

**SCREENING SCHOOL GRANDPARENTS:  
ENSURING CONTINUED SAFETY AND  
SUCCESS OF SCHOOL VOLUNTEER  
PROGRAMS**

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*Schools across the nation have recognized the benefits of senior citizen volunteerism. In the following note, Jamie Lake explores the advantages to senior volunteering, the various roles a senior may play in the school setting, and the myriad of programs a school may institute to avoid legal liability. Liability with respect to school volunteer programs may arise when a volunteer is harmed while performing his or her duties, or if a third party is harmed at the hands of a volunteer. Accordingly, Ms. Lake asserts that school boards may face liability under the legal principals of direct liability, vicarious liability, and negligent hiring. After fully analyzing the implications of school liability under each legal theory and additional public policy rationales, Ms. Lake further contends that schools have a responsibility to screen, train, and supervise senior volunteers to ensure the safety of the school population and the quality of participants. Commonly held myths regarding the cost, difficulty, and deterrent effect of screening senior volunteers are refuted, and the significance of establishing and following screening procedures is emphasized. Ms. Lake concludes by stressing the necessity of safe school environments and further advocates learning through intergenerational contact.*

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## I. Introduction

Across the United States, it is common to find community members volunteering in public elementary schools. In North Carolina, a woman assists a school librarian with shelving books after students visit.<sup>1</sup> In one community in Illinois, students seeking help with homework can attend tutoring sessions with teachers.<sup>2</sup> Throughout the country, the 455,000 participants in a national community service program dedicate countless hours to serving children and communities in schools and youth service organizations.<sup>3</sup> In each of these cases, all of the volunteers are retired senior citizens.

During the past generation, the image of a "school volunteer" has changed.<sup>4</sup> No longer does the term connote a mother as volunteer, but now includes a wide range of community members.<sup>5</sup> As the number of mothers working outside the home has increased and their rates of school volunteerism have decreased, the volunteering senior citizen population has grown.<sup>6</sup> "More and more schools are discovering that there is a wealth of experience and expertise available in their communities' senior populations."<sup>7</sup>

These schools host senior volunteers for a variety of reasons. In some school districts, volunteers fill the gap created between declining budgets and increased student and faculty needs.<sup>8</sup> Other schools hope to bridge the divide that has formed between senior populations and their local school districts.<sup>9</sup> Still others want to foster understand-

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1. See Telephone Interview with Pamela Bailey, Coordinator of Volunteer Programs for Chapel Hill-Carrboro City Schools (Nov. 3, 1999).

2. See Illinois Intergenerational Initiative, *Program Examples* (visited Nov. 4, 1999) <[http://www.siu.edu/offices/iii/isl\\_model.html](http://www.siu.edu/offices/iii/isl_model.html)>. "The Homework Helpers program was organized as a community project under the auspices of the Aurora Area Retired Teachers Association and the Aurora Branch of the American Association of University Women. It was designed to assist middle-school children with their homework assignments." *Id.*

3. See CORPORATION FOR NAT'L SERV., NATIONAL SENIOR SERVICE CORPS (Oct. 1997).

4. See Lois Lipson, *Senior Citizens as School Volunteers: New Resources for the Future*, microformed on ERIC Digest, ED 360774 94 (ERIC Clearinghouse on Teaching & Teacher Educ., Washington, D.C.).

5. See *id.*

6. See *id.*

7. Ronald Armengol, *Getting Older and Getting Better*, 73 PHI DELTA KAPPAN 467, 467 (1992).

8. See *id.*

9. See John Smith, *It Takes 100 Grandparents*, EDUC. LEADERSHIP, May 1998, at 52, 53. As an example, in 1995, the Florida legislature authorized school districts to

ing among students and volunteers through intergenerational contact that children no longer receive at home due to the decline in multi-generational households.<sup>10</sup>

Although the seniors, students, and schools all benefit from participation in volunteer programs, the risks associated with bringing volunteers into public schools can be enormous. The legal questions surrounding volunteerism in the schools are complicated by differences in the volunteers' roles. Some of these volunteers perform duties similar to those provided by public school employees,<sup>11</sup> yet other volunteers have duties that resemble the responsibilities of volunteers in youth service organizations.<sup>12</sup> The complex and varied ways that schools use volunteers create difficulty in answering many of the liability questions associated with volunteer risk.<sup>13</sup>

Problems of characterizing the type of work done by volunteers are compounded by the range of ways that schools obtain and organize volunteers. On one end of the spectrum, schools host projects and programs for volunteers associated with national organizations, such as the Corporation for National Service or the American Association of Retired Persons (AARP).<sup>14</sup> Individual schools on the opposing end of the spectrum open their doors to practically any community member expressing an interest in volunteering in the school. A middle ground lies in community or school district wide programs and policies that advocate and plan for volunteer service.

Yet, despite the wide range of volunteer responsibilities and the types of programs, certain risk management procedures can be enacted to avoid potential problems that can lead to liability and the selection of unqualified volunteers. Policies including procedures for

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impose a half-cent sales tax to help fund construction projects. *See id.* Eight school districts proposed referendums to implement the tax. Of the eight referendums, seven failed. *See id.* "[O]lder voters with no ties to the public school system are among those who turn out to vote in school tax elections in Florida." *Id.*

10. *See* Lipson, *supra* note 4.

11. *See* Ingrid M. Johansen, *Legal Issues in School Volunteer Programs* (pt. 2), SCH. L. BULLETIN, Summer 1997, at 12.

12. *See id.*

13. *See id.*

14. *See* Telephone Interview with Janis Fisher, Program Officer, Corporation for National Service (Oct. 26, 1999). The Corporation for National Service is responsible for the Retired Senior Volunteer Program (RSVP) and Foster Grandparents Program. AARP hosts a volunteer talent bank. Both organizations place senior citizen volunteers in schools and other community organizations.

screening, training, and supervising<sup>15</sup> volunteers are rare but essential to preventing potential harm to children in schools and selecting the best volunteers.<sup>16</sup> This note focuses upon one aspect of the risk management plan—the importance of screening senior citizen volunteers.<sup>17</sup>

Part II explores pertinent background information concerning senior citizen volunteerism such as national trends, the types of programs available, and the benefits to seniors, children, and the schools participating in this type of volunteerism. Part III includes a brief explanation of the types of liability and risks associated with schools employing senior citizen volunteers. In particular, the question of whether schools have a responsibility to screen volunteers will be examined. After establishing the social and legal background advocating the employment and screening of senior citizen volunteers, part IV analyzes the scope of screening and presents an explanation of general screening rationales and methods. Part V responds to the potential drawbacks and criticisms of screening, including cost, time, and discouragement of volunteers. Finally, Part VI recommends the implementation of district wide volunteer policies emphasizing a flexible process for screening volunteers. It also suggests how schools unable to comply can continue to host volunteers with reduced legal liability.

## II. Background

### A. National Trends in Senior Citizen Volunteerism

Volunteering is one of the greatest American traditions.<sup>18</sup> For over one hundred years volunteer service has been a part of U.S. cul-

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15. See Ingrid M. Johansen, *Legal Issues in School Volunteer Programs* (pt. 1), SCH. L. BULLETIN, Summer 1997, at 1.

16. See *id.*

17. The analysis contained in this note applies to public elementary schools. Other concerns and risks may arise or be irrelevant in private schools or public schools serving older students. Also, the term “volunteer” refers to “a person who provides service to a public school without expectation of compensation and with the understanding that the school is under no obligation to continue accepting those services or to compensate the volunteer for them.” *Id.* at 2.

18. See *Volunteer Nation: Will the Presidents' Summit for America's Future Recharge This Great Tradition?*, OUR CHILDREN, Aug./Sept. 1997, at 6. Volunteers are the “glue that hold this country together; imperfect as it may be, the stuff of which our American way of life is made.” Carol Todd, *Thoughts on the Presidents' Summit, in Presidents' Summit for America's Future*, J. VOLUNTEER ADMIN., Fall 1997, at 13. Volunteers founded the United States. See SUSAN J. ELLIS & KATHERINE H. NOYES, *BY THE PEOPLE: A HISTORY OF AMERICANS AS VOLUNTEERS* 17–46 (1990). Both Na-

ture.<sup>19</sup> This unique American spirit is still a strong force in American society even though the nature and value of volunteerism has changed in the latter half of the twentieth century.<sup>20</sup> Throughout this era, particularly the 1990s, various trends, events, and policies have helped create a resurgence of volunteerism. These efforts support a social trend enabling increasing numbers of senior citizens to volunteer in public elementary schools.

America is in the midst of a demographic revolution.<sup>21</sup> Between 1950 and 1992, the life expectancy for people in the United States increased from 68.2 years to 75.8 years.<sup>22</sup> In 1995, thirty-two million Americans were age sixty-five or older, which represents an increase of twenty million since 1950.<sup>23</sup> By 2030, people age sixty-five and older are expected to constitute approximately twenty percent of the U.S. population.<sup>24</sup> Today, more seniors are spending a greater proportion of their lives in postretirement.<sup>25</sup> After retiring, some seniors have one-third of their lives left to live.<sup>26</sup> When a population has a longer life span and communities have more older, retired adults, the social circumstances allow for expansion in programs employing senior citizen volunteers.<sup>27</sup>

“Volunteerism by older Americans is alive and well.”<sup>28</sup> The level of volunteer activity among people age sixty-five and older is higher

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tive Americans and European settlers had social and religious beliefs supporting community and cooperation. *See id.* at 13, 17–46.

19. *See generally* SALLY NEWMAN ET AL., INTERGENERATIONAL PROGRAMS: PAST, PRESENT, AND FUTURE 149 (1997) (citing ELLIS & NOYES, *supra* note 18).

20. *See Volunteer Nation: Will the President's Summit for America's Future Recharge This Great Tradition?*, *supra* note 18, at 7.

21. *See* MARC FREEDMAN, SENIORS IN NATIONAL AND COMMUNITY SERVICE: A REPORT PREPARED FOR THE COMMONWEALTH FUND'S AMERICANS OVER 55 AT WORK PROGRAM i (Apr. 1994).

22. *See* NEWMAN ET AL., *supra* note 19, at 22.

23. *See Background Papers*, White House Conference on Aging, May 2–5, 1995, available in WHCoA CD-ROM, Folio Bound Views, distributed by ProInfo. Currently, people 65 or older make up 12% of the U.S. population. *See id.* By 2030, this age group is expected to account for 20% of the population. *See id.*

24. *See* Armengol, *supra* note 7, at 24.

25. *See* Freedman, *supra* note 21, at i.

26. *See id.* Retirement frees substantial amounts of time that could be spent volunteering. *See id.*

27. “Longer life-span means more time for older adults to seek volunteer, employment, and educational opportunities.” NEWMAN ET AL., *supra* note 19, at 22.

28. *Background Papers*, *supra* note 23. According to two polls completed in the past 20 years, 20–30% of older Americans are actively involved in volunteerism. *See id.* An additional 10% are willing to volunteer, but do not yet participate. *See id.*

than any other age group.<sup>29</sup> Of the forty-eight percent<sup>30</sup> of people in this age group who do volunteer, their levels of activity are between forty and eighty-five percent higher than that of any other group.<sup>31</sup> Older volunteers are a significant community resource, giving more than 4.1 billion hours of community service in 1990.<sup>32</sup> The potential for increasing the numbers of senior volunteers in the future is great.<sup>33</sup> Some studies indicate that up to six million people age fifty-five and older are inclined to volunteer their time, but do not.<sup>34</sup> Older Americans volunteer in a wide range of groups, including religious, health, welfare, civic, recreational, and educational organizations.<sup>35</sup> Of the senior citizens who volunteer, twenty-two percent work in educational institutions.<sup>36</sup>

“Since the early 1960s, the introduction of volunteers in the schools has been accepted for kindergarten through the twelfth grade within the United States.”<sup>37</sup> In 1963, President John F. Kennedy established the National Service Corps not only as a way to motivate young

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29. *See id.* However, it is important to note that until recently “[a]s a group, persons age 65 and older especially those age 75 and older [were] less likely to volunteer than any other age group.” *Id.*; *see also infra* note 30.

30. In *Background Papers* for the White House Conference on Aging, both the figures of 45% and 48% are used. *See Background Papers, supra* note 23. Survey results vary because the term “volunteer” is defined differently in various surveys. *See id.* Also, the *Background Papers* contradict themselves. The brief statistics in *Who Volunteers?* charge that Senior Citizens are less likely to volunteer than other groups; however, in *Maximizing Options for a Quality Life: Assessment of Current Situation* seniors are found to volunteer in increasing numbers. *See id.* In the past senior citizens volunteered in small numbers, but this has since changed. *See id.*

31. *See id.* It is important to note that senior citizens in minority groups volunteer in significant numbers. Thirty-seven percent of black senior citizens and 39% of Hispanic senior citizens report volunteering. *See* Independent Sector, *America's Senior Volunteers: Civic Participation Is for Life* (visited Feb. 8, 2000) <[http://www.indepsec.org/programs/research/senior\\_volunteers\\_in\\_america.html](http://www.indepsec.org/programs/research/senior_volunteers_in_america.html)>.

32. *See Background Papers, supra* note 23. “Some estimates indicate that senior volunteering is worth about \$17 billion today, *excluding* the value of less formal ‘volunteering’ such as childcare (estimated to approach \$50 billion in value).” *Id.*

33. *See id.* In the *Final Report* from the White House Conference on Aging, Resolution 9 (Expanding and Enhancing Opportunities for Older Volunteers) and Resolution 29 (Enhancing Community Participation) include national and local agendas for increasing the number of senior volunteers. *See id.*

34. *See id.* Many people are not volunteering because they are not aware of the opportunities available to them. *See id.*

35. *See id.*

36. *See* Independent Sector, *supra* note 31. *But see Background Papers, supra* note 23 (mentioning a Department of Labor survey that found 4.3% of older adult volunteer activities take place in school or education institutions).

37. NEWMAN ET AL., *supra* note 19, at 96.

volunteers, but also to involve senior citizens in their communities.<sup>38</sup> Then, throughout the 1970s, senior citizens were targeted as potential volunteers.<sup>39</sup>

Seniors were retiring with many years of productivity ahead of them, yet society had only begun to utilize their potential. Volunteer work could channel older people's time and expertise into meaningful community roles. The desire to remain both physically and mentally active, and to be needed, motivated more retired people to volunteer.<sup>40</sup>

However, it was not until 1978 that senior citizens were formally included in volunteer efforts exclusively in schools.<sup>41</sup> As a project of Generations Together at the University of Pittsburgh, the Senior Citizen School Volunteer Program was founded.<sup>42</sup> By 1983, a survey by the National School Volunteer Program estimated that two million older adults were holding direct-service volunteer roles in the public school system and that seventy-nine percent of all public schools had some form of volunteer program.<sup>43</sup>

Congress attempted to respond to this growing trend through legislation. The Intergenerational Education Volunteer Network Act of 1985 would have supported the establishment of a tutorial network comprised of senior citizen volunteers.<sup>44</sup> The volunteers were to be trained and organized through the Retired Senior Volunteer Program (RSVP) and AARP to work in elementary schools and assist disadvan-

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38. President Kennedy spoke about the problem and the solution: Kennedy delivered his most important speech on aging, decrying the loneliness and isolation afflicting older Americans, "heightened by the wall of inertia" standing between a great many seniors and their surrounding communities. In response, Kennedy urged the establishment of a National Service Corps "to provide opportunities for service for those aged persons who can assume active roles in community volunteer efforts."

FREEDMAN, *supra* note 21, at 21 (citing SPECIAL COMM. ON AGING, A COMPILATION OF MATERIALS RELEVANT TO THE MESSAGE OF THE PRESIDENT OF THE UNITED STATES ON OUR NATION'S SENIOR CITIZENS 14 (June 1963)).

39. See ELLIS & NOYES, *supra* note 18, at 273.

40. *Id.*

41. See NEWMAN ET AL., *supra* note 19, at 96. Prior to 1978, the Nixon administration supported the first peacetime effort to stimulate volunteerism in America. Various federally funded volunteer programs were coordinated under ACTION. The Retired Senior Volunteer Program (RSVP) and the Foster Grandparent Program were included in this effort. See ELLIS & NOYES, *supra* note 18, at 267.

42. See NEWMAN ET AL., *supra* note 19, at 96.

43. See *id.* at 68 (citing *Annual Report for 1982, NATIONAL SCHOOL VOLUNTEER PROGRAM* (1983)); ELLIS & NOYES, *supra* note 18, at 294.

44. See NEWMAN ET AL., *supra* note 19, at 68.

tagged children.<sup>45</sup> The bill was referred to committee without further action.<sup>46</sup> In response, states sought private funding to establish networks where information about intergenerational programs, including school volunteer programs, could be exchanged.<sup>47</sup>

The Clinton administration began the 1990s with the Commission on National and Community Service to provide states and communities with support for expanding volunteer service programs.<sup>48</sup> From this Commission, many programs, including AmeriCorps,<sup>49</sup> were founded. The policy of encouraging volunteerism was furthered through the passage of the National Community Service Act, allocating seventy-three million dollars to promote volunteer participation by people of all ages.<sup>50</sup> The 1990s continued expansion of senior citizen and school volunteer programs through the development of the National Mentor Corps Act of 1993,<sup>51</sup> the approval of the Goals 2000: Educate America Act,<sup>52</sup> the foundation of the Corporation for National Service,<sup>53</sup> and the support of the 1995 White House Conference on Aging.<sup>54</sup>

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45. *See id.*

46. *See id.*

47. States such as California, Illinois, Kansas, Massachusetts, New Jersey, New York, Pennsylvania, and Wisconsin all established networks during the 1980s. *See id.* at 69-72.

48. *See id.* at 74. In his inaugural address, President Clinton called for "millions of others who are still young in spirit to give of themselves in service too." *This Is Our Time, Let us Embrace It*, WASHINGTON POST, Jan. 21, 1993, at A26.

49. AmeriCorps is a domestic Peace Corps. Every year 40,000 Americans participate in either full- or part-time community service work. Participants receive compensation in the form of awards to help pay for college or graduate school. *See CORPORATION FOR NAT'L SERV., 1999 GUIDE TO PROGRAMS AND GRANTS* (Aug. 1998).

50. *See NEWMAN ET AL., supra* note 19, at 75.

51. *See* 139 CONG. REC. S6317-02 (1993) (statement of Sen. Pryor). The National Mentor Corps Act would have created links between schools and senior citizen community service organizations. The goal was to make intergenerational mentoring a national priority. *See id.* The spirit of this bill was included in the provisions of Goals 2000: Educate America Act. *See NEWMAN ET AL., supra* note 19, at 76.

52. *See* 20 U.S.C. §§ 5801-6084 (1994). As a measure of education reform, one hope of this legislation was to create holistic support for students by involving parents and community members into the schools. *See id.* § 5886(f).

53. In 1993, the Corporation for National Service was established with the goal of involving citizens of all ages and backgrounds in community service. *See CORPORATION FOR NAT'L SERV., supra* note 49.

54. *See NEWMAN ET AL., supra* note 19, at 77. The 1995 White House Conference on Aging set an agenda for older adults for the next decade. One of the objectives outlined at the conference was to promote older people as mentors in pre-school, elementary school, and higher education. *See id.; see also Background Papers, supra* note 23.



Yet the most highly publicized event concerning volunteerism in the 1990s was the President's Summit for America's Future. In April 1997, civic, political, and corporate leaders joined together in Philadelphia to charge society with the responsibility of caring for the nation's children.<sup>55</sup> Two of the Summit's major goals were to provide all children with adult mentors and to encourage community service.<sup>56</sup> Amidst the media hoopla surrounding the event,<sup>57</sup> the Summit was seen as a "reawakening of [the] country" and a "call to action" for community service.<sup>58</sup> The exact implications of the Summit are still unknown; yet it is clear that the conference delegates and the general public sensed the effort to support volunteer activism as the United States neared the twenty-first century.<sup>59</sup>

### B. Programs That Bring Seniors into Schools

The variety and number of programs that bring senior citizen volunteers into public schools are endless.<sup>60</sup> When looking over the breadth of these programs, three categories emerge: schools and senior citizens are involved in nationally organized programs, district wide or community-oriented projects, and individual efforts.

Two of the largest and oldest national, intergenerational programs operating in the public schools are RSVP and the Foster Grandparents Program.<sup>61</sup> The National Senior Service Corps, as part of the Corporation for National Service, operates both programs.<sup>62</sup>

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55. See *Volunteer Nation: Will the President's Summit for America's Future Recharge This Great Tradition?*, *supra* note 18, at 7-8.

56. See *id.* at 9.

57. See Susan J. Ellis, *Personal Reactions to the President's Summit on The Future of America*, in *President's Summit for American's Future*, J. VOLUNTEER ADMIN., Fall 1997, at 6-8.

58. Trudy Seita, *Reflections of a Delegate to the President's Summit for America's Future*, in *President's Summit for America's Future*, J. OF VOLUNTEER ADMIN., Fall 1997, at 4.

59. See *id.*

60. This section does not include information about all the school volunteer programs in the United States, but only a small sample. Most of the explanations are based on generalities of programs. The goal of this section is to provide the reader with a glimpse of the many programs and types of volunteer activities involving senior citizens in public schools.

61. See Illinois Intergenerational Initiative, *supra* note 2. Neither RSVP nor the Foster Grandparents Program are designed exclusively for school volunteer projects, although they use schools as stations for service. See Fisher, *supra* note 14.

62. See CORPORATION FOR NAT'L SERV., *supra* note 3. Over 500,000 senior citizens are members of one of the three programs managed by the National Senior

RSVP organizes retirees to use their life knowledge and skills to help in the community.<sup>63</sup> Even though RSVP volunteers work in many community organizations and projects, “one of their greatest successes is the service for children and students.”<sup>64</sup> Foster Grandparents are volunteers who work with children having special needs (that is, for example, those who are blind, disabled, or emotionally troubled).<sup>65</sup> They receive special training to work one-on-one with students.<sup>66</sup> Both of these programs provide liability insurance for volunteers and have age and income requirements for participation. Each host (or station) of a project is encouraged to screen its volunteers beyond the screening provided by the national organization.<sup>67</sup>

Communities also establish volunteer programs for their schools. In these programs, a volunteer coordinator or youth service agency organizes and manages a program for an entire school district or community.<sup>68</sup> The nature of these programs varies and can include mentoring, tutoring, pen pals, literacy, pre- and after-school care, or adopt-a-grandparent projects.<sup>69</sup> Mentoring programs pair a volunteer with a student for a variety of activities, including academic tutoring, social experiences, and leadership development.<sup>70</sup> Tutoring programs offer individuals and groups of older adult volunteers an opportunity to assist students with their homework and studies.<sup>71</sup> Also, communities and organizations sponsor literacy building programs. For example, communities in Illinois sponsor Retirees Educating and Assisting

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Service Corps, RSVP, the Foster Grandparents Program, and Senior Companions. *See id.*

63. *See id.*

64. Illinois Intergenerational Initiative, *supra* note 2. “The RSVP programs have led the way in Illinois with creative programming that addresses some of the most serious problems of education.” *Id.*

65. *See id.*; CORPORATION FOR NAT’L SERV., *supra* note 49; CORPORATION FOR NAT’L SERV., *supra* note 3; Fisher, *supra* note 14.

66. *See* Fisher, *supra* note 14.

67. *See id.*

68. *See* NEWMAN ET AL., *supra* note 19, at 83.

69. *See* Illinois Intergenerational Initiative *supra* note 2; *see also* NEWMAN ET AL., *supra* note 19, at 82–83; NATIONAL SCH. SAFETY CTR., WORKING TOGETHER TO CREATE SAFE SCHOOLS 4 (1999).

70. *See* CORPORATION FOR NAT’L SERV., *supra* note 49; CORPORATION FOR NAT’L SERV., *supra* note 3; Fisher, *supra* note 14; Illinois Intergenerational Initiative, *supra* note 2.

71. *See* CORPORATION FOR NAT’L SERV., *supra* note 49; CORPORATION FOR NAT’L SERV., *supra* note 3; Fisher, *supra* note 14; Illinois Intergenerational Initiative, *supra* note 2.

in the Development of Students (READS) to promote reading development in kindergarten through third grade.<sup>72</sup>

Finally, individual schools can host senior citizen volunteers to handle any number of tasks in the school. "The kinds of services that senior volunteers can provide are nearly limitless."<sup>73</sup> Senior citizens can be classroom aides, teaching assistants for special school projects, decorators for events, performers of clerical tasks, readers to students, coaches of sports teams, and providers of additional academic support for struggling students.<sup>74</sup> Seniors can be exceptional guest speakers for classes by providing real life experience and stories. For example, a senior citizen's personal stories about growing up during the Depression can make a history lesson come to life.<sup>75</sup> In many schools, individual teachers or principles might seek an older adult volunteer to fill a specific role through advertisements or contacting a local senior center. However, these volunteers might also approach the school looking for a position. Without a district-sponsored volunteer policy, most of these individual placements are filled casually.<sup>76</sup>

As retirees become increasingly active in school programs,<sup>77</sup> their roles as volunteers will continue to expand.

Senior citizens have the time, the resources, the experience, and the energy to help in the schools. They are capable of assisting in classrooms and offices, taking care of the nitty-gritty routines that dissipate the time and energy of teachers, thereby allowing schools to maximize their potential through the improved management of time, personnel, and money. Teachers who have welcomed senior volunteers into their classrooms as aides have been pleasantly surprised to discover that their assistants often have a wealth of skills and experience that they are willing to share with the students.<sup>78</sup>

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72. See ILLINOIS DEP'T ON AGING, A GUIDEBOOK ON VOLUNTEER OPPORTUNITIES IN ILLINOIS 6 (1994).

73. Armengol, *supra* note 7.

74. See *id.*; see also Linda Sellars, *Helping One Another Across the Generations*, 79 PHI DELTA KAPPAN 703-05 (1998).

75. See STATE OF CONN. DEP'T OF EDUC. & DEP'T OF AGING, *ELDERS AS RESOURCES* 2 (1992).

76. For example, the Chapel Hill-Carrboro City Schools developed a model volunteer policy. The Coordinator of Volunteer Programs believes that this is the only such policy in North Carolina. Yet, other schools in North Carolina have volunteers. See Bailey, *supra* note 1.

77. See Armengol, *supra* note 7, at 467.

78. *Id.*

In volunteer roles, senior citizens are a growing resource with limitless potential<sup>79</sup> whether they participate in national, local, or individualized programs.

### C. Benefits of Senior Citizen Volunteerism

Today's American senior citizens represent the largest, best-educated, and most dynamic group of older adults in the history of the United States.<sup>80</sup> In fact, senior citizens have been described as the United States' "only increasing natural resource."<sup>81</sup> When seniors volunteer in schools, the benefits transfer across both generations of participants and onto the school system.<sup>82</sup> Both seniors and youth reap the benefits of intergenerational contact, and, in turn, society benefits.<sup>83</sup>

#### 1. BENEFITS TO SENIOR CITIZEN VOLUNTEERS IN SCHOOLS

As more social and demographic trends support senior citizen volunteerism, senior citizens "may have more to give and more reason to benefit from national service than any other age group."<sup>84</sup> Through volunteerism, seniors enhance their physical and psychological well-being, obtain personal growth, and avoid isolation.<sup>85</sup> Benefits such as these are present whether the volunteers work directly with students or hold more administrative roles.

Simply volunteering in the school environment provides seniors with opportunities to improve their health. Healthy aging stems from more than just good health care and nutrition; it also relies upon productive involvement in organized activity.<sup>86</sup> "[P]roductive engagement and strong social networks contribute to prolonged mental and

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79. See *id.* "[T]he graying of the American population guarantees their continuing availability as a volunteer force. The U.S. Census Bureau projects . . . a 40% increase in the number of individuals between the ages of 50 and 59 [in the 1990s] . . . . By 2030 those 65 years of age and older are expected to constitute about 20% of the population. Both now and well into the 21st century, there will be no lack of older people." *Id.*

80. See FREEDMAN, *supra* note 21, at 1.

81. *Id.*

82. See *Background Papers*, *supra* note 23.

83. See *id.* When seniors and children have greater understanding of each other, there is less of a tendency for either age group to be a victim of ageism.

84. FREEDMAN, *supra* note 21, at 3 (citing RICHARD DANZIG & PETER SZANTON, NATIONAL SERVICE: WHAT WOULD IT MEAN? 10 (1987)).

85. See *Background Papers*, *supra* note 23.

86. See HELEN K. KERSHNER & JOHN E. HANSAN, 365 WAYS . . . RETIREE'S RESOURCE GUIDE FOR PRODUCTIVE LIFESTYLES 1-8 (1996).

physical health. A 25-year National Institute of Mental Health study found, for example, that 'highly organized' activity is the single strongest predictor, other than not smoking, of longevity and vitality."<sup>87</sup>

One physical benefit of organized volunteering in the schools is increased memory performance.<sup>88</sup> A study of older adult school volunteers found that the "everyday memory performance" of seniors improved as a result of their volunteer work.<sup>89</sup> The volunteers included in the study interacted with students in the classroom on a regular basis.<sup>90</sup> By having to remember things like students' names, school day routines, spelling and grammar rules, historical facts, and math concepts, the senior volunteers had to exercise their memory skills.<sup>91</sup> "The school environment is particularly conducive to the enhancement of memory functioning in older adults, because the focus of classroom activities is learning."<sup>92</sup>

When senior citizens work with children in public schools, they also benefit from improved mental health. A study of the benefits of the Foster Grandparents program found that participants' mental health improved, but that the mental health of people on the waiting list declined.<sup>93</sup> This can be attributed to many factors, but an increase in self-esteem is likely to be the cause.<sup>94</sup> Seniors who volunteer with children and in the schools find that students and teachers view them as valuable.<sup>95</sup> This, in turn, fosters a senior volunteer's improved self-image.<sup>96</sup> "Interacting with an enthusiastic and vibrant group of young people can be just what the doctor ordered to make older members of

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87. FREEDMAN, *supra* note 21, at ii.

88. See NEWMAN ET AL., *supra* note 19, at 135.

89. Sally Newman et al., *Everyday Memory Function of Older Adults: The Impact of Intergenerational School Volunteer Programs*, 21 EDUC. GERONTOLOGY 569, 579 (1995).

90. See *id.* at 570.

91. See *id.*; see also RONALD KOTULAK, *INSIDE THE BRAIN: REVOLUTIONARY DISCOVERIES OF HOW THE MIND WORKS* 160-72 (1996). "Mental exercise, scientists are finding, causes physical changes in the brain, strengthening connections between brain cells called synapses and actually building new connections . . . Education and interesting work protect people against Alzheimer's disease, research shows. The more connections a person has between brain cells, the more resistant he or she is to the onslaught of this memory-robbing disorder." *Id.* at 162.

92. Newman et al., *supra* note 89, at 570.

93. See FREEDMAN, *supra* note 21, at 41.

94. See *id.*; see also STATE OF CONN. DEP'T OF EDUC. & DEP'T OF AGING, *supra* note 75, at 2.

95. See STATE OF CONN. DEP'T OF EDUC. & DEP'T OF AGING, *supra* note 75, at 2.

96. See *id.*

the community feel worthwhile and productive."<sup>97</sup> This increased mental health is likely to last beyond the period of volunteerism.<sup>98</sup>

Having meaningful roles in organized activity provides older adults with more social connectedness.<sup>99</sup> During adulthood, people find identity through paid work.<sup>100</sup> After retiring, seniors with meaningful roles in organizations, where their contributions are valued, have an easier time making the transition from the workforce to retirement.<sup>101</sup> Thus, senior citizen volunteers in schools, whether or not they work directly with students, can grow personally through gained knowledge, improved skills,<sup>102</sup> "increased self-esteem, renewed feelings of health and vigor, and new and satisfying social relationships."<sup>103</sup>

Therefore, programs that link seniors with children and communities have been successful in addressing social problems afflicting senior populations.<sup>104</sup> Such problems include inadequate support systems, detachment between seniors and their communities, and feelings of isolation.<sup>105</sup> Social relationships and social participation are primary to combating the problem of isolation.<sup>106</sup> Geographic separation from family, loss of friends and relatives through death, declining health, detachment from the community, and cultural barriers put many senior citizens at risk of isolation and its consequences.<sup>107</sup> Isolated seniors are less able to adapt and handle stressful life events than those who have strong relationships with other people and the community.<sup>108</sup> Socially isolated senior citizens have a higher risk of illness and untimely death than do those engaged in society.<sup>109</sup> At least seventy percent of adults over the age of sixty-five experience loneliness and miss the social contact they had prior to retirement.<sup>110</sup>

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97. Sellars, *supra* note 74, at 704.

98. See NEWMAN ET AL., *supra* note 19, at 134.

99. See *Background Papers*, *supra* note 23.

100. See *id.*

101. See *id.*

102. See NEWMAN ET AL., *supra* note 19, at 82-87.

103. FREEDMAN, *supra* note 21, at iv.

104. See NEWMAN ET AL., *supra* note 19, at 3.

105. See *id.*

106. See *Background Papers*, *supra* note 23.

107. See *id.*

108. See *id.*

109. See FREEDMAN, *supra* note 21, at 12-13.

110. See *id.* at 12.

To combat this loneliness, volunteering in schools acts as occupational therapy involving social contact.<sup>111</sup> As volunteers in schools, senior citizens form relationships with students, teachers, staff, other volunteers, and the community. Senior volunteers are less isolated and more satisfied with life,<sup>112</sup> have a stronger will to live, report less physical and mental health problems, and are not as lonely as their nonvolunteering counterparts.<sup>113</sup>

The schools provide senior citizens with excellent opportunities for healthy aging. Volunteering in schools, whether or not there is contact with children, provides psychological and physiological benefits, personal growth, and increased social relationships. This type of volunteerism allows older adults to acquire new skills and to have improved life satisfaction, increased feelings of usefulness, and the opportunity to share life experiences with children.<sup>114</sup>

## 2. BENEFITS TO STUDENTS WORKING WITH SENIOR CITIZEN VOLUNTEERS

When children and senior citizens interact in the schools, both groups benefit. In general, when students work with older adults, there is an increased understanding of aging and the contributions of senior citizens are more appreciated.<sup>115</sup> Intergenerational programs in schools address students' social, psychological, and cognitive needs.

There are four general benefits to students. First, students gain a realistic portrayal of senior citizens.<sup>116</sup> They realize that older people are just like themselves in that they are each unique and come from varied backgrounds.<sup>117</sup> The more comprehensive the contact between the generations, the more students' perceptions of the elderly change for the better.<sup>118</sup> Students involved in intergenerational programs are

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111. See *id.* at 13.

112. See SALLY NEWMAN & STEVEN W. BRUMMEL, INTERGENERATIONAL PROGRAMS: IMPERATIVES, STRATEGIES, IMPACTS, AND TRENDS 187 (1989).

113. See FREEDMAN, *supra* note 21, at 13.

114. See NEWMAN ET AL., *supra* note 19, at 84.

115. See STATE OF CONN. DEP'T OF EDUC. & DEP'T OF AGING, *supra* note 75.

116. See *id.* at 2. It is important to note that senior citizens also gain a realistic view of children through involvement in intergenerational programs.

117. See *id.*

118. See NEWMAN ET AL., *supra* note 19, at 129–31.

positively affected by the experience.<sup>119</sup> Thus, senior citizen volunteers in the schools can be seen as a method for fighting ageism.<sup>120</sup>

Second, students develop positive attitudes about their own aging and learn to make better lifelong decisions.<sup>121</sup> Direct experiences with senior citizens while in school are more effective in changing attitudes than just holding classroom discussions on aging.<sup>122</sup> Students are able to compare their own lives to those of the senior volunteers to determine how to make choices regarding diet, exercise, education, and personal relationships that will affect their future lives.<sup>123</sup>

Thirdly, students gain experience working with older people.<sup>124</sup> Although the number of senior citizens in the United States is increasing, students have less direct exposure to older people due to the decline of multigenerational households.<sup>125</sup> For a child to be successful in the future, the ability to communicate and successfully interact with older people will be increasingly valuable.<sup>126</sup>

Finally, senior volunteers help transmit knowledge and values to students.<sup>127</sup> "Older adults interacting in the classroom can help younger students with subjects they are studying and can use their unique backgrounds or expertise to encourage students to learn."<sup>128</sup> Teachers have reported that volunteers have positively influenced students' abilities in academics, such as reading, math, spelling, handwriting, communication skills, grammar, and creative writing.<sup>129</sup> In addition, volunteers also impact students' self-esteem and social growth.<sup>130</sup>

Although the above are benefits to children, they also act as benefits to the senior citizen volunteers. Both children and senior citizens have misperceptions about each other that can be broken down through intergenerational programs in the schools.<sup>131</sup> The interaction

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119. See Sally Newman et al., *Children's Views on Aging: Their Attitudes and Values*, 37 GERONTOLOGIST 412-17 (1997).

120. See NEWMAN ET AL., *supra* note 19, at 129-31.

121. See STATE OF CONN. DEP'T OF EDUC. & DEP'T OF AGING, *supra* note 75, at 2.

122. See *id.*

123. See *id.*

124. See *id.*

125. See Armengol, *supra* note 7, at 467-70.

126. See STATE OF CONN. DEP'T OF EDUC. & DEP'T OF AGING, *supra* note 75, at 2.

127. See *id.*

128. *Id.*

129. See NEWMAN ET AL., *supra* note 19, at 98, 135.

130. See *id.*

131. See Joan Montgomery Halford, *For Significant Support, Turn to Seniors*, EDUC. LEADERSHIP, May 1998, at 50.



between the different generations helps form valuable relationships between the old, the young, and the schools.

### 3. BENEFITS TO SCHOOLS HOSTING SENIOR CITIZEN VOLUNTEERS

Senior citizen volunteerism in the public elementary schools provides reciprocal benefits between the senior volunteers and the students.<sup>132</sup> In addition, the school itself derives two major benefits from the intergenerational exchange. First, seniors provide valuable work during periods of budget shortfalls and increased student and staff need.<sup>133</sup> Also, senior citizen volunteer programs increase the senior population's connection with the schools, thus bolstering support for the schools among a large voting bloc.<sup>134</sup>

School districts are frequently "caught between the rock of spiraling costs and declining revenues and the hard place of student/faculty needs."<sup>135</sup> School systems face funding constraints at the same time that teachers, counselors, support staff, and administrators feel overburdened by workloads.<sup>136</sup> Considering that personnel costs make up a large share of a school's budget, some tasks can be assigned to volunteers for negligible, if any, costs.<sup>137</sup> Senior volunteers can assist the school system by completing tasks that allow school personnel to focus on other aspects of their jobs and function more efficiently. Volunteers can provide, among other things, teaching assistance, mentoring, tutoring, counseling, and clerical work.<sup>138</sup> Hosting reliable and stable senior citizen volunteers<sup>139</sup> is a potential solution to personnel and budget problems.

Schools across the country also face a crisis when senior citizens feel no connection to the public school system. As a large voting bloc, senior citizens with no direct ties to public schools represent a substantial portion of the voters in some communities.<sup>140</sup> Therefore,

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132. See *Background Papers*, *supra* note 23.

133. See Armengol, *supra* note 7, at 467.

134. See, e.g., Sellars, *supra* note 74, at 703.

135. Armengol, *supra* note 7, at 467.

136. See FREEDMAN, *supra* note 21, at 9.

137. See Armengol, *supra* note 7, at 467.

138. See FREEDMAN, *supra* note 21, at 9; see also *supra* text accompanying notes 77-79.

139. See FREEDMAN, *supra* note 21, at 39. In general, senior citizens have a developed work ethic from years of employment. They are viewed as disciplined because they show up on time and understand the expectations of a workplace. See *id.*

140. See Smith, *supra* note 9, at 52.

many schools in aging communities struggle to have tax initiatives, which would raise money for the school system, approved by the voters.<sup>141</sup> In communities with older and retired populations, many senior citizens have limited community involvement.<sup>142</sup> “Without school-age children of their own, some members of this large, growing, and politically influential constituency see little reason to support local and state tax increases to provide public education’s programs and services.”<sup>143</sup> This can lead to detachment and misunderstandings about the public schools.<sup>144</sup>

Volunteering in the schools, however, can change senior citizens’ misperceptions about the school system. In fact, according to one survey, seventy-three percent of senior citizen school volunteers reported positive changes in their attitudes towards the public school system.<sup>145</sup> Programs that involve senior citizen volunteers in the public schools can impact the voting trends in communities. Once senior citizens reconnect with the public schools, they can become valuable allies.<sup>146</sup>

Communities in Florida have seen how intergenerational programs in the schools can build constituencies of support for children and schools.<sup>147</sup> In the early 1980s, Miami began to build a large corps of senior citizen school volunteers.<sup>148</sup> When it came time to campaign for a school bond in 1988, these volunteers became strong advocates for the bond.<sup>149</sup> Seventy-two percent of the senior population voted for the bond, enabling the bill to pass.<sup>150</sup> However, in 1995, seven of eight school referendums, which would impose a half-cent sales tax to raise money for the schools, failed in other Florida communities.<sup>151</sup> Marion County responded by creating a volunteer reading program and other community initiatives aimed at senior citizens in order to build a community coalition to support future referenda.<sup>152</sup>

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141. *See id.*; *see also* John E. Lensch, *A High-Tech Magnet for Seniors*, EDUC. LEADERSHIP, Feb. 1997, at 64.

142. *See* Smith, *supra* note 9, at 52.

143. Lensch, *supra* note 141, at 64.

144. *See* Smith, *supra* note 9, at 52.

145. *See* NEWMAN ET AL., *supra* note 19, at 99.

146. *See* Lensch, *supra* note 141, at 64.

147. *See generally* Smith, *supra* note 9.

148. *See* FREEDMAN, *supra* note 21, at 15.

149. *See id.*

150. *See id.*

151. *See* Smith, *supra* note 9, at 52.

152. *See id.*

When a school opens its doors to senior citizen volunteers, it solves two related problems. Volunteers provide support for busy staff and needy students in times of budget shortfalls. This type of interaction in the schools helps create a link between senior citizens and the school system that leads to public support at the ballot box. "Older adults have significant voter impact at school levy time, yet few seniors are connected with their local schools."<sup>153</sup> By connecting senior citizens with the public school system, schools respond to a decrease in funding while ensuring support for future revenue generating measures.

### III. Liability and Risk: Do Schools Have a Responsibility to Screen Volunteers?

#### A. Liability and Risk

The role of senior citizen volunteers in the public schools provides proven benefits and rewards to the schools, students, and volunteers.<sup>154</sup> Yet, schools and teachers, worried about potential liability and other concerns, may be hesitant to invite senior volunteers into the classroom.<sup>155</sup> School boards have the responsibility to protect against foreseeable danger and provide a safe environment for those people in the school.<sup>156</sup> Any stranger present in the school increases the likelihood of liability for the school board. This liability extends to harm that a volunteer suffers while in school and also to the harm caused by a volunteer to others in the school.<sup>157</sup>

With regard to volunteers, school boards face liability under three legal principles: direct liability, vicarious liability, and negligent hiring.<sup>158</sup> Different legal principles apply, depending on whether the volunteer is suing the school board for injuries or whether the school board is being sued as a result of harm caused to a third party by the volunteer.

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153. Halford, *supra* note 131, at 49.

154. See *supra* notes 80–153 and accompanying text.

155. See CYNTHIA KRAMER & SALLY NEWMAN, SENIOR CITIZEN SCHOOL VOLUNTEER PROGRAM: A MANUAL FOR PROGRAM IMPLEMENTATION 6–8 (1986).

156. See Johansen, *supra* note 15, at 2.

157. See generally *id.*

158. See generally *id.* See also Mark C. Lear, Note, *Just Perfect for Pedophiles? Charitable Organizations That Work with Children and Their Duty to Screen Volunteers*, 76 TEX. L. REV. 143, 147 (1997).

A school board may not be subject to liability, however, when sovereign immunity insulates the school board from lawsuits.<sup>159</sup> Sovereign immunity protects a public school (or other governmental body) from lawsuits resulting from its own negligence, or the negligence of an employee, when the negligence occurs while performing a governmental function.<sup>160</sup> Public schools lose this protection in particular suits when they expressly waive it.<sup>161</sup> One type of waiver occurs through the purchase of liability insurance that offers protection against the type of harm alleged in the suit.<sup>162</sup> Some states, such as Florida and New Mexico, waive sovereign immunity when school boards breach their duty to protect through negligent hiring or other statutory tort violations.<sup>163</sup> Given that the majority of public schools have some type of liability insurance or waiver, the remaining discussion on legal liability assumes that no sovereign immunity exists.

#### 1. DIRECT LIABILITY<sup>164</sup>

Where immunity does not shield the schools from lawsuits, tort liability can result from an act or omission of the institution itself.<sup>165</sup> For example, school boards have a duty to keep the school premises reasonably safe.<sup>166</sup> Therefore, when a school maintains a dangerous condition on school premises and a volunteer is injured, liability may result.<sup>167</sup> This liability stems from a breach of the duty of care owed to the injured volunteer, or owed to any other person on the school grounds.<sup>168</sup> The volunteer needs to demonstrate the presence of a

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159. Sovereign immunity is "a judicial doctrine which precludes bringing a suit against the government without its consent." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

160. See Johansen, *supra* note 11, at 1.

161. See MISSING & EXPLOITED CHILDREN & COMPREHENSIVE ACTION PLAN & NATIONAL SCH. SAFETY CTR., HIRING THE RIGHT PEOPLE: GUIDELINES FOR THE SELECTION AND SCREENING OF YOUTH-SERVING PROFESSIONALS AND VOLUNTEERS 34 (1994) [hereinafter HIRING THE RIGHT PEOPLE].

162. See Johansen, *supra* note 15, at 1.

163. See HIRING THE RIGHT PEOPLE, *supra* note 161, at 34.

164. This section will discuss "direct liability" as a separate type of liability that does not include vicarious liability or negligent hiring. Also, it will explain how an educational institution can be liable for its own torts. See 5 JAMES A. RAPP, EDUCATION LAW § 12.02[3] (2000). But see 27 AM. JUR. 2D *Employment Relationship* § 472 (1996) (organizing liability discussion under the heading of direct liability which includes negligent hiring).

165. See 5 RAPP, *supra* note 164, § 12.02[3][a].

166. See Johansen, *supra* note 11, at 2.

167. See *id.*

168. See *id.*

dangerous condition on the premises, that the school board knew or should have known of it, and that the volunteer did not and was not expected to know of the condition.<sup>169</sup>

School boards may face a greater risk of liability with senior citizen volunteers than other people on school premises.<sup>170</sup> Their injuries and propensity toward injuries may be more severe and occur more frequently than that of younger volunteers.<sup>171</sup> Yet, the failure to offer senior citizens volunteer positions because of potential accidents or health problems can result in other legal problems associated with discriminatory hiring.<sup>172</sup> Thus, to avoid employing senior citizens as volunteers is not a viable solution. If a school board takes reasonable steps to insure that the school premises are safe for all occupants, direct liability does not necessarily pose a greater risk for volunteers than that of teachers, staff, or students.

## 2. VICARIOUS LIABILITY

When tortious conduct occurs that is not a result of conduct by the institution itself but results from the conduct of an employee-agent,<sup>173</sup> the school may be held vicariously liable under the doctrine of respondeat superior.<sup>174</sup> Vicarious liability, “the imposition of liability on one person for the actionable conduct of another,”<sup>175</sup> is the pri-

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169. *See id.* at 2–3.

170. Senior citizens are at greater risk of injury than younger people. *See* Michael G. Tibbits, *Patients Who Fall: How to Predict and Prevent Injuries*, 51 GERIATRICS 24 (1996). Senior citizens endure many factors that make them more prone to injury, such as disabilities, illness, age-related changes, medications, and loss of balance. *See id.*

171. *See id.* Approximately 30% of people aged 65 and older fall each year. *See id.* Senior citizens who fall face a 10 times greater risk of hospitalization and 8 times greater risk of dying than children who fall. *See id.* Out of the senior citizens that fall each year, approximately 5% suffer a bone fracture and 1% suffer a hip fracture. *See id.* Senior citizens also suffer from extended periods of pain after an injury; their pain regularly lasts up to 2 months after falling. *See* Southwestern Med. Ctr., *Falling Down* (visited Mar. 30, 2000) <<http://www.swmed.edu/library/consumer/falldown.htm>>.

172. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1998); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1995). *See also* 29 C.F.R. §1630.13 (1999). “[I]t is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such a disability.” *Id.*

173. *See* 5 RAPP, *supra* note 165, § 12.02[3][b].

174. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984).

175. BLACK’S LAW DICTIONARY 1566 (6th ed. 1990).

mary theory under which employers are found liable for their employees' torts.<sup>176</sup>

Vicarious liability originates from the master-servant relationship.<sup>177</sup> Once this relationship is established, the master becomes vicariously liable for torts committed by the servant within the scope of his or her employment.<sup>178</sup> For a school board to be vicariously liable for the misconduct of a volunteer, the volunteer must be considered a servant and have acted within the scope of his or her engagement in the school.

According to agency law, a servant is "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."<sup>179</sup> Servants are contrasted with independent contractors, for whom employers are not held vicariously liable, because of the lack of control associated with a contractor relationship.<sup>180</sup> An independent contractor is someone who, in rendering services, retains control over the methods and manner used to accomplish the tasks.<sup>181</sup>

For example, when a school board hires a full-time teacher, the board subsequently becomes vicariously liable for the acts of the teacher through the establishment of the master-servant relationship.<sup>182</sup> The role of the volunteer as servant is less certain. Conventionally, contract and compensation are thought to mark the creation of the master-servant relationship.<sup>183</sup> In most circumstances, however,

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176. See RICHARD N. COVINGTON & KURT H. DECKER, *INDIVIDUAL EMPLOYEE RIGHTS IN A NUTSHELL* 343 (1995).

177. See KEETON ET AL., *supra* note 174, § 70, at 501.

178. See *id.* at 501-02.

179. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

180. See KEETON ET AL., *supra* note 174, §§ 71, 509.

181. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. e (1958).

182. See generally 5 RAPP, *supra* note 164.

183. See generally Ingrid M. Johansen, *Legal Issues in School Volunteer Programs* (pt. 3), SCH. L. BULLETIN, WINTER 1998. In understanding vicarious liability and establishment of the master-servant relationship, concern arises over whether or not the master had control over the servant. Contract and compensation are explicit ways to determine whether control existed. However, other acceptable methods of demonstrating control exist. For example, a volunteer consenting to abide by district policies or agreement by the volunteer to accept assigned duties can result in sufficient control by the master upon the servant. See generally *id.*

senior citizen volunteers work in schools without compensation and with either an informal contract or none at all.<sup>184</sup>

The lack of contract and compensation associated with volunteers does not necessarily qualify senior citizen volunteers as independent contractors. Principles of agency law clearly establish that “non-contractual employment” can result in a master-servant relationship.<sup>185</sup> In fact, the relationship can even be premised “upon the most informal basis”<sup>186</sup> as long as a court can determine that a particular relationship meets the definition of servant.<sup>187</sup> Additionally, persons serving gratuitously may be servants<sup>188</sup> because payment is not necessary to create the master-servant relationship as long as consent to the relationship exists.<sup>189</sup>

Within the definition of servant is an explicit requirement of the master’s control over, or right to control, the servant’s actions.<sup>190</sup> Specifically, school boards may exercise control over a volunteer through supervision and the establishment of volunteer policies. However, not all educational institutions appear to exercise any type of control over volunteers through traditionally recognized means.<sup>191</sup> Even if direct control does not exist, the *right* to control the volunteer establishes the school board as the master.<sup>192</sup> Failing to exercise this right over the volunteer does not allow the school board to avoid liability.<sup>193</sup> Regardless of the direct level of supervision of the volunteer, a school board has the general authority to regulate its schools.<sup>194</sup> Thus, if a volunteer qualifies under the definition of servant, the school board has the right to exercise control over the volunteer.<sup>195</sup> This is true even if the right to control the servant is attenuated<sup>196</sup> due to the lack of a

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184. See *supra* note 17 for a definition of “volunteer.” The nature of a volunteer employment connotes a position without pay where service is at the will of the employer. See also 2 JAMES A. RAPP, EDUCATION LAW § 6.01[4][f] (2000).

185. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. b (1958).

186. *Id.*

187. See *id.* § 220(1) (defining “servant”), § 220(2) (listing possible factors to be considered in determining whether someone meets the statutory definition).

188. See *id.* § 225.

189. See *id.* at cmts. a, b.

190. See RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).

191. See Johansen, *supra* note 183, at 2.

192. See RESTATEMENT (SECOND) OF AGENCY § 220(1) and cmt. d (1958).

193. See Johansen, *supra* note 183, at 4.

194. See *id.*

195. See *id.* at 5.

196. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. d (1958).

formal contractual agreement, supervision, and time spent volunteering.

Senior citizen volunteers can be considered servants to the master school board; however, the school board will not be held liable unless the harm caused by the volunteer occurred within the scope of his or her employment.<sup>197</sup> Although it is a vague concept without a precise definition,<sup>198</sup> “scope of employment” generally refers to “acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods . . . of carrying out the objectives of the employment.”<sup>199</sup> Alternatively, conduct is:

[W]ithin the scope of employment if, but only if: (a) it is of the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.<sup>200</sup>

It is important to note that conduct can be within the scope of employment even if the master did not expressly authorize it or if it violates given instructions.<sup>201</sup>

Determining the scope of employment in a volunteer relationship may be difficult.<sup>202</sup> Just because the misconduct occurred while a volunteer was on-duty does not mean that the conduct falls within the scope of the volunteer’s duty.<sup>203</sup> For conduct to be within the scope of employment, the school board must explicitly authorize it beforehand or after the fact.<sup>204</sup> Given the typical lack of control exercised over volunteer programs, however, much of a volunteer’s conduct will be implicitly authorized.<sup>205</sup> Without formal job descriptions, a senior citizen’s volunteer employment is in flux regarding the type of employment, time of performance, and the customary methods used.<sup>206</sup> Once a court has determined that a volunteer is a servant, the court is faced

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197. *See id.* § 219(2).

198. *See* 5 RAPP, *supra* note 164, § 12.02[3][b][ii].

199. KEETON ET AL., *supra* note 174, § 69 at 502.

200. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

201. *See* 5 RAPP, *supra* note 164, § 12.02[3][b][ii].

202. *See* Johansen, *supra* note 183, at 8.

203. *See id.*

204. *See id.*

205. *See id.* “Implicit authorization exists when the conduct that caused harm was (1) within the range of duties the servant was engaged to perform and (2) in furtherance of the master’s business.” *Id.*

206. *See id.*



with the strenuous task of applying the volunteer's employment to the standards for determining scope of employment on a case-by-case basis.

"The liability of educational institutions for volunteers has arisen with some frequency."<sup>207</sup> School volunteers are commonly regarded as employees of the school board or educational institution for determining the applicability of vicarious liability.<sup>208</sup> In these instances, school volunteers are not only servants of the educational institution, but also are considered to have been acting within the scope of their employment when the misconduct occurred.

### 3. NEGLIGENT HIRING<sup>209</sup>

Negligent hiring is wholly separate from vicarious liability.<sup>210</sup> Whereas vicarious liability is based upon the wrongful conduct of an employee, negligent hiring is premised on the misconduct of the employer.<sup>211</sup> In fact, negligent hiring often provides a remedy to third parties who could not recover under vicarious liability because the negligent act did not fall under the scope of employment.<sup>212</sup> Generally, negligent hiring is a tort based upon employment law as opposed to an agency relationship.<sup>213</sup> The rationale supporting the tort of negligent hiring provides liability for harm resulting from the employment of improper persons.<sup>214</sup> This tort protects members of the public from "dangers of unfit employees."<sup>215</sup>

In evaluating negligent hiring, courts tend to focus upon two questions:<sup>216</sup>

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207. 5 RAPP, *supra* note 164, § 12.02[3][b][ii]; *see also* Allan Manley, Annotation, *Liability of Charitable Organization Under Respondeat Superior Doctrine for Tort of Unpaid Volunteer*, 82 A.L.R. 3d 1213 (1978) (referring to liability of YMCA, Boy Scouts, Jaycees, churches, and other charitable organizations).

208. *See* 5 RAPP, *supra* note 164, § 12.02[3][b][ii].

209. Negligent hiring is also referred to as negligent employment. However, because in some circumstances volunteers are not considered to be "employed," the term "negligent hiring" seems more applicable. Generally, the terms are interchangeable.

210. *See* 27 AM. JUR. 2D *Employment Relationship* § 472 (1996).

211. *See id.*

212. *See id.*; *see also* COVINGTON & DECKER, *supra* note 176, at 343.

213. *See* 27 AM. JUR. 2D *Employment Relationship* § 473 (1996); *see also* Lear, *supra* note 158, at 159.

214. *See* 27 AM. JUR. 2D *Employment Relationship* § 473 (1996).

215. Lear, *supra* note 158, at 159.

216. *See* MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 1.12, at 39 (2d ed. 1999).

First, did the employer know or should it have known of the employee's incompetence or dangerous propensities and was it foreseeable that these propensities would create a risk of harm to other individuals? Second, did the employer's negligent hiring of the incompetent or dangerous employee proximately cause the injury?<sup>217</sup>

Proving a case of negligent hiring is difficult because courts begin with the presumption that the employer used due care in hiring an employee.<sup>218</sup> Also, this standard of care is generally regarded as low and easy to satisfy by showing that the employer used reasonable means in hiring the employee.<sup>219</sup>

Similar to the previous discussion on vicarious liability, the applicability of negligent hiring to the relationship between a senior citizen volunteer and the school board depends upon whether the proper relationship is established.<sup>220</sup> Principles of agency law, included in the discussion of vicarious liability, demonstrate that a volunteer can be a servant, thus satisfying the agency/master-servant relationship.<sup>221</sup> Also, the *Restatement (Second) of Agency* section 213 provides that a "person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons . . . in work involving risk of harm to others."<sup>222</sup>

Negligent hiring is a tort, however, not a concept of agency law. In fact, even section 213 indicates that it is a special rule of tort law and not a principle of an agency relationship.<sup>223</sup> To clarify, the *Restatement (Second) of Tort* section 308 states:

It is negligence to permit a third person . . . to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends . . . to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.<sup>224</sup>

The comments to this section suggest that "under the control of the actor" reflects an understanding that the relationship between the par-

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217. *Id.*; see also Lear, *supra* note 158, at 159.

218. See generally Johansen, *supra* note 11, at 9.

219. See *id.* Employers rely on screening and supervision as reasonable means to defray a claim of negligent hiring. The use of screening will be discussed later in this note.

220. See Lear, *supra* note 158, at 159.

221. See RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

222. *Id.*

223. See *id.* at cmts. a, d.

224. RESTATEMENT (SECOND) OF TORTS § 308 (1965).

ties is one of consent to engage in the activities in question.<sup>225</sup> This is not the same type of relationship as the agency relationship required in vicarious liability.<sup>226</sup> If consent to engage in activity of the organization is present, then the proper “employment relationship” has been established for negligent hiring.<sup>227</sup> Thus, the engagement and subsequent misconduct of a senior citizen volunteer in the school could result in potential negligent hiring liability if the volunteer has been given consent to work in the school.<sup>228</sup>

Currently, there are no reported cases that find a school board liable for negligent hiring of a volunteer.<sup>229</sup> However, cases do exist that recognize the application of negligent hiring (or negligent selection or negligent employment) to schools engaging volunteers. In the case of *Koran I. v. New York City Board of Education*,<sup>230</sup> the court recognized the possibility of a claim for negligent hiring of a volunteer by a school.<sup>231</sup> However, the court found that the injury suffered in this case lacked any nexus with the volunteer’s activities in the school; it was attenuated by time and distance.<sup>232</sup> Yet, in dicta, the court found that the principal’s interview and obtaining of references were satisfactory screening, and no duty existed to investigate further in this circumstance.<sup>233</sup>

Also, in *Swearinger v. Fall River Joint Unified School District*,<sup>234</sup> a California Court of Appeals reversed a grant of summary judgment to school districts on the issue of negligent selection of volunteers.<sup>235</sup> In *Swearinger*, a school district hosted a basketball tournament and invited other schools to participate.<sup>236</sup> The school district provided transportation, and families of students in the district provided lodging to visiting students.<sup>237</sup> A visiting student was gravely injured when she and her volunteer host were involved in a car accident on

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225. *Id.* at cmt. a.

226. *See* 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

227. *See id.*; *see also* Lear, *supra* note 158, at 162.

228. *See* RESTATEMENT (SECOND) OF TORTS § 308 cmt. a (1965).

229. *See* Johansen, *supra* note 11, at 10. Johansen suggests that the lack of cases “is probably attributable to the protection of sovereign immunity and to luck.” *Id.*

230. 256 A.D.2d 189 (N.Y. App. Div. 1998).

231. *See id.* at 230.

232. *See id.*

233. *See id.*

234. 212 Cal. Rptr. 400 (Cal. Ct. App. 1985).

235. *See id.* at 408–09.

236. *See id.* at 403.

237. *See id.*

the way home from the tournament.<sup>238</sup> Because the faculty of the school district selected the host families, the school had a duty to exercise reasonable care in selecting host families.<sup>239</sup>

Although the *Swearinger* court did not have to resolve the scope of the duty of careful selection, the court determined that disputed factual issues concerning the duty and selection criteria may exist.<sup>240</sup> If the school district hosting the tournament is found negligent in selecting the host families, then the visiting student's home school district might also be liable for failing to inquire into the selection criteria.<sup>241</sup> On appeal, the California Supreme Court granted review,<sup>242</sup> but the case was later dismissed at the request of the appellants.<sup>243</sup>

Additionally, courts have had mixed results when determining the question of whether a nonprofit organization is liable for negligent hiring of volunteers. The case of *Golden Spread Council v. Akins*<sup>244</sup> rejected the application of negligent hiring to the local Boy Scout group, Golden Spread Council, when a troop leader molested boys in his care.<sup>245</sup> The court found that Golden Spread Council could not have owed a duty based upon negligent hiring because it did not actually hire the volunteer troop leader.<sup>246</sup>

Other cases have recognized a nonprofit organization's potential liability under negligent hiring.<sup>247</sup> One of many examples occurred in *Broderick v. King's Way Assembly of God Church*,<sup>248</sup> where the court found that the church's argument that "a volunteer did not require a formal interview or background check is without merit. A volunteer may be a servant if subject to the control of another. Therefore, a volunteer may be subject to the same interview and background checks

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238. *See id.*

239. *See id.* at 408.

240. *See id.* at 409 n.14.

241. *See id.* at 409.

242. *See Swearinger v. Fall River Joint Unified Sch. Dist.*, 701 P.2d 1172 (Cal. 1985).

243. *See Swearinger v. Fall River Joint Unified Sch. Dist.*, 709 P.2d 430 (Cal. 1985).

244. 926 S.W.2d 287 (Tex. 1996).

245. *See id.* at 290.

246. *See id.* The court did find Golden Spread Council liable under other duties, including a risk of foreseeable injury. *See id.*

247. *See, e.g., Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991); *Big Brother/Big Sister of Metro Atlanta v. Terrell*, 359 S.E.2d 241, 242-43 (Ga. Ct. App. 1987); *Infant C. v. Boy Scouts of Am., Inc.*, 239 Va. 572, 391 S.E.2d 322, 326 (Va. 1990).

248. 808 P.2d 1211 (Alaska 1991).

as any other servant.”<sup>249</sup> The court determined that the church’s failure to interview or conduct a background check of the volunteer demonstrated a lack of due care.<sup>250</sup>

Although courts have had mixed results when determining whether negligent hiring applies to volunteers, the principles and rationales behind the tort support its application to volunteers.<sup>251</sup> Rationally, if negligent hiring applies to hiring practices of nonprofit organizations, then it can also apply to public schools employing volunteers.<sup>252</sup> However, the extension of negligent hiring to schools does more than create another means of potential liability for schools taking on senior citizen volunteers; it also creates the duty to use reasonable care in the selection of volunteers.<sup>253</sup>

### B. Do School Boards Have a Responsibility to Screen Volunteers?

Employers screen potential employees for a variety of reasons.<sup>254</sup> Employers want to hire the best applicants for the job and avoid hiring dangerous, unqualified, and inappropriate employees.<sup>255</sup> Additionally, some professions require screening of employees to ensure that the applicants have met certain credentials.<sup>256</sup> When educational institutions hire teachers and other compensated employees, they abide by these principles in selecting the best candidates for the job.<sup>257</sup> They do not always apply the same logic to hiring volunteers. Based upon the application of the negligent hiring doctrine to volunteers, duties owed to children, duties to keep the school premises safe, and other policy concerns, school boards have a similar responsibility to screen the senior citizen volunteers at their schools.<sup>258</sup> “Schools and

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249. *Id.* at 1221 n.25 (citing RESTATEMENT (SECOND) OF AGENCY §§ 220, 225 (1958)).

250. *See id.* at 1221.

251. *See supra* notes 211–15 and accompanying text.

252. Because both types of organizations serve the same population, children, similar policies and legal rationales apply. For an example of similar treatment, see generally HIRING THE RIGHT PEOPLE, *supra* note 161 (addressing recommendations to “schools and youth-service agencies.”).

253. *See infra* notes 261–68 and accompanying text.

254. *See COVINGTON & DECKER, supra* note 176, at 342.

255. *See id.*

256. *See id.* at 343.

257. *See generally* Johansen, *supra* note 183, at 11.

258. Even if the school board does not do the direct screening of volunteers, the board maintains the duty to do so through its duties to hire and fire employees, to maintain general control over the school, and to keep the school safe. *See id.* at 11.

youth-serving agencies have a moral obligation if not a legal duty to hire those individuals who will not endanger the ones they have been commissioned to serve.”<sup>259</sup>

**1. LEGAL AND POLICY RATIONALES SUPPORTING A RESPONSIBILITY TO SCREEN**

*a. Negligent Hiring* Negligent hiring is premised upon the idea of improper employment; an employer hires an employee that she or he knows or should have known could cause harm to others.<sup>260</sup> Because the employer is in the best position to know the characteristics and risks associated with the job, it is his or her duty to hire with care.<sup>261</sup> If liability for negligent hiring results, it is because the employer has not taken care in selecting the person to be employed.<sup>262</sup> To avoid liability and protect the public, an employer must use reasonable care in selecting employees.<sup>263</sup> Thus, employers should screen employees to demonstrate that they took reasonable care under the circumstances<sup>264</sup> in ascertaining the risks posed by and qualifications of applicants. This has been referred to as a “duty to screen.”<sup>265</sup> Under the rationale of the negligent hiring doctrine,<sup>266</sup> a school board (employer) maintains the same responsibility to screen volunteers working under the auspices of the school as it has for paid employees.<sup>267</sup>

*b. Duty of Care Owed to Students* School boards bear additional duties when hiring employees or volunteers that add to the responsibility to screen and the duty to hire with care.<sup>268</sup> Primarily, a school board owes its greatest duty to the students in its care.<sup>269</sup> Institutions, such as schools and nonprofit agencies serving youth, are held to a higher standard of care through their work with children as

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259. HIRING THE RIGHT PEOPLE, *supra* note 161, at 34.

260. See 27 AM. JUR. 2d *Employment Relationship* § 473 (1996).

261. See COVINGTON & DECKER, *supra* note 176, at 343.

262. See RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1958).

263. See 27 AM. JUR. 2d *Employment Relationship* § 474 (1996).

264. See JOHN C. PATTERSON, NONPROFIT RISK MANAGEMENT CTR., STAFF SCREENING TOOL KIT: BUILDING A STRONG FOUNDATION THROUGH CAREFUL STAFFING 9 (2d ed. 1998).

265. Johansen, *supra* note 11, at 10.

266. See *supra* notes 211–15 and accompanying text.

267. See Johansen, *supra* note 11, at 11.

268. See *id.*

269. See *id.* at 9.

a vulnerable population.<sup>270</sup> For example, schools may owe children in their care a “duty of reasonable care, a duty of special care, a public duty, a contractual duty to the child’s family, and a statutory duty to report suspected abuse.”<sup>271</sup> Also, courts recognize that schools and students form a special relationship that imposes an affirmative duty on the school district to take all reasonable steps to protect the students.<sup>272</sup> The concept of *in loco parentis* causes schools to maintain some of the same duties to children that their parents have towards them.<sup>273</sup> To meet these duties a school board should “exercise a degree of care commensurate with the nature and danger of the business in which [it] is engaged,”<sup>274</sup> starting by employing a level of screening that meets the basic care requirements.

Additionally, and specific to school boards, there is a duty to keep school premises safe.<sup>275</sup> To maintain safe premises, schools must make sure that those people invited onto school grounds are not an additional risk of harm to the other people in schools, particularly students.<sup>276</sup> Screening of volunteers provides a reasonable mechanism for establishing this safety.<sup>277</sup>

*c. Public Policy* As a matter of public policy, the United States is concerned with screening volunteers who work with children.<sup>278</sup> The National Child Protection Act of 1993<sup>279</sup> seeks to encourage screening of youth-service workers by using criminal records.<sup>280</sup> Depending on state law, organizations covered by the Act may obtain criminal background information about prospective employees and volunteers.<sup>281</sup> The Act does not mandate that youth-service organizations require criminal history checks, but authorizes the

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270. See Jessica Lynch, Note, *A Matter of Trust: Institutional Employer Liability for Acts of Child Abuse by Employees*, 33 WM. & MARY L. REV. 1295, 1300–03 (1992); see also PATTERSON, *supra* note 264, at 12.

271. Lynch, *supra* note 270, at 1300–02.

272. See, e.g., *Virginia G. v. ABC Unified Sch. Dist.*, 19 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1993).

273. See Lynch, *supra* note 270, at 1302.

274. *Broderick v. King’s Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991) (quoting 57 G.J.S. *Master & Servant* § 559, at 271 (1948)).

275. See Johansen, *supra* note 11, at 1.

276. See *id.* at 11.

277. See *id.* at 8. “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.” *Id.*

creation of state laws allowing access to national criminal history records of child care or youth-service workers.<sup>282</sup> The Act defines “child care” broadly<sup>283</sup> to include “the provision of care, treatment, education, training, instruction, supervision, or recreation to children.”<sup>284</sup> This definition allows for the inclusion of employees and volunteers of public schools.<sup>285</sup> Thus, Congress has recognized the importance of screening volunteers in schools. Whether a child is participating in a social service program, staying at church, or attending school, that child should be reasonably protected from all foreseeable harm.<sup>286</sup> Careful selection of volunteers is one way to protect children from foreseeable harm.

*d. Screening in Youth-Serving Nonprofit Organizations* When Congress approved the National Child Protection Act, it included all organizations that provide for child care.<sup>287</sup> This reflects a similar approach to that taken by the courts. The case law concerning volunteer screening usually concerns volunteers in youth-serving nonprofit organizations,<sup>288</sup> social services (such as foster care),<sup>289</sup> or churches.<sup>290</sup> The types of care provided by these organizations, and the roles held by their volunteers, can be paralleled to those of the public school system.<sup>291</sup> Thus, the encouragement, and in some cases enforcement, of a duty to screen volunteers in youth-serving organizations can extend to volunteers in the public schools.

## 2. SCOPE OF THE RESPONSIBILITY TO SCREEN

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278. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CONFERENCE ON CRIMINAL HISTORY RECORDS: BRADY AND BEYOND 86 (1995) [hereinafter BRADY AND BEYOND].

279. 42 U.S.C. §§ 5119–5119c (1995).

280. See *id.* § 5119a(1).

281. See BRADY AND BEYOND, *supra* note 278, at app. 11.

282. See *id.* at 80.

283. See *id.* at app. 11.

284. 42 U.S.C. § 5119c(5).

285. See BRADY AND BEYOND, *supra* note 278, at 86–88.

286. See *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991). “We consider it self-evident that the selection of individuals to whom care and safety of children will be entrusted requires a relatively high level of care before it may be considered reasonable.” *Id.*

287. See BRADY AND BEYOND, *supra* note 278, at app. 11.

288. See Manley, *supra* note 207.

289. See BRADY AND BEYOND, *supra* note 278, at 88.

290. See *Broderick*, 808 P.2d at 1211; see also Manley, *supra* note 207.

291. See *supra* note 252.



The establishment of a school's duty to screen volunteers creates a problem of scope.<sup>292</sup> What are the appropriate means and methods of screening? Unfortunately, because of the lack of judicial decisions regarding schools and volunteer screenings, the answer to this question is uncertain.<sup>293</sup> Also, depending on the school, the functions served by volunteers can vary tremendously, thus creating different standards of reasonable screening.<sup>294</sup> Yet, regardless of the exact nature of the volunteer position, it is clear that screening must be reasonable under the circumstances.<sup>295</sup> This may mean, in some cases, volunteers should be screened at a level less stringent than an employee, the same as an employee, or more strictly than an employee.<sup>296</sup> Considering that there is a responsibility to screen volunteers based on legal and policy rationales, if a school allows anyone who walks in off the street to be a student's mentor without screening the volunteer, and harm results, a finding of negligence is possible.<sup>297</sup> Regardless of a school's motivation to screen volunteers, the process is likely to provide for increased safety, higher quality, and avoidance of legal risk.<sup>298</sup>

#### IV. Determining and Preventing Risk and Liability Through Reasonable Screening Mechanisms

Risk management provides a method of responding to the dangers inherent in administering a program or operating an organization.<sup>299</sup> The process of evaluating risks and determining how to control them is complex and multifaceted.<sup>300</sup> At the heart of risk management lies consistent practices that help control risks, particularly policies and procedures that provide systematic methods for prevention and guidance.<sup>301</sup>

Although a comprehensive study of public school volunteer practices does not exist, most schools do not currently employ district

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292. See 27 AM. JUR. 2D *Employment Relationship* § 474 (1996).

293. See Johansen, *supra* note 11, at 12.

294. See *id.*

295. See PATTERSON, *supra* note 264, at 9.

296. See Johansen, *supra* note 11, at 13–14.

297. See *id.* at 13.

298. See generally PATTERSON, *supra* note 264.

299. See CHARLES TREMPER & GWYNNE KOSTIN, *NONPROFIT RISK MANAGEMENT CTR., NO SURPRISES: CONTROLLING RISKS IN VOLUNTEER PROGRAMS* 5 (1993).

300. See *id.*

301. See *id.* at 10; see also NATIONAL SCH. SAFETY CTR., *WORKING TOGETHER TO CREATE SAFE SCHOOLS* 1 (1999).

wide volunteer policies.<sup>302</sup> “A *volunteer policy* is one that provides mechanisms for screening volunteers, guidelines for training and supervising them, and possibly rules concerning how to handle harms that occur in the volunteer program.”<sup>303</sup> These policies provide uniform management of the risks and potential liabilities associated with bringing senior citizen volunteers into the public schools.

The legal risks and liabilities of volunteer programs spur some schools to adopt volunteer policies to conform to their duty of reasonable care under the negligent hiring doctrine.<sup>304</sup> Volunteer screening responds to the negligent hiring doctrine by ensuring that some level of care was used in selecting the person to be employed.<sup>305</sup> Avoiding risks is not the only purpose for screening volunteers; schools will want to hire the best possible person for the job.<sup>306</sup> Proper screening provides a school with information about a volunteer candidate’s eligibility, qualifications, and suitability for the position.<sup>307</sup>

The scope and method of screening to be used will depend upon the nature of the volunteer’s position.<sup>308</sup> The range of positions that a senior citizen volunteer could hold in a school is endless; therefore, no single screening procedure will meet the needs of every position. Schools will have to assess risks and preferences to choose the best mix of possible methods. Presumably, screening provides the school with beneficial information and informed decision making, but there are possible drawbacks. Although they are valid concerns, these potential drawbacks are not reasons to abandon volunteer screening practices.

#### A. Scope of Screening Processes

Generally, when someone challenges a screening process, courts evaluate the reasonableness of the process under the totality of the circumstances.<sup>309</sup> This evaluation will include the “reasonableness of the

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302. See Bailey, *supra* note 1.

303. Ingrid M. Johansen, *Legal Issues in School Volunteer Programs* (pt. 4), SCH. L. BULLETIN 1, Spring 1998.

304. See PATTERSON, *supra* note 264, at 10.

305. See generally RESTATEMENT (SECOND) OF AGENCY § 213(b) and cmt. d (1958).

306. See PATTERSON, *supra* note 264, at 2.

307. See A. Dean Pickett, *What to Ask-Legal and Policy Issues in Conducting Effective Background Investigations*, in SCH. L. REV. 5-2 (1999).

308. See PATTERSON, *supra* note 264, at 4.

309. See Johansen, *supra* note 303, at 1.

process employed; the foreseeability of the risk (whether the organization knew or should have known of the risk of harm); and whether the screening process, or lack of it, caused or contributed to the harm at issue.”<sup>310</sup> Under the negligent hiring doctrine’s standard of reasonableness, the court will consider whether the employer used appropriate and available screening methods.<sup>311</sup>

This is not to say that every possible screening method available must be used in selecting a volunteer. For example, in *Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell*,<sup>312</sup> a volunteer chosen to mentor a young boy pursued an inappropriate sexual relationship with the child.<sup>313</sup> The court found that Big Brother/Big Sister had used sufficient care in selecting the volunteer by relying upon an application, references, extensive interviews, and assessment by a caseworker.<sup>314</sup> Although FBI checks, psychological tests, and credit checks might have been pursued, they were not necessary because they would not have shown the volunteer’s propensity towards molestation.<sup>315</sup>

The scope of reasonable screening is most clear when state or federal law requires the use of certain screening tools.<sup>316</sup> When the law mandates licensing or other requirements to hold a job, it is clearly unreasonable for an employer to neglect screening to ensure that these rules are upheld.<sup>317</sup> This type of background check is not optional.<sup>318</sup> Many states require that schools investigate teachers to make sure that they have the necessary accreditation and fitness for employment.<sup>319</sup> Although these types of statutes do not dictate that schools do similar investigations for volunteers, it would be unreasonable for a school to employ a volunteer to act as a nurse without checking the licensure of the volunteer.<sup>320</sup>

Under most circumstances, a screening process will not be mandated. Therefore, reasonableness will be determined by balancing the

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310. PATTERSON, *supra* note 264, at 9.

311. *See id.* at 11.

312. 359 S.E.2d 241 (Ga. Ct. App. 1987).

313. *See id.* at 242.

314. *See id.*

315. *See id.* at 242–43.

316. *See* PATTERSON, *supra* note 264, at 10–11.

317. *See id.*

318. *See* Pickett, *supra* note 307, at 5-2.

319. *See id.* at 5-3.

320. *See generally* *Deerings W. Nursing Ctr. v. Scott*, 787 S.W.2d 494 (Tex. App. 1990) (suit against nursing home for negligence resulting from the hiring of an unlicensed nurse employee).

circumstances.<sup>321</sup> The test will weigh the risks of the volunteer position against the availability (and cost) of the mechanisms that either were employed or could have been used.<sup>322</sup> Within this balancing process, it is important to recognize again that schools have a higher standard of care in hiring volunteers that work with children and that different positions may require different screening methods.<sup>323</sup>

### B. Correlating Screening Methods with the Level of Risk

In balancing and evaluating the reasonableness of screening, schools developing a volunteer policy will have to evaluate each position to determine its requirements and risks.<sup>324</sup> Simply stated, establishing a volunteer screening procedure is a graduated scale; the more risk and specific requirements associated with a volunteer position, the more extensive the screening methods to be applied.

In an effort to aid youth-serving organizations, the National Collaboration for Youth created a process for screening volunteers to prevent child abusers from coming into contact with the children.<sup>325</sup> The National Collaboration for Youth's approach created a matrix that categorizes volunteer activities into a continuum of three levels of risk: lower, medium and higher.<sup>326</sup> For example, if the position is characterized by "[n]o regular interaction between volunteer and any specific children," the risk designation is low.<sup>327</sup> This position would require less extensive screening methods than a position where the "interaction between volunteer and specific children span[s] a long[er] period of time."<sup>328</sup> Although the National Collaboration for Youth's matrix is premised strictly on preventing child abuse, a similar continuum of screening that takes into account mitigation measures, risks, and requirements associated with a position can be established for screening school volunteers.<sup>329</sup>

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321. See *HIRING THE RIGHT PEOPLE*, *supra* note 161, at 30.

322. See Johansen, *supra* note 303, at 10.

323. See PATTERSON, *supra* note 264, at 12; see also *supra* notes 255–72 and accompanying text.

324. See PATTERSON, *supra* note 264, at 4.

325. See NATIONAL COLLABORATION FOR YOUTH, *SCREENING VOLUNTEERS TO PREVENT CHILD ABUSE: A THREE-STEP ACTION GUIDE* 3 (1998).

326. See *id.* at 5.

327. *Id.*

328. *Id.*

329. Chapel Hill-Carrboro City Schools use a similar process. See Chapel Hill-Carrboro City Schools, *Volunteer Screening Policy, Regulation and Sample Forms*,

When schools tailor the screening methods to match the nature of the volunteer position, the screening procedures appear reasonable. Thus, a higher level of risk calls for more thorough investigation.<sup>330</sup>

Risk is determined by the setting in which the volunteer activity takes place and the intensity of the relationship between the volunteer and student(s). Intensity is defined as solitary time with the client, exclusivity of relationship, amount of time (frequency) and length of time (duration) in contact and level of vulnerability. The thoroughness of the screening increases as the risk of the contact increases.<sup>331</sup>

Although creating a system that correlates risk and thoroughness of screening can be complex and time consuming, models do exist.<sup>332</sup> Yet, regardless of the system and methods chosen, screening will not be reasonable unless it is actually employed. Just asking for references, but never checking them, is not sufficient screening.<sup>333</sup>

### C. Choosing Methods of Screening

Except for schools that automatically accept all interested volunteers that come to them, schools are already doing some sort of screening.<sup>334</sup> Relying on this type of gut reaction is important, but does not provide for the methodological approach favored by the law.<sup>335</sup> The following information is not intended to develop a systematic screening mechanism to be employed at schools.<sup>336</sup> Instead, it presents a basic outline of possible screening measures that schools could use in creating a screening continuum based on level of risk.

A continuum of volunteer positions and screening mechanisms requires a school to choose which methods of screening are appropriate for each particular job. No one method is perfect or completely effective; the use of multiple screens increases the likelihood of finding

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5-7 (May 25, 1997) (unpublished document, on file with Chapel Hill-Carrboro City Schools) [hereinafter Volunteer Screening Policy].

330. See PATTERSON, *supra* note 264, at 15.

331. Volunteer Screening Policy, *supra* note 329, at 3.

332. See *id.*; NATIONAL COLLABORATION FOR YOUTH, *supra* note 325; PATTERSON, *supra* note 264.

333. See TREMPER & KOSTIN, *supra* note 299, at 11.

334. See *id.* at 22.

335. See *id.*

336. Other resources already provide this type of information for either non-profit agencies or for schools hiring employees. See, e.g., HIRING THE RIGHT PEOPLE, *supra* note 161; PATTERSON, *supra* note 264; TREMPER & KOSTIN, *supra* note 299; Pickett, *supra* note 307.

the best volunteers.<sup>337</sup> The school “should develop its screening process based on the nature of the position, the risks perceived to be associated with the position, and the costs associated with the screening procedure.”<sup>338</sup> Each school will need to select the methods that conform to the school’s mission and needs.<sup>339</sup>

#### 1. BASIC SCREENING

The foundation of volunteer screening is having an accurate position description.<sup>340</sup> By mapping out the exact purpose, function, duties, qualifications, skills, and time commitment of the volunteer position,<sup>341</sup> the school will be able to identify whether or not the volunteer meets the requirements of the position and judge all candidates equally.<sup>342</sup>

The remainder of the basic screening process includes applications, interviews, and reference checks.<sup>343</sup> These methods should be used as the foundation of all screening regardless of the exact position.<sup>344</sup>

#### 2. INTERMEDIATE AND HIGHER LEVEL SCREENING

Considering that schools employ volunteers to fill a variety of roles, no single, basic screening procedure will be applicable to all volunteer positions. Therefore, the methods of screening used will have to correspond to the continuum of risk.<sup>345</sup> Positions that require intermediate and higher level screening involve independence, less supervision, frequent contact with students, and the creation of long-term relationships.<sup>346</sup>

Schools can use an endless list of screening mechanisms in these higher-risk volunteer positions. Deciding which of the following methods to use will depend upon their availability, usefulness, cost, and legality.<sup>347</sup> Schools may choose to utilize criminal history

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337. See TREMPER & KOSTIN, *supra* note 299, at 22.

338. PATTERSON, *supra* note 264, at 4.

339. See *id.* at 2.

340. See *id.* at 27.

341. See TREMPER & KOSTIN, *supra* note 299, at 21 (including a larger list).

342. See PATTERSON, *supra* note 264, at 39.

343. See *id.* at 4.

344. See *id.*

345. See *id.*

346. See *id.* at 6.

347. See *id.* at 67–70.

checks,<sup>348</sup> FBI record checks,<sup>349</sup> sex offender registries,<sup>350</sup> driving records,<sup>351</sup> credit bureau records,<sup>352</sup> psychological and personality testing,<sup>353</sup> intelligence and aptitude testing,<sup>354</sup> physical ability testing,<sup>355</sup> drug testing,<sup>356</sup> medical testing,<sup>357</sup> and home visits.<sup>358</sup> Most importantly, the use of these methods of screening must be reasonable.<sup>359</sup> Although physical ability testing and medical testing may initially seem reasonable for schools screening senior citizen volunteers, these methods are fraught with possible discrimination problems and should be used with caution.<sup>360</sup>

## V. The Misapplication of Myth: Responding to Criticisms and Drawbacks of Screening Volunteers

Although both legal and policy arguments can be made to support screening senior citizen volunteers, most public schools do not methodically screen volunteers, let alone have a volunteer policy.<sup>361</sup> Developing extensive screening measures for volunteers will likely meet opposition.<sup>362</sup> School administrators, as creators and implementers of these procedures, will have to accept and overcome conceivable deterrents to volunteer screening processes. Most of these deterrents result from myths about instituting such policies.<sup>363</sup> Each myth

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348. *See id.* at 72.

349. *See id.* at 74.

350. *See generally* BRADY AND BEYOND, *supra* note 278.

351. *See* PATTERSON, *supra* note 264, at 78.

352. *See id.*

353. *See* ROTHSTEIN ET. AL., *supra* note 216, § 1.19.

354. *See id.* § 1.20.

355. *See id.* § 1.21.

356. *See id.* § 1.26.

357. *See id.* § 1.22. *But see* Pickett, *supra* note 307, at 5-5.

358. *See* PATTERSON, *supra* note 264, at 52.

359. *See* HIRING THE RIGHT PEOPLE, *supra* note 161, at 30.

360. *See generally* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1995). It is unlawful to question about physical health or ability except under certain, specified circumstances. *See* 29 C.F.R. §§ 1630.13-1630.14 (1999).

361. *See* Bailey, *supra* note 1; *see also* BRADY AND BEYOND, *supra* note 278, at 88. For example, there is a discrepancy in public schools that use criminal record checks while doing background investigations of employees. In a recent survey, it was found that 30% fewer public school districts will conduct checks on volunteers versus employees. *See id.* at 88. Unfortunately, this survey does not take into account how many of the schools participating were required to conduct criminal history checks of volunteers. Approximately 50% of states require these checks of school employees, some of which will also require checks on certain volunteers. *See id.* at 88.

362. *See* HIRING THE RIGHT PEOPLE, *supra* note 161, at 18.

363. *See* TREMPER & KOSTIN, *supra* note 299, at 2.

contains some level of truth, but when considered in light of other factors, becomes unpersuasive.<sup>364</sup>

**A. Myth 1: Volunteer Screening Is Too Difficult and Costly to Administer**

Developing and implementing volunteer policies takes time and money.<sup>365</sup> The exact amount of time and cost will depend on the current status of volunteer screening at a school and the methods of screening needing implementation. Creating a volunteer policy and screening procedures for a school can take many months and involve numerous school officials, lawyers, risk management experts, and community representatives in order to create a comprehensive policy.<sup>366</sup> This type of development is costly in terms of human and monetary resources.<sup>367</sup> Once a policy is developed, additional costs will be found in the screening methods employed by the school. For example, if a school determines that drug testing of an applicant for a volunteer position is necessary, the test could cost an average of nineteen dollars per volunteer.<sup>368</sup> Other procedures, such as some state criminal history record checks,<sup>369</sup> information from the child abuse registry, and FBI fingerprint checks can cost ten dollars, eight dollars, and twenty-four dollars respectively.<sup>370</sup> The National Child Protection Act of 1993<sup>371</sup> recognized the problem of cost for organizations conducting criminal history checks and requested that states acting in accord with the Act “insure that fees to nonprofit entities for background checks do not discourage volunteers from participating in child care programs.”<sup>372</sup>

In reality, schools will have to invest enough time and money as needed to create a reasonably safe volunteer program.<sup>373</sup> Schools need to consider the development and implementation costs in light of the

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364. See Johansen, *supra* note 303, at 2.

365. See HIRING THE RIGHT PEOPLE, *supra* note 161, at 11.

366. See *id.*

367. See Johansen, *supra* note 303, at 2.

368. See Noy Davis & Susan Wells, *Effective Screening of Child Care and Youth Service Workers*, CHILDREN'S LEGAL RIGHTS J., Winter/Spring 1994-95, at 23.

369. However, some states offer some criminal history searches at no cost to organizations working with children. See *id.*

370. See PATTERSON, *supra* note 264, at 70.

371. 42 U.S.C. §§ 5119-5119c (1995).

372. *Id.* § 5119a(e).

373. See Johansen, *supra* note 303, at 3.



costs that can be incurred by a failure to screen.<sup>374</sup> The investment of time and money into development and implementation is minimal compared to the costs of a lengthy and extensive lawsuit.<sup>375</sup> To focus on implementation and development costs is shortsighted.<sup>376</sup>

Schools concerned about the cost of various background checks and screening methods can employ less expensive alternatives. First, schools can make sure that the information they gather is really necessary and applicable to the duties of the volunteer.<sup>377</sup> One effective and less costly alternative to background and record checks is to increase the supervision over volunteers.<sup>378</sup> Another less costly alternative is to create volunteer programs where students are never alone with an unsupervised volunteer.<sup>379</sup> When volunteers are never alone with students, they are not as high risk and will not need as thorough screening, according to the National Collaboration for Youth matrix model.<sup>380</sup>

#### **B. Myth 2: Volunteer Policies Cause More Problems**

Most of the discussion concerning volunteer policies focuses upon avoidance of legal liability. Yet, creating a screening process can also lead to legal risks.<sup>381</sup> Legal risk in screening derives from a failure to screen thoroughly and violations of an applicant's legal rights.<sup>382</sup> When the policies are written and accepted, but the school does not uphold them and harm results, the school is open to further liability.<sup>383</sup> These schools have clearly recognized the risks in their programs but have chosen not to act upon them. Having a policy that is not properly used can cause more damage to the organization than having no policy at all.<sup>384</sup> However, these problems are easily overcome when

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374. See PATTERSON, *supra* note 264, at 70.

375. See Johansen, *supra* note 303, at 3. "Ultimately, if a board cannot afford to make that expenditure it probably cannot afford to have a volunteer program. Harm caused by a volunteer inadequately screened, trained, or supervised can cost the school astronomical sums in legal fees and damage awards." *Id.*

376. See *id.*

377. See TREMPER & KOSTIN, *supra* note 299, at 24.

378. See PATTERSON, *supra* note 264, at 70.

379. See *id.*

380. See NATIONAL COLLABORATION FOR YOUTH, *supra* note 325.

381. See PATTERSON, *supra* note 264, at 9.

382. See *id.*

383. See John Patterson et. al., *Barriers to Preventing Abuse* (visited Nov. 24, 1999) <<http://www.energizeinc.com/art/achila.html>>.

384. See *id.*

schools implement volunteer policies and screening procedures and actually apply them consistently and appropriately.<sup>385</sup> Policies should be reviewed routinely to make sure that they are being implemented correctly and continue to comply with the law.<sup>386</sup>

Another supposed problem arising from volunteer policies that could cause some school districts to avoid implementation is that screening is not one hundred percent effective.<sup>387</sup> There is some risk that schools can rely upon screening procedures too heavily and disregard gut reactions and warnings about a potential volunteer.<sup>388</sup> Also, most screening methods will not identify first-time offenders.<sup>389</sup> Both of these phenomena may lead some schools to hire inappropriate volunteers even with a screening procedure. Yet, these are not reasons to disregard volunteer screening, but are reasons to use layered screening involving different types of information and methods to get to know the volunteer.<sup>390</sup> Although structured screening methods are not perfect systems for weeding out unqualified or dangerous volunteers, they create a defensible and reasonable method of choosing volunteers when used consistently by people familiar with the system.<sup>391</sup>

### C. Myth 3: Volunteer Policies and Screening Will Deter Volunteers

A school with a methodological screening procedure and volunteer policies will deter some people from volunteering.<sup>392</sup> Although deterrence of volunteers will occur, this is not necessarily a negative result of screening procedures.<sup>393</sup> According to one volunteer coordinator, “people who are deterred probably shouldn’t have been volunteering anyway.”<sup>394</sup> When people apply to volunteer at a school and subsequently find out about the application process, screening procedures, and volunteer policies, they will self-screen if they do not meet

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385. See Johansen, *supra* note 303, at 11.

386. See TREMPER & KOSTIN, *supra* note 299, at 11–12.

387. See Johansen, *supra* note 303, at 9.

388. See TREMPER & KOSTIN, *supra* note 299, at 22.

389. See *id.* at 24. For example, criminal record checks can only eliminate known offenders. See *id.*

390. See *id.*, at 22.

391. See *id.*

392. See *Screen Extended Hours Program Volunteers to Keep Students Safe*, SCH. VIOLENCE ALERT, Dec. 1998. “The size of the application alone often scares off people not really dedicated to working in the programs.” *Id.*

393. See PATTERSON, *supra* note 264, at 37.

394. Bailey, *supra* note 1.

the criteria.<sup>395</sup> This in turn saves the school money by not having to screen an unqualified volunteer.<sup>396</sup> People who are looking to volunteer for inappropriate reasons, such as pedophiles, will be deterred from applying for positions with extensive screening mechanisms.<sup>397</sup>

There is some risk that the policies will also deter qualified volunteers.<sup>398</sup> Although volunteer program administrators are often concerned that implementing screening procedures will scare off excellent volunteers, this has not been the case in schools that have already instituted volunteer policies.<sup>399</sup> These schools take the time and effort to explain the screening requirements, benefits of these procedures, and rationales for applying screening methods to volunteers.<sup>400</sup> Once volunteers understand that the screening procedures are not a sign of suspicion about them, but a process undertaken to protect the children and the school, they will be more willing to participate.<sup>401</sup>

#### D. Myth 4: Schools Do Not Need to Screen Senior Citizen Volunteers

Schools and other organizations that work with volunteers prefer to focus on pleasant outcomes rather than admitting that something could go wrong with a volunteer program.<sup>402</sup> This is denial of real risk that occurs whenever children are placed in the care of strangers. Even though most seniors that volunteer in the schools have good motives and will cause no harm, there is still risk that can be avoided through implementation of screening practices.<sup>403</sup> Schools hosting senior citizen volunteers may be lulled into believing that their volunteers are inherently safe and qualified simply because they are senior citizens. Although intuitively this may be true, it does not mean that screening procedures should not apply to senior volunteers.

The lack of widespread reports of senior citizen school volunteers harming students does not necessarily mean that there are no

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395. See PATTERSON, *supra* note 264, at 37–38.

396. See Johansen, *supra* note 303, at 3.

397. See *id.*

398. See Bailey, *supra* note 1. “It’s a touchy issue. You don’t want to deter or insult the volunteers.” *Id.*

399. See *id.*

400. See *id.*; see also PATTERSON, *supra* note 264, at 38.

401. See Johansen, *supra* note 303, at 3.

402. See TREMPER & KOSTIN, *supra* note 299, at 2.

403. See Johansen, *supra* note 303, at 2.

harmful incidents.<sup>404</sup> Children who suffer harm at the hands of an adult often do not report the abuse.<sup>405</sup> Even when a child does report the incident, parents and school officials may not want to go public with the information in order to protect the child.<sup>406</sup> This is not to say that all senior citizens are abusing children and the public is unaware of it, but any such risk can be minimized through comprehensive screening.

Even if it is accepted as true that no senior citizens have ever harmed children in school settings, “past performance is no guarantee of future safety.”<sup>407</sup> As discussed earlier, the number of senior citizens volunteering in schools is growing and will continue to increase over the next few decades.<sup>408</sup> As more senior volunteers enter the schools, the potential for harm increases. Additionally, other nonprofit groups, social service organizations, and churches have had problems with volunteers harming children.<sup>409</sup> In response to lawsuits and legislation, these organizations have implemented volunteer policies that include extensive screening.<sup>410</sup> Today, schools are one of the few remaining public institutions that do not routinely use volunteer policies and methodological screening.<sup>411</sup> Thus, schools are likely to become the target location for volunteers with sinister intentions.<sup>412</sup>

It is important to remember that the rationale behind screening is not just to prevent harm to children, but also to find the best senior citizen volunteers for the position. “The broad purpose of staff screening is to help . . . select the best applicants to fill positions in

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404. *Cf. id.* (explaining that past performance is no guarantee for future safety with volunteers generally).

405. *See Lynch, supra* note 270, at 1295–99.

406. *See Johansen, supra* note 303, at 2.

407. *Id.*

408. *See supra* notes 21–36 and accompanying text.

409. *See, e.g., M.L. v. Civil Air Patrol*, 806 F. Supp. 845 (E.D. Mo. 1992) (child sexually molested by adult volunteer); *Broderick v. King’s Way Assembly of God Church*, 808 P.2d 1211 (Alaska 1991) (child abused by volunteer church child care worker); *Jeffrey E. v. Central Baptist Church*, 197 Cal. App. 3d 718 (Cal. Ct. App. 1988) (child molested by volunteer Sunday school teacher); *Big Brother/Big Sister of Metro Atlanta v. Terrell*, 359 S.E. 2d 241 (Ga. Ct. App. 1987) (child abused by volunteer mentor); *L.P. v. Oubre*, 547 So. 2d 1320 (La. Ct. App. 1989) (child sexually molested by volunteer scoutmaster); *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996) (child sexually molested by scoutmaster); *Infant C. v. Boy Scouts of America, Inc.*, 391 S.E.2d 322 (Va. 1990) (child sexually abused by volunteer group leader).

410. *See Johansen, supra* note 303, at 2.

411. *See id.*

412. *See id.*

[the] organization.”<sup>413</sup> Schools working with senior citizens need to insure that the volunteers are mentally adept and physically able to handle the rigors of a position working with children.<sup>414</sup> Also, as with all volunteers, the senior citizens selected to volunteer in the school need to have the required skills and experience to qualify for the position. Interviews, applications, and reference checks are an accessible and legal way to determine whether the senior has these necessary prerequisites.

Myths are based on some level of truth. As the myth of “no reason to screen senior citizens” demonstrates, senior citizens are probably not dangerous or risky for schools to place in their volunteer positions. Although this does not call for abandonment of screening procedures, it can impact the type of screening employed. As the National Collaboration for Youth matrix model points out, the graduated scale of screening mechanisms is affected by mitigating measures that reduce risk.<sup>415</sup> Senior citizen status, given the lack of extensively known harm caused by senior citizens, may be construed as a mitigating factor for schools. Thus, it could be reasonable to use lower level screening methods with senior citizens because they do not appear to present the same level of risk to children as other adult volunteers. A similar argument has been made for reduced screening of parent volunteers and other well-known volunteers in schools.<sup>416</sup> This is a questionable practice that will have to be based upon the larger screening procedures and volunteer policies implemented by individual schools and school districts.<sup>417</sup>

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413. PATTERSON, *supra* note 264, at 2.

414. See Bailey, *supra* note 1. Note: be aware of ADEA and ADA discrimination claims. Both statutes can be interpreted to include volunteers.

415. See NATIONAL COLLABORATION FOR YOUTH, *supra* note 325, at 4.

416. See Johansen, *supra* note 303, at 6.

417. See *id.*

[T]he mere fact that a person is a parent does not make that person a known quantity or a no-risk volunteer . . . . If the honed-down policy is applied only to low-risk roles, or the definition of well-known person is clear, such a policy might be an acceptable compromise between the desire to keep dangerous persons out of the school and the desire to avoid the administrative burden and potential offense to community members that screening requirements pose.

*Id.*

## VI. Recommendations

Without notice to public school districts, the increasing numbers of retired senior citizens looking for volunteer positions in schools may be the source of a potential problem. As the senior citizen volunteer population increases, courts' recognition of liability associated with volunteering continues, and the public concern about the safety of children swells, schools that continue to accommodate volunteers without considering the risks involved are placing themselves in a precarious situation.<sup>418</sup> Many schools and teachers acknowledge the valuable role held by senior citizen volunteers without responding to potential risks of harm to students from inappropriate placements and unqualified volunteers. Although this problem can be more acute with senior citizen volunteers because of their innocuous image, a similar dilemma arises with all volunteers in the school system. Therefore, school districts should take action and create comprehensive volunteer policies or shield themselves by using alternative methods of finding volunteers.<sup>419</sup>

### A. Volunteer Policies

An official volunteer policy is one that provides mechanisms for screening volunteers, guidelines for training and supervising them, and possibly rules concerning how to handle harms that occur in the volunteer program.<sup>420</sup> The screening mechanisms employed in such a policy are particularly important as they provide the frontline of selection criteria.<sup>421</sup> Depending on the job description, application, interview, and background checks used, schools will know the type of

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418. As the Director of the National School Safety Center describes :  
No greater challenge exists today than creating safe schools. Restoring our schools to tranquil and safe places of learning requires a major strategic commitment. It involves placing school safety at the top of the educational agenda. Without safe schools, teachers cannot teach and students cannot learn. Developing and implementing district wide and site-specific safe school plans are critical parts of this progress.

Ronald D. Stephens, *Message from the Director: The Art of Safe School Planning* (visited May 23, 2000) <<http://www.nssc1.org/message.htm>>.

419. "Every school system and youth-serving organization should have clear policy guidelines and procedures to weed out individuals who have criminal background of misbehavior involving children." *HIRING THE RIGHT PEOPLE*, *supra* note 161, at 7.

420. See Johansen, *supra* note 303, at 1.

421. See TREMPER & KOSTIN, *supra* note 299, at 20.

training and supervision the volunteers need. In creating these policies, school districts will have to balance the cost and availability of screening mechanisms with the risks and requirements associated with a position to create an appropriately thorough and reasonable system.

Each school will have to create its own graduated screening continuum to meet its needs. Yet, the volunteer policies will serve similar purposes at all schools: reducing liability, clarifying volunteer roles, and helping hire the best possible candidates for each position. The same logic that schools utilize in hiring teachers and compensated staff should be applied to volunteer positions. If a school's normal hiring practices cannot be related to the methods used for selecting volunteers, the schools should look towards nonprofit youth-serving agencies and social services for examples.

Although volunteer policies can be enacted without any state governmental involvement, states should consider how they could assist in the process. State involvement will help legitimize volunteer screening, regulate the methods used, and provide accessibility to certain screening methods. With the National Child Protection Act of 1993, Congress took minimal action to make criminal history checks available at reduced cost to nonprofit child care organizations. Some states have since responded by making these documents available at cost. Yet, in an era where the safety of schools is constantly questioned and doubted, states should take all action necessary to provide secure learning environments for all children.

## **B. National Volunteer Organizations**

Having school volunteer policies that include methodical screening depending on the volunteer's exact position provides legal and practical benefits. Despite the concern that schools have for protecting themselves from liability and students from harm, not all schools will be capable of creating volunteer policies. Unfortunately, many of these schools that cannot afford to create volunteer policies would benefit from increased volunteer participation. Considering the legal risks associated with unregulated volunteer programs, these schools would be acting unreasonably to continue to host volunteers.<sup>422</sup> Yet, legal risks associated with selecting volunteers should not dissuade

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422. See Johansen, *supra* note 303, at 3.

these schools from having volunteers in the classroom. These schools can benefit from the numerous national and community programs that place senior citizens into volunteer positions, such as Foster Grandparents and RSVP.<sup>423</sup>

Schools can create partnerships with organizations that are better equipped to handle the screening of the volunteers. This will reduce some of the liability associated with school volunteering as long as the school is careful in its choice of partners. The school board will still have responsibility to insure that the liaison organization uses reasonable methods of selecting and placing volunteers.<sup>424</sup> By becoming a host station for volunteers, schools can reap the benefits of hosting senior citizen volunteers while reducing the potential liabilities and administrative hassles of managing a volunteer program.

## VII. Conclusion

As Margaret Mead once noted, “the quality of a nation is reflected in the way it recognizes that its strength lies in its ability to integrate the wisdom of its elders with the spirit and vitality of its children and youth.”<sup>425</sup> Schools provide the perfect setting for this type of intergenerational contact. However, all of the benefits of senior citizen volunteerism in public elementary schools are ineffective if they cannot be provided in a safe setting and in an appropriate manner. When schools employ volunteer policies that focus on the importance of screening volunteers, they respond to these obligations and provide for the best possible circumstances for all participants.

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423. See NATIONAL SENIOR SERV. CORPS, FACT SHEET (Oct. 1997).

424. See *Swearinger v. Fall River Joint Unified Sch. Dist.*, 212 Cal. Rptr. 400 (Cal. Ct. App. 1985); *supra* notes 232–41 and accompanying text.

425. See NEWMAN ET AL., *supra* note 19, at 143.