

Inside School Law

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Sensible strategies and preventive practices for NSBA National Affiliates

When Johnny Doesn't Tattle

What it means when students and others fail to report threats

By Julie E. Lewis, NSBA Staff Attorney

On a warm March day, 15-year-old Charles "Andy" Williams took a .22-caliber revolver to his Santee, Calif., high school and shot 15 people, killing two. The school community was shocked, but perhaps it should not have been surprised: According to news reports, Williams told other students and an adult that he planned to bring a gun to school and use it.

Williams is not unique. In all of the high-profile cases of school shootings so far, the shooters have told someone about their plans. What are the policy and legal implications in such situations? Should students be disciplined if they fail to tell a school official that a fellow student is planning to do harm at school? Should teachers and school districts be held liable if they know of a threat and disregard it?

Discipline and due process

Schools have broad discretion in dispensing punishment to maintain order and safety within the school. School officials have the right to adopt and enforce reasonable rules and regulations to control student conduct. But that right is not unlimited: Students enjoy certain constitutional, statutory, and regulatory protections from arbitrary and unreasonable discipline.

The laws and policies governing student discipline vary significantly from state to state and from school district to school district. States commonly require districts to

adopt codes of student conduct. Such codes generally detail the types of conduct that are either required or prohibited, the kinds of discipline that will be imposed for infractions, the procedures that must be followed before discipline can be imposed, and the students' rights to appeal.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the U.S. Supreme Court applied the concepts of procedural due process to disciplinary measures. As a result, a school must use fair procedures before taking away a student's liberty or property interest (such as suspension, expulsion, or corporal punishment).

Minimal requirements necessary to satisfy due process protections include oral or written notice of the charges, an opportunity to be heard, and a decision based on the evidence presented. Students who pose a danger may be removed from school immediately. Notice and a hearing should be conducted as soon as possible thereafter. In addition to the federal constitutional standard required by *Goss*, most states have statutes that address suspension from school.

As such, it is important to put students on notice that reporting threats is mandatory and that they are subject to discipline if they fail to report threats. (See the box on page 2 for a sample policy.) The reporting obligation should be extended to staff members as well. In certain states—including Mississippi, Tennessee, Colorado, and Arizona—state law requires school officials to report certain student offenses to a law enforcement agency.

Based on the principles of *Goss*, schools

would most likely be able to suspend a student for a few days or assign the student to in-school suspension for failure to report a threat or potential danger to others. Appropriate punishments that do not interfere with a student's constitutionally protected property right or liberty interest would most likely be upheld if challenged in a court of law—especially considering the seriousness of guns and drugs in schools.

Liability and negligence

The question then becomes whether school personnel or districts can be held liable in a court of law for failing to report a student's threat that is eventually carried out.

The most obvious avenue of redress for a victim of such violence is a claim of negligence. Negligence law varies from state to state, but in general, the plaintiff or victim must establish that the defendant had a legal duty to conform to a certain standard of conduct to protect others against unrea-

National School Boards Association

1680 Duke Street

Alexandria, VA 22314-3493

(703) 838-6722

Fax: (703) 683-7590

E-mail: info@nsba.org

<http://www.nsba.org>



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Deputy Executive Director
Harold P. Seamon

General Counsel
Julie Underwood

Staff Attorneys:
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Associate Executive Director, Constituent Services:
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Manager, National Affiliate Program
Bonita Metz

About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

sonable risks and that that duty was breached. However, because no common-law duty exists, it has been difficult for plaintiffs to establish that the school owes a legal duty to its students.

In addition, the plaintiff must show that the breach caused the injury and that actual damages resulted. The court will determine whether the harm could have been foreseen or anticipated. Have prior similar incidents occurred that should have prompted the school district to take better precautionary measures? In some states, a plaintiff could also need to assert that the defendant was liable for willful and wanton conduct. In this instance, the plaintiff must show that the defendant had actual or constructive knowledge of an impending danger and failed to exercise ordinary care to prevent the danger.

Another avenue of redress is a civil action for deprivation of federal constitutional and statutory rights, which involves Section 1983 of the Civil Rights Act of 1871. The purpose of § 1983 is to provide a remedy to parties who have been deprived of constitutional rights by a state official's abuse of position while acting under the color of state law.

The school's duty

Generally, school officials or others have no duty to control the conduct of a third person to prevent that person from causing physical harm to someone else. There are two exceptions to this general rule:

1. When a special relationship exists between the actor (for example, a school official) and the third person that imposes a duty on the actor to control the other person's conduct; and
2. When a special relationship exists between the actor and the other that gives the other a right to protection (Restatement Second of Torts § 315-320 (1965)).

An obvious example of the first kind of relationship is the duty of a parent to control the conduct of a child. Another example of such a relationship is one in which a duty is imposed on someone who takes charge of a third party the actor knows (or should know) is likely to cause bodily harm to others if not controlled (Restatement Second of Torts § 316, 319).

An example of the second kind of special relationship is a person who takes custody of someone else and is therefore required to use reasonable care to control the conduct of third persons so as to prevent them from harming the person in custody. Some courts have used

Sample policy

This sample policy on student and faculty rights and responsibilities should be used in conjunction with a rule prohibiting students from having firearms or other weapons on school property:

Students and faculty must cooperate and assist in carrying out the rules and policies of the school and must promptly report any violation of the rules, any threats or behavior that may imperil the safety of students or staff, and any misconduct affecting the ability of school officials to keep students and staff safe while attending school or school-sponsored events. Students must not withhold information, or fail to report all the facts, regarding threats or rule violations to school officials. Students who violate this policy will be disciplined, up to and including suspension.

this relationship to establish liability based on a school's custody of a student. In such cases, the court will consider whether there was a duty to protect the students/victims and if so, what common-sense steps should have been taken to protect those students.

Special relationships

In the town of Waterford, Conn., a student made a claim against fellow students, the school board, teachers, and administrators after several students with whom he played football assaulted and injured him. In the lawsuit, *Sylvia v. Rivera*, the student claimed that his injuries were caused by the carelessness and negligence of the school board and other school personnel, because they failed to address his complaints, failed to intervene when threats and violence occurred in their presence, and failed to take reasonable steps to supervise and control the students who threatened to injure him.

The court addressed the importance of formulating guidelines and implementing policies to receive and handle complaints in an effective manner. "[I]n an atmosphere of increasing school violence," the court said, "school superintendents, principals, and other supervisory personnel have a responsibility to formulate effective procedures to receive complaints where student-on-student threats and violence [are] known to be occurring and to establish guidelines which set forth how various school programs, including athletic

programs, should be conducted." (*Sylvia v. Rivera*, 2001 WL 359215).

The court determined that school officials do have an affirmative duty to protect students from other students based on the special relationship that is created between schools and their students due to mandatory school attendance. The court also determined that school personnel knew how the other team members were treating the plaintiff and actually encouraged them in the actions that led to the assault.

This type of behavior on the part of school officials and personnel prevents them from taking advantage of 11th Amendment immunity, which usually protects such individuals from being held liable. For the most part, the 11th Amendment to the U.S. Constitution immunizes state officials who are sued for damages, but there are exceptions. In order for the school district itself to be held liable for the failure of a school employee to report a student threat, it must be determined that the school board is not an agent of the state, or that one of the exceptions mentioned above has been met (the "special relationship exception" and the "state-created danger exception").

Most courts, however, have found that compulsory attendance does not create a special relationship, which would permit a federal action against school boards and officials who fail to protect students from other students. In *Dorothy J. v. Little Rock School*

District, 7 F.3d 729, the court determined that the mother of a mentally retarded boy who was raped by another student at school failed to make a successful claim against the school district. The mother asserted that the school district was liable because state-mandated school attendance resulted in a custodial relationship and imposed on the district a duty to protect her son, Brian B.

According to the Supreme Court decision issued in 1989 in *DeShaney v. Winnebago County Department of Social Services*, a state's failure to protect an individual against private violence does not constitute a constitutional violation unless the state takes a person into its custody and holds him there against his will. When the state does this, the Constitution imposes a duty to assume some responsibility for the person's safety and general well-being. Brian's mother argued that her claim fell within this exception because the student who attacked her son was in the care and custody of school authorities. The court disagreed and found that state-mandated attendance did not entail a custodial relationship giving rise to a constitutional duty to protect.

Deliberate indifference

On the other hand, in a case involving sexual molestation of a student by a teacher, a panel of the Fifth Circuit Court of Appeals found that the school district had an affirmative duty to protect the child, and that by reason

of compulsory education "the state cultivates a special relationship with [a child] and thus owes [the child] an affirmative duty of protection" (*Doe v. Taylor Independent School District*, 975 F.2d 137).

When the entire Fifth Circuit heard the case after being petitioned to do so, however, the court held that deliberate indifference—not the special-relationship exception—was the appropriate standard for supervisory liability (*Doe v. Taylor Independent School District*, 15 F.3d 443). In *Sylvia v. Rivera*, the case in which students on the football team injured another student, the court followed the reasoning of the Fifth Circuit and found that the deliberate indifference standard applied. The court applied both that standard and the state-created-danger exception in order to permit a claim against the defendants (the athletic director and the vice-principal).

The bottom line

In sum, schools should be able to create legally sound policies to encourage, and even require, students to report threats and potential danger. However, when imposing legal liability on the part of schools, most courts have been reluctant to conclude that a special relationship exists between the plaintiff/student and the school. Few courts have held otherwise, recognizing an affirmative duty on the part of public schools to protect students who are in the total care of the school during the period of their compulsory attendance.

Screening School Volunteers

The importance of an appropriate and consistent policy

By Karen Walking-Eagle, Legal Clerk, Office of General Counsel

Increased parent and community involvement in the classroom pays off in both educational and social benefits to students. Teachers and administrators also report direct benefits, including a reduced workload when a parent helps supervise a field trip, acquisition of new educational resources when a local business donates materials or equipment, or access to expanded opportunities and community resources, such as job placement or mentoring for students. As a result, there has been an increased demand for school volunteers in many communities and a corresponding rise in the number of

parents, senior citizens, college students, business people, and other concerned citizens who have decided to get involved in their local schools.

Despite the trend, however, many school boards have not developed or uniformly implemented screening procedures and selection policies for school volunteers. As a result, volunteer programs might not be as efficient or effective as they could be, students and staff are not as well protected as they should be, and school boards remain vulnerable to potentially expensive lawsuits.

For many of us, "screening" conjures up images of detailed, time-consuming, and costly criminal background checks, medical exami-

nations, and psychological tests. Although such steps might sometimes be advisable or even required by statute in some states or jurisdictions, they are often not necessary.

Screening also includes straightforward and inexpensive policies and procedures, such as requiring all potential volunteers to: (1) submit a written application, (2) provide the names of two or three references, (3) complete an in-person interview, and (4) produce evidence that they have passed a tuberculosis test. Unfortunately, even these minimum steps are often not required.

Moreover, the screening process should not end once the volunteer begins working. Even if a district used such stringent screening requirements as home visits, psychological testing, driving-record checks, and fingerprinting by the FBI, there is no guarantee that an undesirable individual who is intent on volunteering would be deterred.

To be safe, a school district should con-

continue to monitor and communicate with volunteers and supervise their performance. One way to do this is to require volunteers to participate in workshops and other training events relevant to their position. Another way is to conduct periodic performance evaluations, during which volunteers and personnel give each other mutual feedback.

Who should screen and why?

School boards should take responsibility for developing screening procedures and policies, and they should place specific staff members from the central office in charge of recruiting, screening, and training volunteers and conducting performance reviews. This will help ensure that the policy is uniformly and consistently implemented throughout the district. Screening also helps to ensure that good, capable volunteers are appropriately placed, and in the event of a lawsuit, formal, written policy guidelines can serve as an important defense.

In determining school board liability in cases where volunteers have caused harm because of their negligent or criminal acts, the courts will typically analyze the facts under either the doctrine of *respondeat superior* (which loosely translates as "the boss is responsible for what the employees do") or the negligent-hiring doctrine. Under

the former doctrine, liability may be imposed on the school board if the volunteer engages in harmful conduct while acting within the course and scope of his or her work. Although this doctrine is usually applied in an employer-employee relationship, some courts have applied it when a volunteer is determined to have been acting under the direct instruction and close supervision of agency or organization.

Under the negligent-hiring doctrine, courts will impose liability if they determine the organization negligently placed an unfit volunteer in a position that put others at an unreasonable risk of harm. Liability under this doctrine will be found if the organization failed to take reasonable steps that could have detected reasonably accessible information that would have warned them of the potential harm associated with hiring a particular individual.

Reducing costs

Screening beyond the basic application, interview, and reference check can be expensive. For example criminal history checks cost approximately \$10, FBI checks approximately \$25, and drug tests approximately \$20. There are also charges for gaining access to sex-offender registries, driving records, and credit-bureau reports, as well

as for conducting personality and psychological testing. School districts cannot pass these costs on to the individual volunteers without reducing the already small pool of potential participants, so other cost-cutting measures must be considered.

Although many volunteers work directly with students as tutors, mentors, or coaches, some interact indirectly as they help in the library, monitor hallways and cafeterias, or provide clerical and administrative support to staff. In other words, not all volunteers have the same degree of unsupervised access to students, sensitive or confidential information, or valuable equipment. Therefore, it is neither reasonable, prudent, nor cost effective to subject all volunteers to the same screening process.

As a first step, district staff should develop detailed job descriptions outlining the duties and responsibilities of each category of volunteers. Each position should be analyzed to determine the appropriate level of screening necessary to be considered "reasonable," given the nature of the volunteer's tasks, the individuals he or she will work with, and the extent to which he or she will work independently or be supervised by regular school or district employees.

For example, a parent who provides in-class tutoring to small groups of students while the regular classroom teacher is present will likely require less rigorous screening than an employee from a local company who agrees to mentor a student one-on-one after school. In an unsupervised setting, the potential for harm is far greater than if the volunteer works in the presence of a school employee, and this difference should be reflected in the rigor of the screening process each type of volunteer is subjected to.

Crafting a policy

Every school board should develop some kind of volunteer screening policy to help protect students, staff, and property. These policies should be consistent with state and local laws, which might have very specific requirements for particular kinds of volunteers.

Policy development should not be delayed out of concern for the cost of screening volunteers. Costs can be reduced by screening more strategically and by adopting policies that require training and supervision for volunteers and that clearly and consistently restrict where, when, and with whom school volunteers may work. Besides, the costs are small, compared to the potential costs of litigating a negligence suit.

Case in point

The case of *K.I. et al. v. New York City Board of Education*, 683 N.Y.S. 2d 228, illustrates how the doctrines of *respondeat superior* and negligent hiring are applied.

A volunteer teacher sexually abused a student he met during the course of volunteering at a school. The abuse did not take place while the teacher was performing his volunteer work, or on school premises; rather, it occurred in the volunteer's apartment after his stint at the school had ended. The New York court did not find the school district liable under *respondeat superior* because the connection between the molester's volunteer activities at the school "and his assault against the plaintiff was severed by time, distance, and [the molester's] intervening independent actions."

Similarly, no liability was found under the negligent-hiring doctrine because the molester had been interviewed by school personnel, who had also requested and

reviewed his references. The court concluded that this somewhat minimal screening effort was sufficient because, given the circumstances, even a more detailed background check would not have revealed any potential danger to students. The court stated that "the principal had no duty to investigate further in the absence of facts which would lead a reasonably prudent person to suspect the prospective volunteer of dangerous propensities."

This case and others suggest that all screening policies should include at least an application, interview, and reference checks. While close supervision and training of volunteers will help to protect school boards from lawsuits based on *respondeat superior*, a formalized and appropriate screening policy can be an effective defense against negligent-hiring charges—especially if the policy also outlines the additional checks that might be conducted if the initial screening uncovers information that arouses suspicion or concern.

