

Legal Issues Arising from the Use of Volunteers and Independent Contractors in the Public School Context

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I. Overview

It all begins innocently enough. What school district doesn't need some extra help in some way, whether it is assisting with a fundraiser, chaperoning a school function or maintaining the school's athletic fields? Nationally, about sixty-five (65) million Americans performed volunteer services from 2004 to 2005. In that same time frame, about twenty (20) million of those volunteers donated their time for educational or youth service organizations.¹ Given that there are about forty-seven (47) million students in the nation's 15,000 school districts, then there is about one (1) volunteer for every two (2) students in public schools.²

Besides altruism, there are good reasons why school administrators are finding more and more volunteers, and even paid tutors, in their schools. For starters, the No Child Left Behind Act (NCLB) has increased the presence of volunteers and independent contractors in America's public schools.³ NCLB has put pressure on school districts, their staffs, and students to achieve on standardized tests. As a result, if a school fails to make adequate yearly progress (AYP) on a host of measures, including standardized tests scores, then a school could face the option of

¹ Stephanie Boraas White, "Volunteering in the United States, 2005," Monthly Labor Review, February, 2006, pp. 65-70, <http://www.bls.gov/opub/mlr/2006/02/ressum.pdf>.

² Jennifer Hochschild and Nathan Scovronick, The American Dream and Public Schools, (Oxford University Press 2003) p. 20.

³ See P.L. 107-110 No Child Left Behind Act of 2001 (NCLB), Title I, §1118(d) of NCLB requires school districts to develop a school-parent compact that outlined how parents, the entire school staff, and students will share the responsibility for improved student achievement that includes in part the use of volunteers. Tutoring services also may be required under NCLB as part of supplementary services offered to schools that fail to make AYP. Title I, §1116(E)(12)(C) of NCLB.

offering students the choice of transferring schools or providing supplementary services, such as tutoring.⁴ In general, school districts must make supplemental educational services available to eligible students attending a school that did not make AYP for three consecutive years.⁵

This article will review some of the fundamental legal issues facing school districts when they use the services of volunteers or independent contractors. Given the breadth of this article, it cannot possibly address all of the legal issues that can arise in this context for each of the fifty (50) states within the United States. Nevertheless, this article will address the following: definitions of volunteers and independent contractors, contractual liability arising from the use of volunteers and independent contractors, tort liability arising from the use of volunteers and independent contractors, constitutional issues arising from the use of volunteers and independent contractors and recommended practices.

II. Matters of Definition: What is a volunteer? Independent Contractor?

Volunteers

At first blush, the definition of a volunteer, as opposed to an employee or independent contractor, may seem straightforward enough. One writer has defined a public school "volunteer" as "a person who provides service to a public school without the 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."^{6 7} Still other definitions of a

⁴ Patrick Winn, "Tutoring a bigger part of schooling: Vocation is calling for some, business to others," The News & Observer, Jan. 20, 2006; John Merrow, "Free Tutoring," Online NewsHour, May 5, 2005, http://www.pbs.org/newshour/bb/education/jan-june05/tutor_5-5.html.

⁵ No Child Left Behind, "Supplemental Educational Resources: Non-regulatory guidance," U.S. Department of Education, June , 2005. <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf>.

⁶ Ingrid M. Johansen, Legal Issues in School Volunteer Programs (pt. 1), Sch. L. Bulletin, Summer 1997, at 1.; Restatement of Law (Second) Agency § 2 defines a servant, i.e., employee, as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or subject to the right to control by the master." Further, an independent contract is defined as "a person who contracts with another

volunteer have been offered. For instance, the U.S. Congress, the state legislatures and courts have all attempted to draw a distinction among employees, independent contractors and volunteers.⁸

However, the delineation between a volunteer and an employee can sometimes be blurred, especially when an employee is volunteering in another capacity for the same employer, such as when a parent/teacher is volunteering at school. The distinction between when an individual is an employee or a volunteer under such situations is discussed in more depth in Part IV article.

Independent contractor

On the other hand, an independent contractor is someone, not an employee, who performs a discrete task or service according to the individual's own judgment and methods. Whether the relationship of the parties under the contract is that of employer-employee or that of employer-independent contractor lies in whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity with the contract.⁹ Further, where the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such

to do something for him but who is not controlled by the other nor subject to the other's right to control with the respect to his physical conduct in the performance of the undertaking."

⁷ Black's Law Dictionary (6th Edition) defines an employee as "a person in the service of another under contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." In contrast, an independent contractor is defined as one "in the exercise of independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to the end product . . ." A volunteer is someone "who gives his services without any express or implied promise of remuneration."

⁸ Pub. L. No. 105-19, 111 Stat. 218 "Volunteer Protection Act of 1997," "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." (Citation)

⁹ Beck v. Paideia School, 191 Ga. App. 183 (1) (381 SE2d 132) (1989).

control.¹⁰ To be sure, several federal and state statutes undertake to define an individual as either an employee or an independent contractor. Accordingly, subtle but important distinctions can arise, depending on the area of law, as to whether an individual is in fact an employee, independent contractor or volunteer. School districts can cause a great deal trouble for themselves by incorrectly labeling an employee as an independent contractor, including unwittingly creating due process rights, sometimes called tenure rights, for employees where they would not have existed before.

III. Scope of volunteer and independent contractor activities

Moving from matters of definition, volunteers and independent contractors are used throughout the nation's schools. In general, they can be found tutoring, coaching, chaperoning, fundraising, or building. In short, they can be found doing just about anything that a school needs to have done.

Overall, no study was found comparing the involvement of volunteers and independent contractors in America's public schools. Anecdotally, independent contractors are employed frequently by school districts, such as through private management companies like Edison Schools, Inc. Other examples of independent contractors are architects, engineers, and attorneys who may be employed by school districts.

However, the extent of volunteerism in public school schools is fairly well documented. The Bureau of Labor Statistics of the U.S. Department of Labor (2005) reported that about sixty-five (65) million people volunteered at least once between September 2004 to September 2005.¹¹ That number translated into about three (3) out of ten (10) persons in the civilian non-institutionalized population age sixteen (16) and over. This rate has remained steady over the

¹⁰ *McGuire v. Ford Motor Credit Co.*, 162 Ga. App. 312, 313 (290 S.E.2d 487) (1982).

¹¹ Stephanie Boraas White, "Volunteering in the United States, 2005," *Monthly Labor Review*, February, 2006, pp. 65-70, <http://www.bls.gov/opub/mlr/2006/02/ressum.pdf>.

past several years. Higher rates of volunteering were found for females than males, whites than in other major racial and ethnic groups, the employed over the unemployed, and married persons versus singles or persons of other marital status. As a whole, volunteers spent about fifty (50) hours doing volunteer activities. The Bureau of Labor Statistics found that one-third of the volunteers reported that a religious organization was the main group for which they performed work. Educational or youth service organizations were the second most frequently reported. Volunteers are more likely to volunteer when they have school-age children themselves.¹²

The impact of volunteering in public schools is debated. At least one study from Johns Hopkins University found that volunteer programs in the Baltimore Public Schools had a beneficial impact.¹³ Teams of experts at Johns Hopkins Schools of Medicine and Public Health conducted studies designed to determine how the work of a tutoring non-profit affected children and schools. The studies involved more than 125 volunteers from a specific non-profit and a comparable control group of adults (aged 60 – 86), along with nearly 2,000 school children (K-3) at six Baltimore elementary schools. The results of the research were published in a series of peer-reviewed articles in the Journal of Urban Health in March, 2004. Overall, the study found that the students exhibited better behavior, better test scores, and teachers/principals reported high levels of satisfaction with the program.

IV. Work-based claims from the use of volunteers and independent contractors

¹² Bernard Michael, Ed., Volunteers in Public Schools, National Academy Press (1990). This book provides a thorough review of the following: the development of volunteer programs in schools, a review of the profile of volunteers, the factors influencing the decision to volunteer, a review of the literature on the effectiveness of school volunteer programs and a discussion of effective volunteer programs; see also, Jeffrey L. Brudney, "The Effective Use of Volunteers: Best Practices for the Public Section," 62 Law & Contemp. Prob. 219 (Fall, 1999).

¹³ "Experience Corps: Hopkins Research Documents Positive Experience of Impact of Experience Corps," <http://www.experiencecorps.org/images/pdf/Hopkins.pdf>.

School districts benefit significantly from the use of volunteers and independent contractors because these individuals perform the work traditionally done by regular employees, but the school district does not incur the same financial obligation as it does with its employees. For instance, the school district typically does not have to pay the following for volunteers or independent contractors: no overtime pay; no benefits; no withholding federal, state, or local taxes; no FICA contribution; no unemployment insurance and no worker's compensation.¹⁴ This section of the article will analyze generally the circumstances under which a school district may be liable to an individual under a contract, under the Fair Labor Standards Act, and for unemployment insurance.

School district hiring requirements

Before launching into a review of the case law involving independent contractors and volunteers, it is helpful to review some of the typical requirements placed on school districts, as public entities, prior to hiring an independent contractor. First, most school districts have three types of employees: at will employees; contractual, non-tenured employees; and tenured employees.¹⁵ An independent contractor in a school district will typically be terminable at will.¹⁶ Before hiring independent contractors, a good understanding of the school district's hiring procedures is necessary. The failure to follow those procedures could result in the contract being

¹⁴Diane M. Juffras, "Independent Contractor or Employee? The Legal Distinction and Its Consequences," *Public Employment Law*, No. 32, May 2005, p. 1.

¹⁵ Robert P. Joyce, *The Law of Employment in North Carolina's Public Schools*, Institute of Government (2000) p 4.

¹⁶ An at will employee is one whom the employer is free to decide among the job applicants which one it will offer employment and the employer can terminate the employee for any reason except an illegal reason. In contrast, a contractual, non-tenured employee is one who is hired under a contract for a specified term to perform certain duties. Joyce, pp. 4-5.

found null and void.¹⁷ First, depending on the service to be provided, the school district may be required to request bids for the services.¹⁸ Typically, the local board of education will use a request for proposal to solicit service contracts. Specialized rules can pertain to the solicitation of construction of services, i.e., construction services in excess of \$100,000.00.¹⁹ Second, school districts are required to have most contracts approved by the local board of education.²⁰ Third, most contracts with a local board of education are limited in their term, i.e., the contracts must be approved annually by the local board of education.²¹

Independent Contractors

Of course, a school district exposes itself to potential liability if it breaches a contract with an independent contractor.²² A critical first step in evaluating any potential contract claim is to determine whether or not the individual is an employee or independent contractor. The basic analysis here is whether the employer controls the time, manner and method of the

¹⁷ Article III, Section 6, Paragraph 6 of the Constitution of the State of Georgia provides that the Government, including a public body, such as a Board of Education, cannot make donations, grants or gratuities. Shelley v. Board of Public Education, 132 Ga. App. 314, 208 S.E.2d 126 (1974). (“A payment of plaintiff’s claim, with or without a judgment against the defendant board, in settlement of a supposed tort liability of the board would be a gratuity which is forbidden. Constitution, Art. VII, Sec. I, Par. I.”)

¹⁸ J. Matthew Maguire, Jr., “Government Contracting in Georgia,” Georgia Bar Journal, Feb. 2005, pp. 12-21.

¹⁹ O.C.G.A. § 36-91-1.

²⁰ American Ins. Co. v. Seminole County Bd. of Educ., 51 Ga. App. 808, 181 S.E. 783 (199X) (“A county superintendent of school cannot contract a debt on behalf of the county board of education without previous authority from the board.”) See also, Knight v. Troup County Bd. of Ed., 144 Ga. App. 634, 636, 242 S.E. 2d 263 (1978).

²¹ O.C.G.A. § 20-2-506 prohibits multiyear leases, purchases, or lease purchases of all kinds for the acquisition of goods, materials, real and personal property, services, and supplies. Further, the vendor is required to give the school board an unrestricted right to cancel the contract at the end of each year. Finally, the total expenditure for each year of the contract must be shown within the contract.

²² Teacher’s Ret. Sys. v. Forehand, 234 Ga. App. 437, 506 S.E. 2d 913 (1998). (“Where the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control.” The other factors suggestive that the employer controlled the employee’s work were: paying employer’s contribution of Social Security; paying the estimated state and federal tax; paying unemployment compensation; paying worker’s compensation; paying health insurance; accruing sick leave; and accruing tenure.)

individual's work. While the "time, manner, and method"²³ test is useful in roughly determining whether an individual is an employee or an independent contractor, courts typically employ a much more detailed analysis of the employment relationship, reviewing the following factual issues: whether the employer has the right to direct the individual's work step by step; whether the employer has the right to inspect the individual's work versus requiring certain results; the nature and skill of the employee's work; the method of payment for the work; and who pays for any for insurance coverage arising from the work.²⁴ In sum, if there is a rule of thumb for determining whether an individual is an employee or independent contractor, then the more education, training and skill required for the position, then it is more likely that the individual is an independent contractor.

Numerous cases also illuminate the liability of an employer to an independent contractor in other areas of contract law, such as non-performance. For example, in Eudy, a professional wrestler named "Sid Vicious" entered into a contract to provide wrestling services with an entertainment company. Sid Vicious was injured during a wrestling match, filed for worker's compensation and the company reduced his salary under the terms of his contract.²⁵ The contract between the parties was entitled "Independent Contractor Agreement," spelled out the terms of compensation and performance. In the contract, the parties anticipated the possibility that the wrestler could become injured, because the contract provided that "[i]n the event that the Wrestler is unable to perform due to incapacity as defined below," then different compensation terms apply. "Incapacity" was defined "as Wrestler's inability to perform all of the physical requirements of the Services." After thirty (30) days of incapacitation, the company could

²³ O.C.G.A. §§ 51-2-2; 51-2-5 (5).

²⁴ Cooper v. Binion, 266 Ga. App. 709, 715, 598 S.E. 2d 6 (2004).

²⁵ Eudy v. Universal Wrestling Corp., 272 Ga. App. 142, 611 S.E.2d 770 (2005).

terminate the agreement without further obligation; further, unless the company terminated the agreement, it could choose to pay the wrestler either one-third of his compensation or pay him one-half of his normal compensation for nonwrestling services. Additionally, the contract provided that WCW could terminate the agreement "with or without cause after giving Wrestler at least three months prior written notice." The Appeals Court of Georgia affirmed the grant of summary judgment to the company on the basis that the wrestler could no longer perform. "If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance."²⁶

In addition, it is important to point out that independent contractor typically cannot sue a school district under quantum meruit theory. Under this theory, the independent contractor may claim that, while there was no contract, a promise was made to pay for certain services and that the promise was detrimentally relied upon by the employee.²⁷ There, the Georgia Court of Appeals ruled as follows:

OCGA § 36-10-1 provides that all contracts entered into by the county governing authority with other persons in behalf of the county shall be in writing and entered on its minutes. To be enforceable, therefore, a contract with a county or subdivision of a county must comply with those requirements. As a result, quantum meruit is not available when a county is the defendant. As the Georgia Supreme Court [has] noted, . . . quantum meruit is another name for an implied contract, which is statutorily prohibited when a county or its subdivision is the defendant.

Further, the determination of whether an individual is an independent contractor is important in determining whether the Fair Labor Standards Act ("FLSA") applies to the individual's wages. The FLSA defines an employee broadly as "any individual employed by an

²⁶ Brown Transport Corp. v. Gunnell, 167 Ga. App. 833, 307 S.E.2d 727 (1983).

²⁷ Harden v. Clarke County Bd. of Educ., 2006 Ga. App. LEXIS 627 (2006).

employer.”²⁸ Given this broad definition, courts have developed the “economic realities” test to determine whether an individual is an employee for FLSA purposes. Briefly, the economic realities test looks to whether a worker is economically dependent on the organization for which he renders services.

The status of the individual as an employee or independent contractor is also critical in determining the coverage for unemployment insurance or the continuation of health insurance.²⁹ In terms of unemployment insurance, a school district may be liable for the unemployment insurance of an independent contractor. Again, the school district should carefully review the contracts or business relationships it has with any independent contractors to insure that the independent contractors cannot be treated as employees for purposes of unemployment insurance.³⁰ Generally, to prove independent contractor status, an employer must prove that an individual who receives wages meets the three-pronged test for exemption from the definition of "employment".³¹ For instance, an individual who received more than 80% of his or her total income for personal services rendered from a single employing unit in the previous calendar year shall be conclusively presumed to be an employee of the employer for purposes of the Employment Security Law. However, substitute teachers probably are not due unemployment

²⁸ 29 U.S.C. 203(e)(1).

²⁹ Miller v. Clayton County, 271 Ga. 135, 518 S.E. 2d 402 (1999). (“The public may not be estopped by the acts of any officer done in the exercise of an unconferrred power.” The Supreme Court found that even if public officials promised an employee benefits to which they were not entitled then the public entity is not estopped from asserting correct entitlement.)

³⁰ Sarah Coventry, Inc. v. Caldwell, 243 Ga. 429, 254 S.E.2d 375 (1979). Although the compensation fell under the statutory definition of "wages," the employer was not liable for unemployment tax where the employer met the three statutory elements establishing the independence of its "fashion show directors." the employer satisfied the elements of § 54-657(h)(6)(A),(B), and (C), by showing that 1) the fashion show directors were free from any significant employer control over the performance of their services; 2) that the directors were unlimited as to territorial or geographical spheres of operation; and 3) that the fashion show directors were free to engage in their trade with other employers or competitors.

³¹ O.C.G.A. § 34-8-70; Georgia DOL Rule 300-2-7-.13.

insurance benefits because of the part-time, unstable nature of the work.³² Again, the amount of work performed by the substitute teacher and whether that individual has a teaching certificate should be reviewed before making any determination about the availability of unemployment insurance.

Volunteers

The foregoing discussion of contractual liability for school districts to independent contractors is based primarily on how much control the employer exerts over the individual's work. Similarly, with a volunteer, the issue can arise as to whether a volunteer is an agent or employee of the school district. It may appear that volunteers cannot be agents or employees of school districts because, most fundamentally, they are not paid, they do not perform services with any expectation of being paid, and they certainly have no contract for employment.³³

However, while this analysis may seem straight forward enough, careful attention needs to be paid to employees who also volunteer to undertake various duties for their employers. A review

³² Campbell v. Poythress, 216 Ga. App. 834 (456 S.E.2d 110) (1995); Palm Beach County School Bd. v. State of Florida Unemployment Appeals Commn., 504 So. 2d 505 (Fla. App. 4th Dist. 1987); Town of Bourne v. Director &c. Division of Employment Security, 25 Mass. App. Ct. 916, 515 N.E.2d 1205 (Mass.App.Ct. 1987).

³³ Gove v. Grafton Volunteer Ambulance Squad, 1995 U.S. Dist. LEXIS 11157 (N.H. 1995). ("In the case at hand, the members of the Squad were all volunteers. They signed no written contract. Further, the by-laws do not contain any sort of specific employment language. The plaintiff never brought to the court's attention any evidence of an oral contract, express or implied between himself and the Squad. The plaintiff did not receive any recompense for his labors, and thus suffered no monetary damages when he was dismissed. Plaintiff could quit at any time. There was a lack of exchanges of promises and no consideration."); Johnson v. Unorganized School Dist., 159 Minn. 226, 198 N.W. 463 (1924). ("The bus driver had written contracts in the past with the school district for transportation. However, because of the loss of certain state aid, the district decided to discontinue the transportation. Nevertheless, when school started in the fall, the driver assumed that his old contract was renewed and he transported the children in the usual manner. The driver brought suit when his request for payment for his services was refused. The trial court granted the school district's motion for a directed verdict and denied a new trial. On appeal, the court affirmed the judgment, holding that the driver was not entitled to compensation under contract or a quantum meruit basis. The court saw that the district very definitely refused to contract at all; thus, its conduct could not have been the expression of contractual consent to the rendition of the driver's services. Moreover, there was no quasi-contractual obligation because there was no request by that the services be performed. Instead, the driver was considered a mere volunteer with a duty to make sure that his services were wanted before he performed them.")

of the case law in the last ten (10) years reveals no cases in which a volunteer has been held to be an employee of a school district.

Besides contract law, a school district may be liable to a volunteer/employee under the FLSA. The Wage and Hour Division of the U.S. Department of Labor (“DOL”), which administers the FLSA, addressed the issue of when an employee is really a volunteer. Of course, the FLSA does not prevent private individuals who are not employed by a school or agency from volunteering to perform services without compensation. Certainly, an individual who is employed by one public agency can volunteer with a different agency. But issues arise when an employee volunteers to perform services for the same public agency for whom he or she is employed.

Overall, when dealing with a public agency, the DOL will first look at the applicable job titles and reported duties and consider the occupation set forth in the Dictionary of Occupational Titles, which is referred to as the Occupational Informational Network. In doing so, the DOL will evaluate whether the job duties performed as a volunteer and paraprofessional were similar or identical. Even if the volunteer services are found to be in a different occupation, the DOL still will consider whether the occupations are in the same job family and will look at the relationship between the two occupations in deciding whether they are truly different.

However, the Wage and Hour Division has listed several exceptions to the general rule that employees cannot volunteer to do work for their employer. For instance, an employee who is a bus driver, who is also a parent, may volunteer to drive the bus to an activity involving the employee’s child.³⁴ It is important to note that the Wage and Hour Division opined that the same bus driver could not volunteer to drive the bus if his child was not involved in the school event.

³⁴ Wage and Hour Opinion Letter, July 14, 2004.

Driving a school bus constitutes the same, identical, or similar service within the meaning of the FLSA regulations, regardless of the characterization of the passengers as students or student athletes and of whether the transportation is to and from school or school authorized activities.³⁵

Similarly, a cafeteria worker/parent was exempt from the FLSA prohibitions against volunteering when the worker provided a meal for a PTA meeting at her child's school, even though the cafeteria worker provided the same services to the PTA as the work provided to the school. Further, the Wage and Hour Division also opined that a paraprofessional can volunteer to coach after school without running afoul of the FLSA's prohibition of an employee being a volunteer for the same or similar services for which they were hired to perform.³⁶

Finally, the issue frequently arises as to whether the school district can compensate its volunteers for their participation in a school event. The FLSA and its regulations provide that a volunteer may only be paid expenses, reasonable benefits, or a nominal fee, or any combination thereof, without losing the volunteer status. Examples of permissible expenses are dry cleaning, uniform allowances, reimbursement of out of pocket expenses, or payment for benefits in group life insurance plans. In terms of what is a nominal fee, the FLSA and regulations do not define what a nominal fee is. However, a nominal fee cannot be a substitute for compensation or cannot be tied to productivity.

As discussed earlier, quantum meruit does not apply where the services are rendered with no expectation of compensation being recovered by a volunteer.³⁷ Ordinarily, when one renders a service or transfers property which is valuable to another, which the latter accepts, a promise is

³⁵ Id.

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³⁷ Pembroke Steel Co. v. Technical Sales Assocs., 138 Ga. App. 744, 745 (2) (227 S.E.2d 491) (1976); Creative Svcs., Inc. v. Spears Constr. Co., 130 Ga. App. 145 (3) (202 S.E.2d 581) (1973); Addison v. Southern R. Co., 108 Ga. App. 314, 315-316 (132 S.E.2d 833) (1963).

implied to pay the reasonable value thereof."³⁸ However, when the person renders services or contributes property as a gratuity as a volunteer, quantum meruit is not recoverable, because neither party had an expectation that anything would be paid.³⁹

Similarly, a volunteer cannot seek worker's compensation benefits injuries incurred in the scope of volunteering because of the lack of any employment status.⁴⁰

V. Tort-based liability arising from use of volunteers

If school districts potentially have liability to a school volunteer or an independent contractor for contract-based claims, then a school district's exposure is significantly reduced for negligence-based, i.e., tort, claims. By way of background, negligence-based claims typically involve a claim of personal injury. Immunity more than likely bars any tort claims against a school district.

To explain, school boards have immunity, sometimes called sovereign immunity for tort claims. In general, no liability may be imposed when sovereign immunity applies. Further, public employees, such as superintendents, principals, and teachers, have official immunity. "School employees are entitled to official immunity from their actions if those actions are within the scope of their employment, discretionary in nature, and without willfulness, malice, or corruption. However, a public official who fails to perform a purely ministerial duty is subject to an action for damages by one who is injured by his omission."⁴¹ "Generally, the determination of whether an action is discretionary or ministerial depends on the character of the specific

³⁸ O.C.G.A. § 9-2-7.

³⁹ Creative Services, Inc. v. Spears Const. Co., 130 Ga. App. at 145; Addison v. Southern Ry. Co., supra at 316; Guyton v. Young, 84 Ga. App. 155, 162 (5) (65 S.E.2d 858) (1951).

⁴⁰ Jones v. Lumberman's Mut. Casualty Co., 58 Ga. App. 713, 199 S.E. 832 (1938).

⁴¹ Guthrie v. Irons, 211 Ga. App. 502, 504 (439 S.E.2d 732) (1993); Wright v. Ashe, 220 Ga. App. 91, 92 (469 S.E.2d 268) (1996); Larkins v. Cobb County Sch. Dist., 225 Ga. App. 387, 484 S.E.2d 10 (1997).

actions complained of, not the general nature of the job, and is to be made on a case-by-case basis."

Immunity is typically is a strong defense to tort-based claims against school districts and their employees. In one case, a volunteer alleged that she was injured when she tripped and fell over an electrical receptacle in the cafeteria of the school. The volunteer⁴² was volunteering at a school-sponsored carnival at the time of her fall. She alleged that the receptacle was normally under a refrigerated case, but the case had been moved for the carnival. The trial court granted summary judgment based upon official immunity to the school officials. The Appeals Court affirmed the dismissal of the case because the school official's decision of approving the use of the school for the carnival was a discretionary act afforded official immunity.

VI. Tort based liability for use of independent contractors

The analysis for the potential liability of school districts and school officials for claims arising from the use of independent contractors is similar to that for volunteers. As previously discussed, school districts cannot be sued based on a tort claim because of sovereign immunity. Further, any individual school employees who are sued by an independent contractor for a tort claim may be afforded official immunity if the actions were not taken with actual malice.⁴³

It is important to point out that several states have passed laws that provide immunity to an employer or to the independent contractor in specified contexts. For instance, Georgia has the long-standing policy that an employer of an off-duty policeman incurs no vicarious liability as a

⁴² While beyond the scope of the paper, volunteers typically have immunity from negligence claims, which operates much like official immunity. See Ingrid M. Johansen, "Legal Issues in School Volunteer Programs," School Law Bulletin, Summer, 1997, O.C.G.A. § 51-1-20.

⁴³ Larkins, 225 Ga. App. at 387.

result of acts performed by the policeman in furtherance of his public duties.⁴⁴ In other situations, legislatures have provided immunity to individuals rendering emergency care.⁴⁵

VII. Constitution-based claims

Another area in which legal issues can arise from the use of volunteers in public schools is over constitutional issues, such as the Equal Access Act and the First Amendment. To that end, in 1984, Congress passed the Equal Access Act (EAA).⁴⁶ In passing the EAA, Congress sought to address the problem of religious student groups being permitted to meet on school campuses the same as non-religious groups could do.⁴⁷ The EAA broadly prohibits public schools receiving federal assistance and having a limited open forum from discriminating against students or denying them a fair opportunity to conduct a meeting on the basis of the religious, political, philosophical, or other content of the speech at such meetings.⁴⁸ A school is considered to have a limited open forum if it permits "one or more non-curriculum related groups to meet on school premises during non-instructional time."⁴⁹ A fair opportunity for student participation in non-curriculum related student groups is confined to meetings, which must satisfy the following criteria. They should: 1) be voluntary and student initiated; 2) have no sponsorship of the meeting by the school, the government, or its agents or employees; 3) permit school employees to attend only in a non-participatory capacity; 4) should not materially or

⁴⁴ Beck v. Paideia School, Inc., 191 Ga. App. 183, 381 S.E. 2d 132 (1989). (The Appeals Court of Georgia affirmed the trial court's grant of summary judgment to the school based on the alleged negligence of the police officer who was an independent contractor providing traffic control for a school festival.)

⁴⁵ O.C.G.A. § 31-11-8.

⁴⁶ 20 U.S.C. § 4071-74 (1984).

⁴⁷ Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982).

⁴⁸ 20 U.S.C. § 4071(a) (1984).

⁴⁹ 20 U.S.C. § 4071(b) (1984). (Non-instructional time includes meetings during lunchtime or other non-curriculum related groups are permitted to meet at that time. Ceniceros v. Board of Trustees, 106 F.3d 878 (9th Cir. 1997).

substantially interfere with the orderly educational activity of the school; and 5) ought not allow non-school persons to direct, conduct, control, or regularly attend activities of the group.⁵⁰

The EAA specifically prohibits schools from certain actions. First, schools may not influence the formal content of any prayer or other religious activity.⁵¹ Second, schools may not require any person to participate in prayer or other religious activity or expend funds beyond the incidental costs of providing the space for student initiated meetings. Additionally, schools are not permitted to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee. Employees do not have to sanction meetings that are otherwise unlawful.⁵²

Although the EAA only applies to schools receiving federal assistance, the Act expressly prohibits the government from denying or withholding federal financial assistance to any school.⁵³ The Courts have had the opportunity to review the provisions of the EAA through several challenges to access to school buildings. What follows is a summary of some of the more significant cases in this area.

In terms of cases involving student religious clubs, the U.S. Supreme Court found that a public high school violated the EAA by refusing to permit a Christian club to meet on school premises under the same terms and conditions as other student groups.⁵⁴ In another case, school officials did not violate the EAA when they required religious student groups to meet during

⁵⁰ 20 U.S.C. § 4071(c)(1-4).

⁵¹ 20 U.S.C. § 4071(d)(1).

⁵² 20 U.S.C. § 4071(d).

⁵³ 20 U.S.C. § 4071(e). In addition, the EAA does not limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty and to ensure that the attendance of students at meetings is voluntary. Courts in turn can use a full range of legal and equitable remedies in order to enforce the EAA, including declaratory or injunctive relief, attorney's fees, compensatory damages, and damages available under Section 1983 of the Civil Rights Act of 1964.

⁵⁴ Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

lunch since lunch period was not instructional time.⁵⁵ The district court found that the EAA was not violated when school officials prohibited a high school student from distributing religious literature on campus.⁵⁶ The EAA prohibited a school employee from sponsoring or participating in a religious club's meeting at school where the employee was a secretary at the school, held herself out as a school employee, and regularly attended and participated in the high school gospel choir.⁵⁷

There are several cases in which non-curricular, non-religious student groups have sought protection under the EAA, even though the group is not religious in nature. One recent case arose out of a gay student group's attempt to organize and meet within the White County School District in Georgia. There, White County High School Peers Rising in Diverse Education ("PRIDE") is a non-curricular student group commonly known as a gay-straight alliance ("GSA"). The individual plaintiffs were students at White County High School ("WCHS") who are members of PRIDE.⁵⁸ The federal district court granted the Plaintiffs' motion for injunctive relief, finding that the school district had denied the students equal access to school facilities.

In January 2005, one of the students met with the high school's new principal and requested recognition of a GSA. The principal told the student to submit her request in writing with an explanation of her reasons for wanting to start a GSA. The student did so, submitting a paper stating that she wished to start a GSA to create a "safe ground" for lesbian, gay, bisexual, or transgender students who experienced bullying at school. The principal, however, denied the request. On January 31, 2005, the school district's superintendent informed the plaintiffs via

⁵⁵ Ceniceros, 106 F.3d 878.

⁵⁶ Clarke v. Dallas Independent School District, 806 F. Supp. 116 (N.D. Tex. 1992).

⁵⁷ Sease v. School District of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1992).

⁵⁸ White Co. High School Peers Rising in Diverse Educ. v. White Co. Sch. Dist., 2006 U.S. Dist. LEXIS 47955 (N.D. Ga. 2006).

letter that they could proceed with the formation of a GSA but that they should provide the principal with certain information, including a list of proposed members and proposed by-laws, before the organization would be recognized by the school. Meanwhile, the school board organized a clubs and organizations committee, which recommended the elimination of all noncurriculum-related clubs and organizations. Plaintiffs claim that the decision to ban all noncurricular student groups was motivated by a desire to ban PRIDE and to suppress the content and viewpoint of its members' speech.

The issue before the district court was that if any student groups were noncurriculum related and met on school premises, then the EAA's requirements are triggered. The court found that there were several clubs, which were non-curriculum related, and were permitted to meet within the school district. The court reviewed the activities of the following clubs: "(1) Beta Club; (2) Dance Team; (3) Student Council; (4) Youth Advisory Council (YAC); (5) Prayer Group; (6) Shotgun Team/4-H Club; and (7) Prom Group. It found that all, but the Beta club, were non-curriculum related. Hence, the district court ruled: "Plaintiffs have demonstrated that defendants maintained a limited open forum under the EAA. Plaintiffs have also presented evidence that they have been denied equal access to meet based on the content of their speech at such meetings. Therefore, the court finds that defendants have violated plaintiffs' rights under the EAA."

First Amendment Issues

Related to the issue of organizations seeking access to public schools is the issue of free speech for volunteers or visitors of schools. In 2004, parents sued an Arizona school district for violations of their first and fourteenth amendment rights after they were asked to remove the

word "god" from an inscription stating "God bless Quin. We love you, Mom and Dad."⁵⁹ There, the public elementary school engaged in a fundraising campaign where parents were encouraged to purchase personalized tiles that would be permanently affixed to the interior of the school halls. However, school officials refused the requested message of the plaintiffs, but agreed to install a tile inscribed with the message "In God we trust, the Seidman family." The parents sued and the District Court found in part that the school opened the forum to inspirational or encouraging messages from parents to their children. Hence, the Court found that the school district violated the parents' right to free speech of the first amendment, reasoning that the school district's interest in avoiding an establishment clause violation was not compelling enough to justify exclusion of the parents' message because of their religious viewpoints.

A similar case arose in a Virginia high school where a student filed suit against a school district alleging that the district violated the free speech, establishment and free exercise clauses of the Constitution when they removed bricks from a walkway near the entrance of the school.⁶⁰ The bricks were inscribed with a Latin cross and were purchased by parents as part of a fundraising project to be displayed in the school's "walkway of fame." The principal of the school later informed individuals who purchased the bricks inscribed with a Latin cross that the bricks had been removed to avoid legal problems associated with allowing religious symbols on school property. The court held in part that the bricks were not school sponsored speech and did not have the appearance or effect that the school was endorsing Christianity. Therefore, the

⁵⁹ Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098 (D. Arz. 2004).

⁶⁰ Demmon v. Loudoun County Pub. Schs., 342 F. Supp. 2d 474 (ED Va. 2004).

court ordered the bricks inscribed with the Latin cross be immediately returned to the former places in the "walkway of fame."⁶¹

VIII. Suggested Practices

It is clear that school districts have a symbiotic relationship with volunteers and independent contractors who provide much-needed services for the schools. To ensure the smooth operation of volunteer programs in schools, as well as the proper relationship with independent contractors, school districts should consider the following recommended practices. First, school districts should review their policies to determine if they have a written policy regarding volunteers and independent contractors.⁶² The school districts' policies in these areas should contain the following provisions: the mechanisms for screening these individuals, guidelines for training and supervising them, and rules for how to handle legal issues that arise in the use of volunteer and independent contractors.

One issue that may arise in the development of a policy governing volunteers is whether to require fingerprinting of prospective volunteers or independent contractors. Here, a federal law known as the Fair Credit Reporting Act (FCRA) requires employers, such as school districts, to comply with the act if the employer utilizes an outside agency to perform background investigations on applicants. If an outside agency is utilized for this purpose, applicants must authorize the background check and the employer must advise the applicant of the results of the inquiry if any adverse action, such as a decision not to hire the applicant, is based on those results.

In most states, both public and private schools are required to include fingerprinting as a necessary prerequisite before an employee is permitted to work in an educational setting. For

⁶¹ See also Fleming v. Jefferson County Sch. Dist. R-1, 2002 U.S. App. LEXIS 12779 (10th Cir. 2002); Kiesinger v. Mex. Acad. and Cent. Sch., 2006 U.S. Dist. LEXIS 22426 (ND NY 2006).

⁶² Ingrid M. Johansen, "Legal Issues in School Volunteer Programs," Sch. L. Bulletin (Spring, 1998).

instance, in California all programs staffed with volunteers are subject to fingerprint clearance requirements. Further, many school districts require that volunteers or independent contractors who work with children be fingerprinted just as thoroughly as those who are employed within the school district. Failure to screen volunteers in this context may give rise to legal action against school districts for failing to screen volunteers as they do school district employees.⁶³

In addition to screening issues, school districts should be mindful of other activities that volunteers or independent contractors may engage in with students at schools. A individual's faith may have motivated him or her to participate in the school tutoring program as a volunteer or an independent contractor, but the Constitution does not allow this individual to infringe on the religious freedom and beliefs of the students being helped. The U.S. Department of Education has provided guidelines for school officials to follow when working with volunteers and mentors in public schools.⁶⁴

⁶³ Jamie Lake, "Screening School Grandparents: Ensuring Continued Safety and Success of School Volunteer Programs," *Elder L.J.* Vol. 8 423 (2000).

⁶⁴ "Guidelines for School Officials, Volunteers, and Mentors Participating in Public School Community Partnerships." <http://www.ed.gov/inits/religioninschools/v-guide.html>.