Legal Issues in School Volunteer Programs

by Ingrid M. Johansen

This is Part II of the four-part series discussing issues of liability in school volunteer programs. Part I discussed circumstances in which volunteers themselves could be liable for harm they cause while performing services for a public school. A new federal law passed since Part I was written may make significant changes in the law of liability for volunteers themselves. For a brief discussion of this law, see the sidebar "Part I Revisited: Liability of Volunteers Themselves" on page 4. Part II addresses the potential liability of a school board for its own negligence in circumstances where a volunteer is harmed, or causes harm, during school service.

A SCHOOL BOARD MUST WORRY ABOUT TWO KINDS of liability in managing a volunteer program: direct liability and vicarious liability. A school board may be *directly* liable when its own negligence is to blame for an injury or, to put it another way, when the board itself can be said to be a wrongdoer. For example, if a board breaches its duty to keep school premises reasonably safe and this breach causes injury to a volunteer, the board could be directly liable to that volunteer. A school board may be *vicariously* liable, on the other hand, merely by virtue of its relationship to the wrongdoer: the board need not have direct involvement in causing the injury. For example, the board might be held vicariously liable to a volunteer who is injured when a science teacher, an employee of the board, accidentally spills a caustic solution on the volunteer's skin. Part III of this series—which will appear in the Fall 1997 issue of *School Law Bulletin*—will address vicarious liability.

No liability may be imposed—direct or vicarious—where *sovereign immunity* applies. Under the doctrine of sovereign immunity (also known as *governmental immunity*), a governmental body such as a school board may not be sued for harm resulting from its own negligence, or the negligence of its officers or employees, if the negligence occurred during the performance of a governmental function.[1] A school board may waive this immunity and thus consent to suit, however, simply by purchasing liability insurance.[2] Purchasing liability insurance waives immunity only for the *kind* of claims covered by the policy and only up to the *amount* of coverage the policy provides. For example, if a student riding a school bus is injured because of the driver's negligence, and the board's policy excludes coverage for injuries arising out of the operation of a motor vehicle, the board retains immunity from that student's suit.[3] If a school employee causes someone damages in the amount of $50,000, but the board's policy provides coverage of only $20,000, the injured person can receive only $20,000. Also, if the board has insurance covering only damages of more than $1,000,000, and the plaintiff alleges damages of only $45,000, the board is immune from suit.[4]

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1. Minneman v. Martin, 114 N.C. App. 616, 442 S.E.2d 564 (1994). The distinction between governmental and proprietary functions, as well as other niceties of sovereign immunity, will not be discussed here. North Carolina courts addressing school board immunity have consistently operated on the premise that the board is engaged in a governmental activity and cloaked by immunity (unless consent to suit was given). *See, e.g.,* Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Overcash v. Statesville City Bd. of Educ., 83 N.C. App. 21, 348 S.E.2d 524 (1986). For the purposes of this article, the essential point is to note the existence of this barrier to liability and to move on to address the potential for liability when it has been waived.

2. N.C. GEN. STAT. (hereinafter G.S.) §§ 115C-42, 115C-47(25).

3. Vester v. Nash/Rocky Mount Bd. of Educ., 124 N.C. App. 400, 477 S.E.2d 246 (1996).

4. Hallman v. Charlotte-Mecklenberg Bd. of Educ., 124 N.C. App. 435, 477 S.E.2d 179 (1996).

Most, if not all, North Carolina school boards have purchased liability insurance covering some kinds of injury and so have waived their sovereign immunity. The discussion below assumes that sovereign immunity does not bar suit in a given case.

PART II: DIRECT SCHOOL BOARD LIABILITY

Every school board has a duty to keep its school premises in a reasonably safe condition. This duty has two components. First, the board is obligated to keep the physical condition of its schools reasonably safe and, second, it is required to guard against foreseeable danger posed by people at school. Because of this duty, the board may be held directly liable for an injury that a volunteer suffers because of an unsafe physical condition on school premises or for harm that a volunteer suffers at the hands of an individual who should have been kept away from the school. In the same vein, if a volunteer injures school personnel or students, the school board may be held directly liable if, as it turns out, the volunteer should not have been allowed onto the premises in the first place.

Unsafe Conditions on School Premises

The school board, as the owner of school property,[5] has a duty to all invitees on school premises to keep the premises reasonably safe.[6] *Invitees* is the legal term for persons who enter a landowner's premises for purposes that—at least partially—serve the interests of the landowner. In the school context, volunteers are invitees, as are school staff, delivery persons, spectators at athletic events, and parents.[7] The board's duty to each of them is essentially the same.[8] Thus the presence of volunteers imposes no greater duty on school boards to maintain safe premises than already exists. For this reason, the discussion below will only briefly sketch the outlines of the issue.[9]

Unsafe Physical Conditions

A volunteer reading assistant breaks her wrist when she trips over a doorsill that has come loose. Assuming that the school board has waived its immunity (as will be assumed in all the following examples), may it be held liable for this harm? To impose liability on the board, a court would have to find that (1) the condition was a dangerous one, (2) the board knew about it or should have known about it, and (3) the volunteer did not, and could not have been expected to, know about it. These elements are required in all unsafe conditions cases.

1. When is the condition dangerous? Determining this requires analyzing previous experience with the source of "danger."

> *Example 1:* A volunteer giving a presentation to a social studies class suffers a seizure due to an allergic reaction to a chemical used to clean the school's floors. The board probably would not be liable to the volunteer for

5. G.S. 115C-40.

6. G.S. 115C-524(b). *See also* Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 467 S.E.2d 58 (1996), *citing* Harris v. Department Stores Co., 247 N.C. 195, 198–99, 100 S.E.2d 323, 326 (1957).

7. Douglas S. Punger, "Tort Liability" (hereinafter "Punger"), Chapter 32 in *Education Law in North Carolina* (Institute of Government, The University of North Carolina at Chapel Hill, 1990): 32-22.

8. Students are also invitees on school premises, but the board's duty to them differs in both degree and kind from the duty owed to adult invitees. Because children, especially young or disabled children, are generally more vulnerable to injury than adults are, the measures the board must take to make the premises reasonably safe for them are greater than those necessary for adult invitees. And, because the school board has a special responsibility as educator to the students, there is a different kind of "caretaking" duty owed to the students. On this latter point, see Ross v. St. Augustine's College, 103 F.3d 338 (4th Cir. 1996), and Caviness v. Durham Pub. Sch. Bd. of Educ., No. 1:95CV00878, 1996 U.S. Dist. LEXIS 19973 (M.D.N.C. Dec. 16, 1996). Although the extent of this duty is not well defined, it is clearly different from that owed to adult invitees.

9. For more details, see 57 AM. JUR. 2D, *Municipal, Etc., Tort Liability,* §§ 551–71; Punger, *supra* note 7, at 32-22 through -24.

any injury she suffered as a result of the seizure, because the floor-cleaning chemical probably was not a dangerous condition. The school is filled with hundreds of people every day, no one of whom has exhibited a similar reaction to the solution.

2. Did the board know, or should it have known, about the condition? The North Carolina General Statutes charge the board with responsibility for keeping all school buildings in good repair[10] (and, to this end, with making sure that employees in schools make periodic inspections of their facilities and report to the board any unsafe conditions).[11] If an unsafe condition could have been discovered in the course of a reasonable inspection, the board will probably be held liable even if it was not actually aware of it.

The board is responsible, however, only for those unsafe conditions that can be discovered through reasonable inspection. It does not have a duty to find and warn of every possible source of injury—only those that are reasonably foreseeable.

Example 2: An opera singer volunteers to come to music class for a brief performance. During her aria she reaches a particularly high note, and the glass in a nearby window shatters, cutting her arms and hands. The board probably would not be held liable for this injury because the susceptibility of the glass to breakage under these conditions probably could not have been revealed in a reasonable inspection.

3. Did the volunteer know about the condition? Even if the condition is one about which the board knew or should have known, the board will not be held liable unless the condition was unknown to, or could not be anticipated by, the volunteer. Put another way, the board does not have a duty to warn of dangerous conditions that are obvious, or about which a volunteer already knows.

Example 3: A volunteer softball coach notices that during practices the ball often takes erratic leaps due to the very bumpy surface of the field. She asks school officials to allow her to use another field but they deny her request. Later in the season the volunteer loses several teeth when a grounder bounces off a bump in the field and hits her in the mouth. The volunteer probably would not have a claim against the board because she knew that the field was dangerously bumpy and could have anticipated such an injury but continued to practice there anyway.[12]

Consider the three questions in the examples above. (1) Was the loose doorsill dangerous or not? If the sill had been loose for four years and not one person had tripped over it until the volunteer did, it probably was not dangerous. On the other hand, if several school employees had tripped over it and suffered some injury, it probably was.

(2) Could the board have been reasonably expected to know about the doorsill? If several people, including teachers and the assistant principal, had tripped over this doorsill during the last month, the board could be presumed to have known about it; a reasonable inspection would have revealed the defective sill. In addition, the knowledge of school staff members about the doorsill—from having stumbled upon it themselves—may reasonably be attributed to the board. On the other hand, if the doorsill had come loose immediately before the volunteer tripped over it, a reasonable inspection probably would not yet have revealed it and the board would not be held to have known about it.

(3) Did the volunteer know about it? Maybe the volunteer knew, or should have known, about the sill. If the board can show that the volunteer had been warned about the doorsill during her orientation, or that she had tripped over it twice in the past without serious injury, a court probably would find that she knew of the condition. Whether or not the board is liable, then, depends on the circumstances.

To conclude, the board owes a duty to volunteers (and all other invitees) to keep school buildings and grounds in reasonably safe physical condition. Premises must be inspected on a regular basis, and when hazards are found they must be repaired immediately or steps must be taken to keep invitees away from them until repairs can be completed.

Unsafe Conditions Caused by Persons

A volunteer supervising recess on the school playground is injured when an apartment dweller on the adjoining property throws a metal object out of her window.[13] Could the board be held liable for harm the volunteer suffered because of the neighbor's action?

The board's obligation to keep school premises safe encompasses a duty to prevent reasonably foreseeable injury from *human* sources as well as physical conditions. This does not mean that the board will be held

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10. G.S. 115C-524(b).

11. *See, e.g.,* G.S. 115C-523.

12. *See* Daniel v. City of Morganton, ___ N.C. App. ___, 479 S.E.2d 263 (1997), on which Example 3 is based.

13. Facts taken from the case of *Rubino v. City of New York*, 114 A.2d 243, 498 N.Y.S.2d 831 (1986).

Part I Revisited: Liability of Volunteers Themselves

New Federal Statute Overrides State Law

Part I of this four-part series "Legal Issues in School Volunteer Programs," published in the Spring 1997 issue of *School Law Bulletin*, discussed the ways in which volunteers can be liable for harms they cause through negligent conduct and for harms they cause through intentional acts.

On June 18, 1997, President Clinton signed into law the Volunteer Protection Act of 1997,[1] a federal law that may change dramatically the potential liability of public school volunteers for harms they cause during their school service.

What does the Volunteer Protection Act do? The Act's primary effect is to limit the potential liability of volunteers serving nonprofit or governmental organizations for harm that occurs while the volunteer is acting within the scope of his or her duties, so long as the harm is not caused by willful or criminal misconduct or gross negligence and, importantly, so long as it is not caused while the volunteer is operating a motor vehicle. In effect, volunteers are immune from suit for negligent actions that harm others. This provision is *directly contrary to the discussion of negligent harm under North Carolina law contained in Part I of this series*, which read as follows:

> 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 some degree of skill and care in performing that undertaking. 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." [citation omitted] 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.

The Act does not affect the potential liability of organizations using volunteers for suits brought against them because of harm caused by volunteers. And, more significantly for volunteers, the Act does not limit the right of organizations to bring suits against their own volunteers. Therefore, if an individual who is injured by a volunteer brings suit against the volunteer's organization (because he or she cannot directly sue the volunteer), the organization may in turn bring suit against the volunteer for contribution or indemnification in the event it is ordered to pay a damage award.

Does the federal Volunteer Protection Act replace North Carolina law? Yes. It preempts any state's laws that are inconsistent with its provisions (like North Carolina's) unless that state enacts a specific statute excepting itself from the Act's provisions. The 1997 session of the North Carolina General Assembly has adjourned without enacting any such exempting statute.

When does this change in the law become effective? It becomes effective on September 18, 1997, and it applies to claims filed on or after that date so long as the injury alleged occurred after that date.

Does the Act eliminate volunteers' liability for intentional acts, such as assault or battery, that cause harm? Probably not. It seems unlikely that the Act grants volunteers immunity from suit for harm that arises from intentional torts, although the Act's language is not entirely clear on this point. The Act exempts a range of conduct from its protection: the least culpable conduct the Act exempts is *gross negligence*, which requires no specific intent—either to act or to cause harm; the most culpable conduct it exempts is *willful or criminal misconduct*, which requires both intent to act and intent to cause harm. Intentional torts would seem to fall in the range between these two kinds of conduct, requiring the intent to act but not the intent to cause harm. So such torts are likely exempt as well. In addition, numerous congressional supporters of the Act are on record saying that it was intended to protect volunteers from suit only in cases of "simple negligence." Thus the information in "Liability for Intentional Acts that Cause Harm" in Part I of this series probably remains relevant and accurate.

1. Pub. L. No. 105-19, 111 Stat. 218 (1997).

New Federal Statute

Volunteer Protection Act of 1997

SECTION 1. SHORT TITLE.

This Act may be cited as the "Volunteer Protection Act of 1997."

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS - The Congress finds and declares that—

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because—

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D)(i) liability reform for volunteers will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and

(ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) PURPOSE - The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

SEC. 3. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

(a) PREEMPTION - This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.

(b) ELECTION OF STATE REGARDING NONAPPLICABILITY - This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation—

(1) citing the authority of this subsection;

(2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

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Volunteer Protection Act of 1997 (*continued*)

SEC. 4. LIMITATION ON LIABILITY FOR VOLUNTEERS.

(a) LIABILITY PROTECTION FOR VOLUNTEERS - Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—

(A) possess an operator's license; or

(B) maintain insurance.

(b) CONCERNING RESPONSIBILITY OF VOLUNTEERS TO ORGANIZATIONS AND ENTITIES - Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) NO EFFECT ON LIABILITY OF ORGANIZATION OR ENTITY- Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) EXCEPTIONS TO VOLUNTEER LIABILITY PROTECTION - If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e) LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF VOLUNTEERS -

(1) GENERAL RULE - Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) CONSTRUCTION - Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f) EXCEPTIONS TO LIMITATIONS ON LIABILITY -

(1) IN GENERAL - The limitations on the liability of a volunteer under this Act shall not apply to any misconduct that—

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) RULE OF CONSTRUCTION - Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

SEC. 5. LIABILITY FOR NONECONOMIC LOSS.

(a) GENERAL RULE - In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY -

(1) IN GENERAL - Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY - For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

SEC. 6. DEFINITIONS.

For purposes of this Act:

(1) ECONOMIC LOSS - The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) HARM - The term "harm" includes physical, nonphysical, economic, and noneconomic losses.

(3) NONECONOMIC LOSSES - The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) NONPROFIT ORGANIZATION - The term "nonprofit organization" means—

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(5) STATE - The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) VOLUNTEER - The term "volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive—

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation,

in excess of $500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

SEC. 7. EFFECTIVE DATE.

(a) IN GENERAL - This Act shall take effect 90 days after the date of enactment of this Act.

(b) APPLICATION - This Act applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date.

Source: The enrolled bill was downloaded from the Internet at **http://thomas.loc.gov/cgni-bin/query/z?c1-5:s.543.ENR:**

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liable for the independent actions of third parties: as a general rule, the board is entitled to rely on the presumption that people will behave in a reasonably civilized manner—unless there is a foreseeable reason to expect otherwise. Where risk *is* reasonably foreseeable, the board has a duty to warn of it or otherwise protect invitees against it.

When is the risk reasonably foreseeable? Harm to invitees on school premises that is caused by third parties may be foreseeable because of a pattern of similar behavior within the relevant past.

> *Example 4:* Several volunteers have been attacked by knife-wielding muggers on school property within the last few months. The fourth volunteer attacked brings suit against the board, alleging that it negligently failed to warn her about the danger or to take security measures that were reasonably necessary to prevent the attacks. The board probably will be held liable. It probably should have known that another attack was likely.[14]

> *Example 5:* A high school student has a history of seriously threatening volunteers. On one occasion he attacked a volunteer and broke her glasses. The board probably has a duty to warn the next volunteer who works with that student about his aggressive tendencies.[15]

So would the board be liable to the volunteer monitor injured by the object thrown from an apartment adjacent to the playground? It seems clear that throwing a metal object from some height constitutes a dangerous activity. If the apartment dwellers had thrown objects out of their windows on past occasions, injuring school personnel or students, then the board should be held accountable for knowing about the condition. The board would then be liable to the injured volunteer, unless, of course, the volunteer was also aware of the danger. That would be true, perhaps, if she were at the school every day and had been privy to a general warning issued to all persons in the school, or if the dangerous part of the playground were strewn with litter that clearly came from the neighbors.

Risk of third-party harm is foreseeable in some cases even where there is no pattern of behavior on which to base the prediction. Harm caused by third parties may also be foreseeable when a given context or situation entails inherent risk of some kind. Such risks might come from dangerous tools or *instrumentalities*—automobiles or other nonhuman agents of risk—or from the vulnerability of the people participating in a situation.

> *Example 6:* Each year the shop class includes a unit on the use of power tools. The board approves the hiring of a shop teacher who has no experience with power tools. During one of the power tool sessions a volunteer assistant is injured when the teacher incorrectly uses the band saw. Because the shop class involves the use of dangerous tools, the board should have realized the risk of placing an inexperienced teacher in the position.

> *Example 7:* The principal of a public elementary school initiates a mentoring program, with board approval, for "at risk" students in the third grade. Mentors are approved on the basis of their membership in the local church. Mentors meet alone with their individual students off school premises after school hours. The principal does no follow-up on the mentor-student relationships. The board should know that allowing vulnerable children to spend unsupervised time with persons whose appropriateness for mentoring has not been investigated poses a risk of serious harm to those children. If a mentor abuses a child in some way, the board would probably be held liable.

When a situation entails inherent risk, the board must take reasonable steps to make sure that persons who will be involved in those situations have the qualities—both personal and professional—necessary to behave appropriately and reasonably safely in them.

Negligent Employment

A school board hires a teacher without bothering to call his references, one of whom is a former employer. During class this teacher calls out to his volunteer classroom assistant, "Hey sexy mama, bring that pretty little figure of yours over here and help this student." The volunteer requests that the teacher refrain from using such language, but he persists and, during the next class, he places his hand on her buttocks. At the end of the school day, when the volunteer approaches the teacher to voice her strong displeasure with his behavior, he grabs her around the waist and kisses her forcefully despite her obvious lack of consent. The volunteer sues the board for negligent employment and presents evidence that the teacher was fired from his

14. *See, e.g.,* Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981) (evidence of thirty-one criminal incidents at a shopping mall within a one-year period raises a genuine issue as to whether an assault on a mall patron was reasonably foreseeable). *Compare* Brown v. North Carolina Wesleyan College, 65 N.C. App. 579, 309 S.E.2d 701 (1983) (murder of student not reasonably foreseeable based on evidence of a break-in ten years earlier, a vending machine break-in five years earlier, and an attempted rape three years earlier).

15. *See, e.g.,* Ferraro v. Board of Educ. of N.Y., 212 N.Y.S.2d 615 (N.Y. App. 1961), *aff'd,* 221 N.Y.S.2d 279 (N.Y. App. 1961) (principal had duty to warn substitute teacher about known aggressive tendencies of student).

former position for sexual harassment of his female colleagues. Will the board be held liable?

Every school board has a duty to take reasonable steps to determine that the individuals it employs[16] in the schools are qualified for the roles they will play and that they remain qualified once they are employed. Screening applicants for employment serves the former purpose, supervising employees serves the latter. Failure to reasonably screen or reasonably supervise, or negligence in retaining an employee, will, for the purposes of this article, be called "negligent employment." Although in the example above, the volunteer is suing the board for negligent employment of a *paid employee*, the board's duty to exercise reasonable care in employing school personnel probably applies to volunteers, too. This issue is discussed below, under the heading Negligent Employment of Volunteers.

To prove that a school board negligently employed an employee, a claimant must show that (1) the employee was unfit or incompetent, (2) the board knew or should have known of this incompetence, and (3) the injury alleged was caused by this incompetence.[17]

Negligent Employment of a Paid Employee

At the most general level, an employer's investigation, supervision, or retention of an employee is not negligent if a reasonable person in similar circumstances would have behaved the same way. While an employer is generally entitled to presume that a prospective or current employee is competent to perform simple tasks (and thus the employer has only a minimal duty to investigate or supervise), the duty to investigate and supervise increases when the task or position poses a serious risk of harm to third parties.[18]

Proving a case of negligent employment is difficult. North Carolina courts are "noteworthy for their rejection of negligent hiring claims"[19] and begin with the presumption that the employer has used due care in hiring its employees.[20] Further, the standard of care to which state courts have held employers is relatively easy to satisfy.

The leading negligent employment case in North Carolina involved a school board and illustrates this fairly forgiving standard of care. In that case, a student was allegedly sexually molested by her principal, Vann J. Bass. Her parents sued, charging that the board was negligent in its selection process leading to the decision to hire Bass. The court found that, at the time it hired Bass, the board did not know, and reasonably could not have been expected to know, that Bass had left his former job because of a similar allegation. Two of Bass's references were administrators from his former school system, and neither expressed any reservations concerning his appropriateness for the job. And when the hiring school system called a third reference to investigate a rumor about "his sexuality," this reference gave no indication of the earlier charge. This investigation followed usual board policy, the court held, and was reasonable.[21]

This opinion is notable for what it did not require of the hiring board. Bass's application indicated that he had left his former position because of "health" reasons, yet there is no indication that the board asked him to explain this (even though he had worked in the former school system for ten years and sought his new position just over six months after leaving it). In addition, the board hired Bass before it received even one complete reference.[22]

In sum, the inference that can be drawn from this case is that it is reasonable to rely on the representations of an applicant's references.[23] Standards for preemployment investigations distilled from other North Carolina negligent employment cases—not involving school boards—are also fairly forgiving. For one thing, courts have held that there is no duty to check an applicant's criminal records[24] (although school boards

16. "Employs" in this context is used in a broad sense to mean "putting to use" as opposed to "exchanging wages for labor." Emphasizing the service aspect of the relationship rather than the monetary aspect is consistent with the conclusion that a volunteer may be the subject of a negligent employment suit.

17. Another necessary underlying requirement is that the employee must have engaged in tortious or criminal conduct that caused the volunteer's injury. A court will not hold the board liable unless it makes such a finding. Graham v. Hardee's Food Sys., 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996).

18. Carlsen v. Wackenhut Corp., 868 P.2d 882, 887 (Wash. App. Div. 2 1994), *quoting* 1 RESTATEMENT OF AGENCY, § 213 (American Law Institute, St. Paul, Minn., 1958).

19. Robert P. Joyce, "Board Liability for Employee Actions," paper presented at School Attorneys Conference, February 7, 1997 (Institute of Government, The University of North Carolina at Chapel Hill): 4, n.10.

20. Moricle v. Pilkington, 120 N.C. App. 383, 387, 462 S.E.2d 531, 534 (1996); Stanley v. Brooks, 112 N.C. App. 609, 612, 436 S.E.2d 272, 274 (1993), *rev. denied*, 335 N.C. 772, 442 S.E.2d 521 (1994).

21. Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990).

22. Medlin v. Bass, 96 N.C. App. 410, 386 S.E.2d 80 (1989).

23. This is reasonable, despite the widely acknowledged problem of "passing the trash" within the public schools. Issues involved in checking and giving references in relation to volunteers will be one of the topics discussed in Part IV of this series.

24. *Moricle*, 120 N.C. App. 383, 387, 462 S.E.2d 531, 534 (1996); *Stanley,* 112 N.C. App. 609, 612, 436 S.E.2d 272, 274 (1993), *rev. denied*, 335 N.C. 772, 442 S.E.2d 521 (1994).

are statutorily authorized to do so in certain circumstances).[25] In a related point, it is within the bounds of reasonable care to rely on an applicant's representations about his or her criminal history, if any.[26] More broadly, an investigation is probably reasonable if it complies with the practices of similar employers.[27]

The already difficult job of proving a negligent employment case may be even more difficult when it is an injured volunteer who is making the claim. The reason for this difficulty is that the mission of the public schools is to educate children: the investigation of applicants for employment and the supervision of current employees reasonably focuses on qualities necessary to perform that function. In addition, most of the risk of harm inherent in any public school job arises from the presence of children, some of them disabled, who are more vulnerable to injury than adults. If an employee is unqualified for his or her job, it is a child's education that will suffer; if an employee is dangerous, it is most likely to be a child, quite probably a younger or disabled child, who suffers maltreatment.

Thus it is to students that a school board owes its greatest duty to screen and supervise persons employed in the schools and, as seen in the *Bass* case, this duty is not so great. Therefore the board's duty to volunteers and other adult invitees in regard to screening and supervising employees is probably quite minimal, and volunteers will have a difficult time showing that the board breached a duty to them.

> *Example 8:* In screening a second-grade teacher, the board conducts a criminal history check seeking to identify convictions for certain crimes that it has determined pose particular danger to students. The check comes back clean. The board also checks the applicant's references and certification, and everything seems in order. None of these methods turns up the fact that the applicant has a judgment against him for slandering a co-worker. The teacher later slanders a volunteer, who then brings suit against the school board for negligent employment. The volunteer probably will not prevail. The board's investigation of the teacher seems reasonable: it focused on qualities relevant to his teaching ability and his appropriateness to work with children. Further, it's not entirely clear that a seeming tendency to slander makes a teacher unfit for employment.

The point is that a screening may be fully reasonable and still not reveal qualities that pose an unreasonable danger to a volunteer or other adult.

Nonetheless, the board does have a duty to all invitees to keep school premises reasonably safe, and on this basis a claim of negligent employment can be made. So would the board be held liable to the volunteer classroom assistant who was sexually harassed by the math teacher who called her "sexy mama"? Engaging in sexual harassment, it may be argued with some force, makes a person unqualified for employment in the public schools. Teachers are role models for their students. Certainly, if the board knew that this teacher had a history of sexual harassment, it could reasonably predict that he might sexually harass an invitee on school premises. On the other hand, if the teacher had indicated in the selection process that there were no factors that might impede his ability to teach in the public schools, the board would presumably be entitled to rely on this representation. And, if the board had called his reference and this person had given an unqualified endorsement, the board would be entitled to rely on this representation as well. It is an open question whether the board's failure to check the teacher's references was negligent in the face of evidence that the references would not have revealed the negative information.[28]

Negligent Employment of Volunteers

A student is injured in an automobile accident while being driven by a volunteer to a statewide drama competition. Subsequent investigation reveals that the volunteer's license had been revoked two months earlier for driving while intoxicated. Does the student have a claim against her school system for negligent employment? After all, the person negligently "employed" in this case is not an employee, but a volunteer.

Many questions arise from the "nonemployee" status of volunteers, the most obvious of which is whether there is a duty to exercise due care in selecting and supervising them. Assuming there is such a duty, who, or what body, is obligated to fulfill it? Finally, what is reasonable or not negligent in terms of fulfilling this duty?

Is there a duty to screen and supervise volunteers? Yes. There is a duty to screen applicants for volunteer positions and then to supervise them once they are in the schools. Although no reported cases hold a school board liable for negligent employment of a volunteer, this absence of cases is probably attributable to the protection of sovereign immunity and to luck. At least one

25. G.S. 115C-332.

26. *Stanley*, 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).

27. *Moricle,* 120 N.C. App. 383, 386, 462 S.E.2d 531, 533 (1996).

28. Medlin v. Bass, 327 N.C. 587, 592, 398 S.E.2d 460, 462 (1990) ("Although Holmes . . . did not receive the written recommendations until after Bass was hired, it is clear that the recommendations contained no information indicating that Bass was a pedophile").

court has expressly acknowledged the propriety of such an action against a school board.[29] In that case, a student from one school district, staying with a host family in another school district, was seriously injured in an accident that occurred while she was riding in the host family's car. The student brought suit against her home school district alleging, among other things, that it had been negligent in selecting host families. The court found that the home district's liability could not be predicated on its failure to properly select host families because it appeared to have taken no role in selecting them. However, the court said, the home district could be held liable for its failure to ask what criteria the host district used in selection. That is, the home district could be held liable for its negligence in blindly entrusting the selection of host families to the host district.

In addition, many nonschool organizations that use volunteers to work with children—such as the Boy Scouts,[30] Big Brother/Big Sister,[31] churches,[32] and others[33]—have been sued for negligently selecting their volunteers.

The existence of such cases supports the conclusion that the fact that a volunteer is not an "employee" of the board—in the sense of being paid for his or her services—is not fatal to a negligent employment claim based on harm the volunteer causes.[34] It is the power to exercise control over a volunteer, rather than the exchange of wages for service, that is the crucial element, and in this regard a volunteer sufficiently resembles a paid employee to impose a duty to reasonably investigate and supervise him or her. A volunteer is "working for" the board, or is an agent of the board, insofar as the board is empowered to establish requirements for volunteer service, has the power to dictate what roles a volunteer may perform and how, and has the authority to ban a volunteer from the school on any legal grounds.[35] So it would appear that the student injured on the way to the drama competition *could* bring a negligent employment suit against her school district.

Who, or what body, has the duty to screen and supervise volunteers? A friend of the seventh-grade science teacher volunteers to give a lab demonstration to the science class. In the course of the demonstration there is an explosion that severely injures two students. Against whom may these students bring a suit for negligent employment?

Although nowhere in the law is the school board made expressly responsible for the selection of volunteers, as it is for employees,[36] it does have a duty to take reasonable steps to avoid negligently employing unfit or incompetent volunteers, and this duty is the same as in the case of paid school personnel.[37] It arises, albeit tacitly, from a board's "general control and supervision of all matters pertaining to the public schools in their respective school administrative units,"[38] from its plenary power to make rules concerning the conduct and duties of personnel[39] and over the hiring and firing of all school personnel, and from its duty to keep school premises reasonably safe.[40]

The fact that a board is not directly involved in the daily selection or monitoring of volunteers in each of its schools does not lessen the force of this conclusion.

29. Swearinger v. Fall River Joint Unified Sch. Dist., 166 Cal. App. 3d 335, ___, 212 Cal. Rptr. 400, 408 (1985).

30. *See, e.g.,* Infant C. v. Boy Scouts of America, Inc., 391 S.E.2d 322 (Va. 1990) (jury verdict against local troop for negligently selecting and retaining scoutmaster who molested a scout; troop approved the master before submitting his application for approval by the national branch, which maintained a confidential list of unfit applicants).

31. *See, e.g.,* Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 395 S.E.2d 241 (Ga. App. 1987) (screening of "big brother" adequate; it consisted of application, three or more references, an extensive interview and assessment by a clinically trained caseworker, completion of a family history, and a personal meeting with the membership committee; organization was not required to do an "FBI check," psychological test, or credit check).

32. *See, e.g.*, Broderick v. King's Way, 808 P.2d 1211 (1991).

33. *See, e.g.,* L.P. v. Oubre, 547 So. 2d 1320 (La. Ct. App.), *writ denied,* 550 So. 2d 634 (La. 1989) (Boy Scout molested by troop leader sought to hold local volunteer fire department and VFW liable for negligently selecting the leader).

34. "The relation of principal and agent can be created although neither party receives consideration." RESTATEMENT OF AGENCY 2D, § 16(b) (American Law Institute, St. Paul, Minn., 1958).

35. Although it may, in fact, be the school principal or other on-site employee who executes these decisions, it is clearly within the board's authority to promulgate rules by which such decisions are governed. The principal or teacher in this case is an agent acting at the board's bidding; thus the fiction that the "board" is doing all these things.

36. G.S. 115C-315(b).

37. Commentators on the liability of an organization for negligent selection, supervision, or retention of volunteers seem to agree that the potential for liability with volunteers is essentially the same as it is with paid employees. *See, e.g.,* Lynn Buzzard and Susan Edwards, "Church Hiring Guide," § C-3, 52 (Cary, N.C.: Baptist State Convention, 1995): "Churches must realize that the law does not differentiate between permanent and volunteer workers when considering a negligent hiring suit. The same standard of care is required from the employer for both." *See also* John Patterson et al., "Staff Screening Kit" (Washington, D.C.: Nonprofit Risk Management Center, 1994): 9–20.

38. G.S. 115C-36, -40. This grant of power authorizes boards to make rules concerning persons working in the schools, to the extent that the rules do not conflict with state or federal law or with State Board of Education rules.

39. G.S. 115C-47(18).

40. Just as it is reasonably foreseeable that an unqualified or dangerous employee could cause harm, it is reasonably foreseeable that a volunteer of the same ilk could do so. For example, it is probably no more or less likely on any given trip for an unqualified volunteer driver to have an accident than it is for a fully employed, unqualified school bus driver.

Boards are not involved in the daily inspection of school premises or the supervision of employees, yet they are responsible if something goes awry. A system has been developed in which those who are in direct daily contact with the school building and personnel are obligated to monitor and keep the board informed of problems. The board has a duty to develop and implement a similar system with respect to volunteers.

In the example of the exploding lab demonstration, the board might or might not be held liable for negligent employment of the careless volunteer. If the board had no policy concerning the use of volunteers in its schools, and the absence of such a policy led to the presence of an incompetent or dangerous volunteer in the science class, then it could be held liable. Similarly, if the board had developed a policy outlining requirements for screening and supervising school volunteers, but then failed to require schools to implement it, it could probably be held liable. The development of the policy could be used as evidence that the board knew what steps were reasonable to take but then failed to take them. If the board had a reasonable policy and required schools to use it, but the failure of one person at the school level (the teacher who issued the invitation to his friend) to use it was responsible for the presence of the dangerous science class volunteer, then the board probably would not be liable.

What is the duty to screen and supervise volunteers? There is a duty to screen and supervise volunteers and it ultimately rests with the board. What is the nature of that duty? This is a difficult question to answer because of the absence of court cases directly on point, because of the lack of a legislative statement on the issue, and because of the complex ways public schools use volunteers. Volunteers in the public schools in some instances perform duties similar to those of public school employees and in other instances more closely resemble volunteers in nonschool, youth-serving organizations.

Youth-serving organizations screen prospective employees and volunteers based on the requirements of a given job. In the best of circumstances, these requirements are set out in a job description. Job descriptions serve several functions. Primarily, they clarify the duties of each position—setting out its responsibilities, the setting in which it takes place, the number of students with whom the volunteer will work, when the service is to be performed, and the amount of supervision and training provided. This, in turn, makes clearer the risks inherent in each position as well as the qualifications a volunteer must possess to be fit or competent to perform it. With this information in hand, determining what screening mechanisms and what degree of supervision are appropriate for a given position becomes easier.

School boards do not have job descriptions for volunteers, and this lack of job descriptions can lead to the selection and retention of volunteers whose qualities are not well suited—or are even dangerous—for their roles. In fact, the lack of job descriptions can lead to a failure to screen altogether. Even when volunteers are screened, the lack of role definition may cause volunteers to perform duties that are, or should be, beyond the scope of their roles, potentially leading to harm.

> *Example 10:* A volunteer taken on as a reading assistant occasionally functions as a classroom supervisor when the teacher is called out of the room. One day a fight breaks out among four students, and the volunteer sprays one of them with Mace. Were reasonable measures taken to determine whether this volunteer was unfit or incompetent for her role?
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> Assume that the volunteer was screened for the role of reading assistant. A reasonable screening for this role would begin with determining whether the prospective volunteer possessed any qualities that automatically disqualified her from working with children and then would move on to assessing whether her reading and teaching abilities were up to the role and how she worked one-on-one with students. It would not necessarily be reasonable, as it would if the volunteer had applied for a role as a classroom supervisor, to investigate her experience working with large groups of children, her disciplinary style, or her ability to maintain control in a classroom situation. If the volunteer's role had been classroom supervision, and if an appropriate screening for that position had been done, the investigator might have discovered that the volunteer had some kind of panic disorder or had been the victim of several gang attacks. Such red flags would not have appeared in the screening for the role of reading assistant.

Specifying the duties of each volunteer position is an affirmative (and reasonable) recognition of the fact that volunteers play a variety of roles within the public school system and that the level of screening and supervision must intensify as the degree of risk associated with a position increases.

Nonschool organizations that regularly use volunteers have identified risk factors, the presence of which in a given job position justifies an intensified screening or heightened supervision. For public school volunteer jobs, risk factors might include

- unsupervised contact with students, especially young, disabled, or otherwise particularly vulnerable students;
- helping students with personal activities such as changing clothes or going to the bathroom;

- access to confidential student information;
- use of dangerous machinery or other instruments such as cars or power tools;
- handling school funds or valuable property;
- extreme physical exertion; and
- regular physical contact between the volunteer and student such as might occur when coaching sports or delivering health-care services.[41]

It is indisputable that volunteers play roles in public school programs that may involve considerable risk. Some volunteer positions, such as bake-sale assistant or photocopier, involve no unsupervised contact with students, require little technical skill, and entail a correspondingly small risk of serious harm to any student. More risk may be involved in driving students to school events, which combines the use of a dangerous instrumentality (the car) with unsupervised student contact. Depending on the number of students in the car and their age and vulnerability, the risk of harm may be more or less serious. At a higher risk level are volunteer jobs such as coaching sports. Coaching may require both technical know-how and some knowledge of first-aid techniques; it also usually involves regular physical contact with students, possibly at times when students may not be fully clothed (i.e., in the locker room). The volunteer positions in the public schools that carry the highest risks of serious harm are positions such as chaperone and mentor. These positions involve solitary, unsupervised contact (generally off school premises) with a student or students over a longer period of time.

Even if a school board has not developed formal job descriptions that help identify risks posed by volunteer positions, it can still identify certain characteristics that make a volunteer inherently unfit for any role in the public school—a history of, or tendency toward, child molestation, for example, or extreme and obvious prejudice against ethnic minorities. Boards should make clear what these automatically disqualifying criteria are.

In reference to other, less clearly disqualifying information, determining whether a volunteer is fit or competent for a given role requires knowing the risks and responsibilities of that role. Fitness may turn on personal or moral qualities, while competence may turn on professional and technical skills. For example, to be fit for the position of hall monitor or classroom supervisor, a volunteer might need certain attitudes concerning discipline. A volunteer playground assistant may have to be free of any physical limitations. A volunteer mentor must demonstrate fitness for the job through more personal qualities. He or she might be screened for drug or alcohol use, family history, temperament, interests and hobbies, and employment history. If a volunteer applies for the math tutoring program, professional or technical qualities such as education, previous experience, and relevant training are important.

Once the board has developed descriptions that include identified risk factors and desired qualifications for volunteer positions, it must implement a system for investigating potential volunteers, for placing the appropriate volunteers in the appropriate roles, and for supervising their activities. The reasonableness of using any particular method of investigation or supervision will be judged, in part, on its availability and cost.

What is reasonable under the circumstances? Today most school boards have no policy on screening and supervising volunteers at all, despite the use of volunteers in positions that present obvious risks to students.[42] Schools are free to establish a mentor-student relationship between any of their students and a volunteer who walks in off the street (assuming parental consent), but this lack of care in screening and supervising volunteers constitutes negligence.

Is it reasonable for the board to require less screening or supervision for volunteers than is required for employees? Or should the board, at times, require that volunteers be subject to more stringent screening and supervisory requirements than employees? Because the duty to investigate and supervise a volunteer corresponds to the risks inherent in the position he or she fills, the answer to each of these questions is yes.

Some volunteers perform essentially risk-free jobs: the bake-sale assistant, the person who helps make copies in the office, the one-time speaker at a general assembly. For these roles, a perfectly reasonable investigation may consist simply of a brief chat with the volunteer, letting him or her know any pertinent school rules, and sending him or her to work.

Other positions, such as one-on-one tutors or sick room volunteers, entail more or less risk depending on the amount of supervision the volunteer receives. For these positions, three screening devices

41. Patterson, *supra* note 37, at 5.

42. As mentioned in Part I of this article, the Chapel Hill–Carrboro City School Board is one group developing such a policy, and it could well be used as a model for other districts. This program will be discussed in Part IV.

would be reasonable: (1) an application (on which the volunteer might be required to sign a pledge indicating that he or she has never been convicted of a crime involving drugs, sex, or violence; has no history of child molesting; does not use illegal drugs or abuse alcohol; and has not been substantiated by social services officials for child abuse, neglect, or domestic violence);[43] (2) an interview; and (3) reference checks. When a volunteer role requires driving students or school personnel, driving and insurance records should be checked. Technical skills relevant to any volunteer position should be investigated.

Aside from driving records, which do cost something, none of these mechanisms requires the direct expenditure of money and all are available to schools with the volunteer's consent. In other words, it seems reasonable for a board to require their use.[44]

But volunteers who are recruited for positions in which they have direct contact with students and receive little or no supervision from school personnel, such as mentors and overnight chaperones, must be more carefully screened than other volunteers and, in fact, reasonably could be subject to more careful screening than employees.

> *Example 11:* Over the course of a year, a student's volunteer mentor sexually abuses him. During the trial of the student's negligent employment claim against the board, evidence reveals that the mentor was subject to the same screening as teachers employed in the district are. Evidence also shows that the mentor was never required to check in with the school and that no effort was made to assess the progress of the mentoring relationship. Was the screening and supervision negligent?
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> Because no screening process can ever completely verify that a volunteer is an appropriate and safe individual for a given position, the failure to supervise the mentor at all was clearly unreasonable, no matter how reasonable the initial screening. The reasonableness of the screening is harder to assess. The duties of mentors and teachers share some similarities, but some factors may actually make the mentor role more risky than the teacher role: The mentor comes, presumably, with no assurance of professional training (i.e., teacher certification) and no school system references. Further, he does not depend on good performance evaluations for his paycheck. Finally, the mentor probably spends more unsupervised time with the student than a teacher does, and certainly spends more time off campus with the student. So even if the teacher was not subject to a criminal history check upon hiring, it might be reasonable to subject the volunteer to one. If the student will be spending time with the mentor's family, it might be prudent to do a home visit. Because the risks of the mentor position are greater than that of the teacher position, the screening reasonably should be more extensive.

For positions such as these, the screening mechanisms used by boards to screen employees may not be sufficient—especially in those districts where the board does not have a policy of checking the criminal history of applicants whose jobs entail extensive access to children. More reasonable might be the mechanisms used by other youth-serving organizations with volunteers in mentoring positions—organizations such as the Boy Scouts or the Girl Scouts, or Big Brother/Big Sister. The screens used by these organizations for their volunteers include psychological profiles, criminal record checks, and home visits. Such mechanisms are available to school boards.[45] But they do cost money, and their cost in terms of time and human resources can be great. On the other hand, presumably only a small subset of volunteers will work in positions where such checks are warranted.

In addition to rigorous screenings, supervisory methods must be designed to address the fact that most of the work done by volunteers in these kinds of positions occurs off school premises. Requiring the volunteer to keep notes of meetings with students and to come in for meetings with school personnel periodically may be necessary.

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43. *See, e.g.,* Chapel Hill–Carrboro City Schools Volunteer Screening Policy, Regulation and Sample Forms, May 25, 1997: 16.

44. Such mechanisms do have some cost, however, in terms of time and human resources—especially in comparison to conducting no screening at all—the common current approach. This cost must be balanced against the potential harm that could result from not using the measures. For example: The assistant principal of an elementary school meets with a prospective tutor. On her application the volunteer has listed three references, but after the interview the assistant principal has such a good feeling about her he decides not to take the time to call any of them. He assigns her to tutor an African-American third grader in a one-on-one situation. Halfway through the year the student's mother calls to complain that the volunteer has been making increasingly demeaning and racist comments to her child and that as a result the child is suffering acute mental and emotional trauma. If the assistant principal had called even one of the references, he would have been alerted to the need for further investigation: one of the references was made up, another was the volunteer's mother, and the third was a colleague of the volunteer's from a nearby militia movement. Weighing the potential harm against the cost of making the calls—in time and money—did the assistant principal behave reasonably or negligently? (Adapted from a hypothetical used in Patterson, *supra* note 37, 9–14.)

45. G.S. 114-19.3(a)(10) authorizes providers of treatment for, or services to, children, the elderly, mental health patients, the sick, and the disabled to obtain criminal history checks on applicants for employment. This part of the statute probably authorizes schools to obtain such histories on volunteers in appropriate circumstances. This issue will be discussed at more length in Part IV.

For this high-risk group of volunteer positions, it may well be that the cost of conducting screening and supervision is too high. In that case, the board needs to make a judgment about whether allowing volunteers to perform these roles with less rigorous screening and supervision creates unreasonable risk. It may be that schools are just not equipped to exercise the degree of care necessary to use such volunteers reasonably safely. Such volunteers may still be available to the public schools if they obtain them through an organization that is equipped to screen and supervise thoroughly (such as the organizations discussed above). The board must still, however, exercise due care to ascertain that its chosen organization does use reasonable screening and supervisory methods.

Conclusion

The use of volunteers in the public schools raises serious liability concerns for school boards. A volunteer suffering harm during school service is less likely to be a liability risk; a volunteer inflicting harm during school service is a much greater concern. In fact, school boards across the state have left themselves wide open to liability by failing to develop and implement any sort of policy concerning the screening and supervision of volunteers.

Of course, this lack of policy also allows a serious risk of harm to students to continue unabated, a state of affairs much more disturbing than any potential liability. ■

Next, "Vicarious Liability of School Boards," in the Fall issue of School Law Bulletin. *Part III of this series examines the ways in which the actions of a volunteer may create liability for the school board.*