there are three reasons that it seems unlikely that this contact would lead to liability. First, as mentioned above, contact that is reasonable under the circumstances is not battery, and physical contact used in breaking up a fight may be reasonable. Second, it might be said that, by virtue of engaging in the fight on school premises, the students have impliedly consented to the degree of physical contact necessary to break it up.

Third, it can be argued that volunteers are among the category of school “personnel” who are specifically authorized to use reasonable physical force in such circumstances. G.S. 115C-391 states that school personnel may use reasonable force to control behavior or remove a person from the scene when it is necessary to quell a disturbance threatening injury to others; to obtain possession of weapons or other dangerous objects on the person, or within the control of, a student; for self-defense; or for the protection of persons or property. The fact that the statute speaks to school “personnel” leaves it uncertain whether school volunteers are authorized to use such force: maybe volunteers are personnel, and maybe they are not. The term personnel may be broader in scope than the term “employee,” encompassing not only persons employed by an organization but also people merely “associated” with it.³¹ On the other hand, many places in the education section of the General Statutes use the term personnel where it seems fairly evident that only employees are contemplated.³² So it is not clear whether a volunteer is statutorily authorized to use force to quell disturbances threatening

injury and therefore not clear whether the statute would play any role in determining a volunteer’s liability for battery in quelling such disturbances.

These three considerations seem to indicate that a volunteer using physical contact to quell a disturbance would not be held liable for battery, but the accuracy of such a conclusion is by no means certain. A court might interpret the notion of “personnel” in the statute as not inclusive of volunteers. In that case, the conclusion could be reached that since volunteers are not specifically *authorized* by the statute to use force to quell a disturbance, they are in fact *prohibited* from using force. Also, it is not always possible to predict in advance what level of contact is reasonable in any given set of circumstances. A volunteer not accustomed to life in a crowded school might overreact to conduct that those more acclimated would take in stride. The most prudent advice for volunteers is to refrain from the use of physical force in all but the most compelling of circumstances.

One clear example of such compelling circumstances is self-defense or the defense of another person from imminent injury. If a volunteer has reasonable grounds to believe that he or she is about to be attacked, the volunteer may use as much (and only as much) force as is reasonably necessary to protect against that injury. The volunteer may also be justified in using force in defense of a third person, if the volunteer reasonably believes that the third person would have been entitled to use self-defense. So, for example, the volunteer who injures a student who is coming at her with a knife probably would not be held liable for battery; nor, most likely, would a volunteer who injured a student who was approaching another student with a knife.

2. Maintaining order. Two students are chasing each other down the hall during the time between classes. Would a volunteer be held liable for battery if he or she grabbed one of the students to stop her from running and bruised the student’s arm? As in the context of quelling disturbances that threaten injury, it seems likely that in most situations occurring in schools, volunteers would not be held liable for battery in using force to maintain order: First, it is likely that most such contact would be seen as reasonable in the circumstances. Second, it might be argued that the students involved, by running down a school hallway, had in effect consented to a certain level of physical contact to control their disorder. And third, it may be that a small subset of volunteers is specifically authorized by statute to use reasonable force to “restrain pupils and maintain order.” That authorization is extended by G.S. 115C-

31. *American Heritage Dictionary*, 3d ed. (Boston: Houghton Mifflin Co., 1992).

32. See, e.g., G.S. 115C-305 (“Appeals to the local board of education or to the superior court shall lie from the decisions of all *school personnel* . . .”); G.S. 115C-315 (hiring of school personnel); G.S. 115C-318 (liability insurance for nonteaching public school personnel . . . provided that the cost of protection shall be funded from the same source that supports the salaries of these employees); cf., Article 23, Employment Benefits, which does not use the term “personnel” once.

390 to teachers (among others) and, by the wording of the statute, to “voluntary teachers.”

But who is a voluntary teacher? The term is not defined in the General Statutes, the North Carolina Administrative Code, or the State Board of Education Policy Manual; nor is it ever mentioned in the state allotment or salary schedule manuals. The absence of the term from sources that extensively cover the employees of a local school board indicates that voluntary teachers are probably volunteers who teach, not employees.

These considerations make it seem unlikely that a volunteer would be held liable for battery in using physical contact to maintain order. For several reasons, however, such a conclusion is shakier in this context—“maintaining order”—than in the “quelling disturbance” context discussed above. First, even if the statute authorizing “voluntary teachers” to use reasonable force to maintain order does protect volunteers who teach, this protection covers a very small group of volunteers.³³ Second, physical force is less likely to be “necessary” (and therefore reasonable under the circumstances) in maintaining order than it is in quelling a disturbance that threatens injury. Third, because the statute authorizing reasonable physical force to maintain order specifically enumerates those entitled to its protection (principals, teachers, and teachers’ assistants)—unlike the statute authorizing the use of force to quell disturbances, which extends to the nonspecific group “school personnel”—a court may be more likely to find that those *not* specifically authorized to use force to maintain order are in fact *prohibited* from using force. Finally, it bears repeating that it is not always possible to predict what level of contact will be judged to have been reasonable in any given circumstance. Therefore, the most prudent advice is that volunteers refrain from the use of physical force in all but the most compelling of circumstances.

Even if volunteers who are acting as teachers are authorized under G.S. 115C-390 to use reasonable force to maintain order, they still must check, of course, to make sure that they also are so authorized under their local board’s policy. A local board may entirely prohibit the use of physical force for maintaining order.

33. Just how small this group is depends on the definition of “teacher.” Does teacher in this context mean a person who meets all of the State Board of Education criteria to obtain a teaching position in North Carolina, or does it merely mean a person whose primary responsibility is teaching students? A discussion of this issue is beyond the scope of this article.

3. **Administering corporal punishment.** Volunteers are not authorized to administer corporal punishment (that is, discipline based on physical contact). Teachers, substitute teachers, principals, or assistant principals are the only persons statutorily authorized to administer corporal punishment, and they may do so only in limited circumstances.³⁴

Defenses to Intentional Torts

The defenses available to a volunteer who commits an intentional tort against a minor may be limited, just as they are in negligent torts. Consent, a key defense to intentional torts, may be limited by the law’s presumptions about a minor’s capacity to consent. Generally a person who has reached the age of eighteen can give an effective consent to all kinds of conduct unless he or she suffers from some kind of mental incapacity known to the defendant. A minor, however, “acquires the capacity to consent to different kinds of invasions and conduct at different stages in his [or her] development. Capacity exists when the minor has the ability of the average person to understand and weigh the risks and benefits.”³⁵ This analysis would also apply to a defense of assumption of risk.

Conclusion

Despite the fact that public school volunteers are as vulnerable to lawsuits as are average citizens, there have been no North Carolina appellate court decisions in lawsuits against school volunteers. As the number of volunteers in the schools increases, however, this may change. If a school in which a particular volunteer performs service (or the school board governing that school) has not developed an official policy governing the use of volunteers in the school, the volunteer needs to ask certain questions to ensure that the cost of benevolence does not become too high and that the volunteer understands the risks of performing volunteer service in a given context. Administrators should be prepared to answer at least the following questions from volunteers:

1. Does the school board have a liability policy that covers me, and if so, what are the limits on the coverage?

34. G.S. 115C-391(a)(3).

35. W. Page Keeton et al., *supra* note 19, at 115, Section 18.

2. If the school board's liability policy does not cover me, will the school board indemnify me for costs and damage awards if legal action is brought against me? If so, in what circumstances?
3. What qualifications is the school looking for in the volunteer who fills this position? Do I need specific training to perform the duties? If so, does the school provide it?
4. What is the basic position description? What are the specific responsibilities of the position, and what activities are beyond its scope? Who is my supervisor? Under what conditions will I be performing this service? How will I know when I am performing my duties well, as expected, or poorly?
5. What are the things any volunteer in a public school should know? Are there certain things I am absolutely prohibited from doing (for example, taking students off campus without permission, using alcohol or drugs before or

during service, administering corporal punishment)? Are there other school policies of which I should be aware? What do I do in the case of a medical emergency or fire? How do I handle situations that are physically dangerous to me or others?

Of course, the less risk involved in a given volunteer position—for example, a bake sale participant has much less cause for concern than does a volunteer coach—the less necessary precautionary questions may be. The main thing is for the volunteer to try to understand the scope of his or her duty and to perform it reasonably under the circumstances.

If the volunteer works in a school that has an official volunteer policy in place, most of the above questions should be answered during the process of screening and training. ■

Next, "Part II: Liability of School Boards When Volunteers Cause Harm"