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## Volunteers Enter the Schoolhouse Gate

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# Volunteers Enter the Schoolhouse Gate

*"In our society, a great many people are asked to render a community service, and they do so without expecting or receiving compensation for their services. . . . [I]t seems obvious that the youth of our state would be seriously and adversely affected if . . . the many organizations attempting to help young people could be sued by their respective volunteers for the value of the services rendered by the volunteers simply because someone in the organization asked the volunteers to serve and did not specify the services would be rendered gratuitously."<sup>1</sup>*

## I. INTRODUCTION

As recognized by the Nebraska Court of Appeals in the above quote, volunteers provide tremendous services to our youth. In the public schools, use of volunteers provides an occasion to save money in tight budgetary times, to get tasks done in times of labor shortages, and to get skilled services from persons who have special expertise. Using volunteers also provides a chance to develop parental involvement and to model the importance of community service to students. For the volunteer, providing uncompensated service offers a chance to satisfy the emotional need to serve others, as well as the opportunity to learn new skills and develop personal contacts for career advancement.

Use of volunteers presents public schools with many of the same legal issues that arise with public school employees. While school districts spend considerable time assessing legal issues involving employment matters, they frequently do not devote significant consideration to the legal issues involved in using volunteers. In order to establish a framework to examine these legal issues, we address the following three questions:

1. What "jobs" may volunteers perform?
2. What "pay" may volunteers receive?

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1. *Thomas v. Kearney Little League Baseball Ass'n*, 5 Neb. App. 405, 407-08, 558 N.W.2d 842, 845 (1997).

3. What is the potential liability for volunteers personally and for the School District in which they volunteer, and how can this liability exposure be reduced?

## II. WHAT TASKS CAN VOLUNTEERS BE PERMITTED TO PERFORM?

### A. In the Classroom

In order for a volunteer to serve as an administrator or teacher, the volunteer must have a Nebraska administrative or teaching certificate.<sup>2</sup> Use of a volunteer to perform teaching duties, even if the volunteer has a teaching certificate, may be contrary to the collective bargaining agreement between the School District and the teachers' association.<sup>3</sup> In the absence of a special provision in the collective bargaining agreement or a separate agreement with the applicable bargaining unit, volunteers should not be assigned to perform duties of union members.

More commonly, volunteers in the public school classrooms serve in roles where they provide assistance to teachers and other professional employees. Volunteers may serve as "teacher aides" without a teaching certificate, so long as they do "not assume any teaching responsibilities."<sup>4</sup> A "teacher's aide" must be "specifically prepared for such duties, including the handling of emergency situations which might arise in the course of his or her work."<sup>5</sup>

In assigning volunteers to work with students, public schools must be aware of the laws that restrict access to student records. Both federal and state law regulate such access. Under federal law, "school officials" are authorized to have access to student education records when they have legitimate educational interests in the records.<sup>6</sup> A volunteer may conceivably be determined to be a "school official."<sup>7</sup>

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2. See NEB. REV. STAT. §§ 79-801, 79-802, 79-804 (Reissue 1996); 92 NAC 10.003.01 (1998) ("The school system shall use only persons certificated pursuant to 92 NAC 21 to teach"); 92 NAC 10.004.03(A)(2) (1998) (requiring administrators to hold a Nebraska Administrative and Supervisory Certificate, with an appropriate endorsement). Another example of a circumstance where licenses are required for school volunteers would be school bus drivers, who are required to hold a "student transportation vehicle operator's permit." See NEB. REV. STAT. §§ 79-318(13), 79-607, 79-608 (Reissue 1996); 92 NAC 91 (1998).

3. See Industrial Relations Act, NEB. REV. STAT. §§ 48-801 to 48-842 (Reissue 1998).

4. NEB. REV. STAT. § 79-802(3) (Reissue 1996); see also NEB. REV. STAT. § 79-101(12) (Reissue 1996) (defining the term "teach").

5. NEB. REV. STAT. § 79-802(3).

6. See 34 C.F.R. § 99.31 (2000) (regulations to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1994)).

7. See *Falvo v. Owasso Indep. Sch. Dist.*, 22 F.3d 1201 (10th Cir. 2000). In *Falvo*, the court held that a violation of the Family Educational Rights and Privacy Act (FERPA) occurs when fellow students grade their classmates' papers. In reach-

However, under state law, access to student records is limited to “parents, guardians, teachers, counselors, or school administrators.”<sup>8</sup> With this restriction, volunteers are in most instances not authorized to have access to student files, at least absent written consent of the parent or guardian.

## B. On the Athletic Field

Volunteers are frequently used in public school extracurricular programs. In Nebraska, the restrictions on use of volunteers for coaching duties are based on the rules of the Nebraska School Athletic Association (NSAA).<sup>9</sup> The NSAA is a voluntary association of schools organized to promote and regulate competition between schools in extracurricular activities. The NSAA’s current regulations require that head coaches be certificated as a teacher or administrator, and be employed by the school district for which they coach.<sup>10</sup>

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ing the conclusion that the grade placed on a student’s paper is itself an “education record” under FERPA, the court stated: “In so assisting the teacher, the correcting student becomes a ‘person acting for [an educational] agency or institution.’” *Id.* at 1216 (quoting 20 U.S.C. § 1232g(a)(4)(A)(ii)). Using this reasoning, an adult volunteer who helps in a classroom by grading student papers may be deemed as acting as an agent for the school district. While the court in *Falvo* proceeded to determine that a fellow student does not thereby become a “school official” with a legitimate educational interest in having access to another student’s graded papers, the courts might reach a different conclusion with respect to an adult volunteer.

8. NEB. REV. STAT. § 79-2,104(1) (Reissue 1996).
9. A review of the legal requirements for coaching and other athletic personnel (e.g., athletic trainers) in public schools in other states is set forth in James B. Gessford et al., *Athletic Personnel and Volunteer Issues*, in LEGAL HANDBOOK ON SCHOOL ATHLETICS (National School Boards Association ed., 1997). This article reports that, as of 1996, Nebraska was one of only twelve states that continued to base coaching qualifications on teacher certification for all coaches. *See id.* at 10-8 & n.31. The trend in other states has been to establish separate coaching certification requirements and to allow non-faculty coaches to be used, but to require coaching education for these non-faculty coaches. *See id.* at 10-8.
10. *See* NEBRASKA SCHOOL ATHLETIC ASSOCIATION, NSAA YEARBOOK 2000-2001, Art. 2 (Activity Bylaws), § 2.12.1 (“any team competing in interschool competition must be under the direction of a member of the school’s faculty”); § 2.12.2 (“In order to serve as a head or assistant coach or sponsor of any activity sponsored by the Nebraska School Activities Association, the individual must possess a valid Nebraska Teaching Certificate or Nebraska Administrative and Supervisory Certificate and have a written contract of employment as a coach or sponsor with the school in which he/she is to perform these duties”). An exception to the certification requirement does exist. *See id.* at § 2.12.2.1 (“Individuals who possess a Provisional Trade Certificate endorsed in coaching may be employed by a school district as a head or assistant coach in NSAA sponsored activities”). Another exception exists for persons who serve as coaches’ aides. *See id.* at § 2.12.3 (“Schools may contract non-certificated personnel to assist with their activities programs, but such personnel shall be coaches’ aides.”). Coach’s aides “must

Frequently, alumni and other adults desire to assist in extracurricular activities by participating in scrimmages or other similar activities with students. These types of activities have led to student injuries and litigation.<sup>11</sup> The NSAA rules thus restrict volunteers and others from “participat[ing] in any practice session, drill, scrimmage, or game in which a school team is involved.”<sup>12</sup>

### III. WHAT COMPENSATION OR BENEFITS CAN VOLUNTEERS BE GIVEN?

A principal motivation in using volunteers is to get tasks performed for free. The Kearney Little League Baseball Association recently defended litigation, which went to the Nebraska Court of Appeals twice, in order to solidify the principle that volunteers are not

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carry out specific directions given by the head coach” and is restricted with respect to the scope of their duties. *Id.* at § 2.12.3.1 to 2.12.3.4.

11. *See, e.g., Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559 (E.D. Pa. 1999); *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995). In *Hearon*, a high school wrestler at Dundy County High School was injured while being taught how to do a fireman’s carry by Tim May. *See* 248 Neb. at 889-90, 540 N.W.2d at 127-28. May had been hired by Dundy to be a referee for a wrestling meet between Dundy County High School and Culbertson High School, but he was not otherwise employed by Dundy. *See id.* at 889, 540 N.W.2d at 127. At the conclusion of the wrestling meet, May “volunteered to instruct the Dundy wrestlers on certain wrestling maneuvers.” *Id.* May executed a fireman’s carry on Hearon. *See id.* at 890, 540 N.W.2d at 128. Instead of landing on his hip or his back, Hearon landed on his head. *See id.* As a result, his cervical spine was fractured and displaced. *See id.* Hearon and his mother then filed a lawsuit against May, Dundy County Public Schools, and the athletic director at Dundy. *See id.* The court ruled that the case could proceed to trial, stating:

We hold that instructors, teachers, and coaches are liable for injuries sustained by an instructee if such injuries are received by the instructee while the instructor, teacher, or coach engages in physical contact with the instructee and the instructee’s injuries are the proximate result of the ordinary negligence of the instructor, teacher, or coach.

248 Neb. at 894, 540 N.W.2d at 130.

The *Sciotto* decision also involved an injury to a student as a result of a wrestling maneuver. *See Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559, 561 (E.D. Pa. 1999). The injury occurred during a wrestling practice at which alumni participated, by invitation of the coach. *See id.* Greg Fendler, one of the volunteer alumni, demonstrated a “half-nelson” on team member John Sciotto, a 16-year-old weighing 110 pounds. *See id.* at 562. Fendler was a 22-year-old weighing 145 to 150 pounds. The young Sciotto sustained an injury to his spinal cord and is now quadriplegic. *See id.* The court ruled that Sciotto’s case against the school district, the coach, and the alumni volunteer could proceed to trial, observing that because of the alumni volunteer’s greater experience, age, and weight, his conduct of wrestling with Sciotto was “wanton and reckless” sufficient to constitute an assault and battery. *Id.* at 577.

12. NEBRASKA SCHOOL ATHLETIC ASSOCIATION, *supra* note 10, at § 3.11 (approving ruling and interpretation).

required to be compensated.<sup>13</sup> Nevertheless, to encourage volunteers, inducements are often needed and the question frequently arises as to what pay, benefits, or reimbursements may be made to volunteers.

The question of "pay" for volunteers is affected by state and federal law. With regard to state law, the question is whether authority exists to provide pay or benefits to the volunteer.<sup>14</sup> With regard to federal law, the question is reversed, and it becomes an issue of whether the volunteer must be paid (e.g., in the form of a "minimum" or "prevailing wage").

### A. Statutory Authority to Pay Salary, Benefits, or Expenses of Volunteers

School board members are the forgotten "volunteers." In Nebraska, "members of a school board . . . shall not receive a per diem."<sup>15</sup> This means that school board members are not to be paid any salary, and they are only to be reimbursed for "their actual and necessary expenses incurred while carrying out their duties."<sup>16</sup>

The authority to provide reimbursement for expenses and miscellaneous benefits to school board members and other volunteers is primarily controlled by the Local Government Miscellaneous Expenditure Act.<sup>17</sup> Because the Act regulates even seemingly trivial expenditures, such as serving coffee at Board meetings, it is commonly referred to as the "Coffee Act."

The Coffee Act defines a "volunteer" as a person who is not elected, appointed, or employed by the school and "who, at the request or with the permission of [the school], engages in activities related to the purposes or functions of [the school] for its general benefit."<sup>18</sup> Volunteers may be paid or reimbursed for their "actual and necessary expenses" incurred in attending or participating in events, provided the school board gave prior approval for the event and for the payment or reim-

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13. See *Thomas v. Kearney Little League Baseball Ass'n*, 5 Neb. App. 405, 558 N.W.2d 842 (1997). In *Thomas*, a coach of a little league all-star baseball team sued the Little League organization, claiming he was entitled to \$1,200.00 as compensation for his coaching services. See *id.* at 407, 558 N.W.2d at 844. The court acknowledged the general rule that "the law implies a promise by the person knowingly accepting the services to pay the reasonable value of the services." *Id.* at 408, 558 N.W.2d at 845. This legal presumption was determined to have been rebutted where the "services were rendered to a community service organization under circumstances for which no reasonable person would expect compensation." *Id.* at 412, 558 N.W.2d at 847.

14. See *Robertson v. School Dist. No. 17*, 252 Neb. 103, 111, 560 N.W.2d 469, 475 (1997) ("The school district is a creature of statute and possesses no other powers than those granted by the Legislature").

15. NEB. REV. STAT. § 79-546 (Reissue 1996).

16. *Id.*

17. NEB. REV. STAT. §§ 13-2201 to 13-2204 (Reissue 1997).

18. NEB. REV. STAT. § 13-2202(6).

bursament.<sup>19</sup> Reimbursable expenses include registration costs, mileage, lodging, and meals (but not meals at Board meetings, unless the meal is at a joint public meeting with another governing body).<sup>20</sup> Beverages (of a non-alcoholic variety) and meals may be provided to volunteers during or immediately following their participation in the volunteer activity.<sup>21</sup> Recognition dinners may also be provided to volunteers (at a maximum of \$25.00 per person),<sup>22</sup> and volunteers may be awarded "plaques, certificates of achievement, or items of value" in accordance with a preexisting policy of the School Board.<sup>23</sup> When the volunteers' spouses attend the recognition dinner, the spouses will go hungry (or pay for their own plate), since the school is not authorized to pay for any expenses incurred by or on behalf of a volunteer's spouse.<sup>24</sup>

Other Nebraska statutes specifically authorize additional benefits that can be provided to school volunteers. School volunteers may be given a free activities pass which may be used by both the volunteer and the volunteer's spouse.<sup>25</sup> School board members may be provided with insurance coverage ("hospitalization, medical, surgical, accident, sickness, or term life"),<sup>26</sup> and liability insurance can also be provided to school board members and other volunteers who may be classified as agents of a school district.<sup>27</sup>

## B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) requires that minimum wages and overtime be paid to individuals who perform services.<sup>28</sup> Public school "volunteers" are exempt from the FLSA.<sup>29</sup> To be a "volunteer" for purposes of the FLSA exemption, the following two-part test must be met:

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

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19. NEB. REV. STAT. § 13-2203(1).

20. *See id.*

21. *See* NEB. REV. STAT. § 13-2203(2)(b).

22. *See* NEB. REV. STAT. § 13-2203(2)(b)(iii).

23. NEB. REV. STAT. § 13-2203(3).

24. *See* NEB. REV. STAT. § 13-2204.

25. *See* NEB. REV. STAT. §§ 79-517 to 79-518 (Reissue 1996).

26. NEB. REV. STAT. § 79-502 (Reissue 1996).

27. *See* NEB. REV. STAT. § 79-516(8) (Reissue 1996).

28. *See* 29 U.S.C. §§ 201 to 219 (1994).

29. *See* 29 U.S.C. § 203(e)(4)(A). Nebraska's Wage and Hour Act, NEB. REV. STAT. §§ 48-1201 to 48-1209.01 (Reissue 1998), provides an exemption to minimum wage requirements for work done for an educational organization "when the employer-employee relationship does not in fact exist or when the services rendered to such organization are on a voluntary basis." NEB. REV. STAT. § 48-1202(3)(e).

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.<sup>30</sup>

The first part of the volunteer test involves the compensation which may be given to the volunteer. To maintain volunteer status (and thus, not be required to be paid minimum wages and overtime), the individual may only be paid "expenses, reasonable benefits, [and] a nominal fee."<sup>31</sup> The FLSA regulations give a school-related example of a permitted expense reimbursement:

A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service.<sup>32</sup>

The FLSA regulations also clarify that "payment for the cost of meals and transportation expenses" incurred in providing volunteer services may be made to a volunteer;<sup>33</sup> furthermore, providing reimbursement for volunteer training programs and materials and reasonable benefits, such as insurance coverage (liability, health, life, disability, and workers' compensation), pension plans, and length of service awards, is permitted.<sup>34</sup> Even a nominal fee is permitted to be paid, so long as the fee is not "tied to productivity" and otherwise meets the general "economic realities" test that the FLSA sets forth to determine whether any particular compensation will take an individual out of the "volunteer" status.<sup>35</sup>

The second part of the volunteer test involves the type of work which a volunteer may perform. If the individual is employed by the School District, the duties as volunteer may not be "similar or identical" to those for which the individual is employed to perform.<sup>36</sup> For example, a school janitor cannot "volunteer" to clean up after the dance. Aside from that restriction, there is no restriction in the FLSA on the type of work which a volunteer may perform.<sup>37</sup> The regulations give the following school-related examples of volunteer services: "Examples of services which might be performed on a volunteer basis

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30. 29 U.S.C. § 203(e)(4)(A).

31. 29 C.F.R. § 553.106(a) (2000).

32. 29 C.F.R. § 553.106(b).

33. *Id.*

34. NEB. REV. STAT. § 553.106(c)-(d).

35. NEB. REV. STAT. § 553.106(e)-(f).

36. 29 C.F.R. § 553.103(a) (2000).

37. See 29 C.F.R. § 553.104(a) (2000). Note that if the work involves a school building project (construction, alteration, or repair, including painting and decorating), a "prevailing wage" may be required to be paid for under the Davis-Bacon Act, 40 U.S.C. § 276a (1994). In general, the Act applies when work is done on a building which is financed in whole or in part by the federal government. An exception for volunteers was created by the Community Improvement Volunteer Act of 1994, 40 U.S.C. § 276d (1994). The tests for the Davis-Bacon Act volunteer exception are similar to those for the FLSA volunteer exception. See *id.*

when so motivated include . . . assisting in a school library or cafeteria; or driving a school bus to carry a football team or band on a trip."<sup>38</sup>

### C. Other Considerations Involved In Paying Volunteers

The question of whether to pay volunteers is also impacted by whether such payment will make the individual subject to workers' compensation<sup>39</sup> and unemployment compensation laws,<sup>40</sup> and whether such payment would affect the individual's protection under volunteer immunity statutes.<sup>41</sup>

## IV. WHAT LIABILITY DO VOLUNTEERS FACE AND CREATE?

### A. Immunity Protection for Volunteers

When approached to volunteer, people often decline for fear of being sued. The Federal Volunteer Protection Act of 1997 was enacted to overcome this fear.<sup>42</sup> This Act provides that "no volunteer of a non-profit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity," provided certain conditions are satisfied.<sup>43</sup>

Two cautionary flags must be raised regarding over-reliance on the Federal Volunteer Protection Act of 1997. First, the law only protects the volunteer. It does not protect the school district itself or the

38. 29 C.F.R. § 553.104(b).

39. The Nebraska Workers' Compensation Act requires that there be a "contract of hire." NEB. REV. STAT. § 48-115(2) (Reissue 1998). As the Nebraska Attorney General has recognized, "[a] 'contract of hire' connotes that the worker will receive payment of some kind in return for his/her labor." 1995 Neb. Att'y Gen. Op. No. 95008 (citing 3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 64.01 (2000)) (concluding that students participating in school to work activities on an unpaid basis are not covered by the Act).

40. The Employment Security Act defines "employment" as "[a]ny service performed . . . for wages or under any contract of hire," which suggests that unemployment benefits would not be applicable in a volunteer situation. See NEB. REV. STAT. § 48-604(1) (Reissue 1998); cf. Seldin Dev. & Management Co. v. Chizek, 208 Neb. 315, 303 N.W.2d 300 (1981) (stating that student involved in school-to-work program was not subject to Employment Security Act).

41. See, e.g., Federal Volunteer Protection Act of 1997, 42 U.S.C. § 14505(6) (Supp. IV 1998) (defining "volunteer" as individual who performs services and does not receive compensation other than reasonable reimbursement or any thing of value in lieu of compensation in excess of \$500.00 per year).

42. 42 U.S.C. §§ 14501-05 (Supp. IV 1998).

43. 42 U.S.C. § 14503(a). The conditions, in brief, are that the volunteer be acting within the scope of responsibilities at the time of the act or omission, that the volunteer hold any license or certificate required to have been held, that the harm not be caused by willful or criminal misconduct, gross negligence, or similar fault, and that the harm not be caused by the volunteer operating a motor vehicle or other vehicle which requires a license and insurance. See *id.*

school's regular personnel (e.g., administrators, teachers, etc., or members of the School Board). The School District and school personnel could be potentially liable for the negligent or unlawful acts of the volunteer on an agency-type theory, and they could also be held liable for negligence in assigning a non-qualified volunteer to perform a particular task.

Second, the federal law has not been legally tested. Some authorities have expressed the opinion that the law is unconstitutional.<sup>44</sup>

Other measures to alleviate volunteers' concerns about liability include: (1) use of releases signed by participants in activities in which the volunteers are involved; (2) securing liability insurance coverage for the volunteers;<sup>45</sup> (3) providing indemnification for volunteers<sup>46</sup> (i.e., defending volunteers and paying for any claims against the volunteers either in advance by agreement or after a claim is made to the extent permitted by state law).

In some states, volunteers are protected by tort claims acts.<sup>47</sup> In Nebraska, the Political Subdivisions Tort Claims Act provides protec-

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44. See Alfred R. Light, *Conscripting State Law to Protect Volunteers: The Odd Formulation of Federalism in "Opt-Out" Preemption*, 10 SETON HALL J. OF SPORT L. 9 (2000). But see Kenneth W. Biedzynski, *The Federal Volunteer Protection Act: Does Congress Want to Play Ball?*, 23 SETON HALL LEGIS. J. 319, 350 (1999) (concluding that, while there are "some serious constitutional issues" about the Act, "this author has his doubts about whether constitutional challenges [to the Act] would be successful").

45. School Districts are authorized by statute to maintain liability insurance on any person who is or was "a school board member or an officer, employee, or agent of the school district." NEB. REV. STAT. § 79-516(8) (Reissue 1996). The question is whether the individual volunteer is an "agent," or whether authority to maintain such insurance may be implied from other statutory duties of the School District.

46. School districts are authorized by statute to provide indemnification to "a school board member or an officer, employee, or agent of the school district." NEB. REV. STAT. § 79-516(2), (3), (4), (6) (Reissue 1996). The decision in *Murray v. Zarger*, 642 A.2d 575 (Pa. Commw. Ct. 1994), illustrates the protection which state indemnification laws can provide to volunteers. In *Murray*, a parent sued the school district, volunteer diving coach, and the owner of the vehicle in which the coach was driving, when a student was killed after being involved in an auto accident while en route to a diving meet. See *id.* The court determined that the coach could be provided indemnification under the Pennsylvania statutes even though he was a volunteer. See *id.* at 577. The Pennsylvania statutes define an employee for purposes of indemnification as "any person who is acting or who has acted on behalf of a government unit, whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit . . ." See *id.* at 576. The court ruled that since the volunteer coach was acting on behalf of the school district, was authorized to drive the students, and possessed a good faith reasonable belief that transportation of the diving team to a diving meet was one of his duties as assistant diving coach, he was entitled to indemnification. See *id.* at 578-79.

47. See, e.g., *Sunderland v. Tri-City Community Unit Sch. Dist. No. 1*, 549 N.E.2d 992 (Ill. App. Ct. 1990). In *Sunderland*, plaintiff was injured when the student manager of the volleyball team, who was unpaid and acting under the direction

tion against tort claims to some, but not all, volunteers.<sup>48</sup> The Act extends tort claim protection to “employees,” and defines the term “employee” as including members of the governing boards (e.g., members of a school board), appointed members of boards, and volunteer firefighters and rescue squad personnel.<sup>49</sup>

It should also be observed that some individuals may be reluctant to volunteer in public schools for fear of their own personal safety. The Nebraska Legislature has taken action, through amendment of the student discipline statutes, to provide at least some protection in this regard.<sup>50</sup>

## B. District Exposure

The use of volunteers exposes a school district and its officials to potential liability in an unlimited number of ways. To the extent that the District or its officials have a duty to supervise or provide safe facilities and programs, the use of volunteers will create potential liability where the District fails to provide this supervision or fails to provide a safe program.<sup>51</sup> A school district’s liability exposure for volunteers includes not only claims stemming from the volunteers’ acts, but also from claims based on the school district’s failure to protect the volunteer.<sup>52</sup>

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and supervision of the coaches, wheeled a volleyball stand onto the gym floor and the stand separated from the support, landing on the plaintiff’s foot. *See id.* at 993. The court concluded that the manager was entitled to the protection of the Illinois Local Governmental Employees Tort Immunity Act, which defined an employee as including a “volunteer . . . whether or not compensated”. *See id.* at 994.

48. *See* NEB. REV. STAT. §§ 13-901 to 13-926 (Reissue 1997).

49. *See* NEB. REV. STAT. § 13-903(3). Note that statutory protection is provided for those who assist with cleaning up hazardous wastes. *See* NEB. REV. STAT. §§ 81-1567 to 81-1570 (Reissue 1999). This liability protection is likely to be seldom used in the school context.

50. *See* NEB. REV. STAT. § 79-267(3) (Reissue 1996)(grounds for student expulsion include “[c]lausing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student”); § 79-268(3)(principal may suspend student who has been recommended for expulsion, on an immediate basis pending a hearing, where the student presents risk of “a personal injury to the student himself or herself, other students, school employees, or school volunteers”); § 79-283(3)(student may be expelled for a longer period of time where the expulsion is for “the knowing and intentional use of force in causing or attempting to cause personal injury to a school employee, school volunteer or student”).

51. *See, e.g.,* C.P. v. Township of Piscataway Bd. of Educ., 681 A.2d 105 (N.J. 1996) (regarding school board sued under tort and constitutional claims for sexual molestation of a girl by a volunteer instructor in the school-sponsored swimming program).

52. *See, e.g.,* Teters v. Scottsbluff Pub. Sch., 256 Neb. 645, 592 N.W.2d 155 (1999)(regarding school district sued by a parent who had volunteered on a school-sponsored outdoor education program, where parent was injured while using an obstacle course known as the “slide-for-life”).

A service which volunteers frequently provide to public schools is that of driving youth to different activities. The decision in *McCurry v. School District of Valley*<sup>53</sup> illustrates the liability exposure faced from just such a situation. In *McCurry*, an extra driver was needed for a school-sponsored ski trip. A teacher asked Scott Nielsen to drive his (Nielsen's) van on the trip, which Nielsen agreed to do without wage or salary. The School District and Nielsen agreed that Nielsen would be reimbursed for gas and lodging, but he was to cover his own expenses for food and skiing. During the trip, Nielsen lost control of his van; the van rolled over and a student was killed. Both Nielsen and the School District were sued. Nielsen paid a settlement. The court ruled that "reasonable minds could differ as to whether Nielsen was an agent of the school district" so as to impose liability on the School District under the respondeat superior doctrine.<sup>54</sup> The School District was only able to escape liability on the basis that Nielsen's settlement served to release not only Nielsen, but the School District, as well.

While respondeat superior liability may exist for volunteers in some circumstances, a recent Illinois Supreme Court decision illustrates that an organization's legal responsibility for the acts of its volunteers is in some circumstances less than its responsibility for its employees. In *Hills v. Bridgeview Little League Association*,<sup>55</sup> two assistant coaches assaulted the coach of an opposing all-star youth baseball team during the game.<sup>56</sup> The victim sued the Little League Association on the theory that its manager, who was an employee, failed to stop the attack by the two assistant coaches, who were both volunteers.<sup>57</sup> The court held that the Association could not be liable for the assault by the volunteers, and it reversed a judgment imposing liability on the Association.<sup>58</sup> The court quite clearly recognized that the result would be different for an assault by employees, stating:

[Restatement (Second) of Torts] Section 317 is addressed primarily to the most common form of master-servant relationship, that of employer and employee. In a situation such as that presented here, where it is alleged that a

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53. 242 Neb. 504, 496 N.W.2d 433 (1993).

54. *Id.* at 513, 496 N.W.2d at 440. To establish the possible agency relationship, the court relied on the fact that

the trip also furthered the interests of the school district . . . he was given a destination and an approximate departure and arrival time . . . he had no control over who rode in his van; and while he was not being paid wages or a salary to drive, certain of his expenses were being defrayed by the school district.

*Id.* But see *State ex rel. Higgs v. Summers*, 118 Neb. 189, 194, 223 N.W. 957, 959 (1929) ("the school district is not bound by the acts of volunteers").

55. Nos. 87895, 87910, 2000 WL 1709913 (Ill. Nov. 16, 2000).

56. See *id.* at \*1.

57. See *id.* at \*7.

58. See *id.* at \*17.

master has a duty to intervene in an ongoing criminal attack committed by its servants, there is a theoretical justification for imposing a duty to control upon the master, when the master is an employer and the servant is a paid employee. Because an employer controls an employee's salary, an employer has economic leverage and, hence, a measure of actual control over an employee. During an ongoing assault, an employer may use that economic leverage, and exercise his authority as master, by verbally threatening to discipline, demote or discharge an employee if he or she does not stop the assault. Arguably, even in the heat of an attack, an employee may pause when threatened with the loss of his livelihood or a portion thereof. Imposing a duty to control on the employer in such a situation is thus, generally speaking, warranted.

In the case at bar, however, [the assaulting coaches] were not paid employees of Bridgeview. They were volunteers. Unlike an employer, a master of a volunteer has no inherent economic leverage or control over that volunteer. . . . [A] verbal threat by [the manager] to "discipline" or "fire" the assistant coaches would have been worthless as an effective means of control.<sup>59</sup>

### C. Anti-discrimination Laws

Federal and state laws prohibit discrimination against employees on the basis of race, color, religion, sex, national origin, marital status, age, pregnancy, bankruptcy, military service, AIDS or HIV status, disability, and unlawful retaliation.<sup>60</sup> The courts have held that these laws, being applicable only to employees, are not applicable to volunteer workers.<sup>61</sup>

Unlike many other anti-discrimination statutes, the Americans with Disabilities Act (ADA) covers individuals who are not employees,

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59. *Id.* at \*16 (citations omitted).

60. *See, e.g.*, 42 U.S.C. §2000e (1994) (Title VII); Nebraska Fair Employment Practice Act, NEB. REV. STAT. §§ 48-1101-1126 (Reissue 1998); Equal Pay Act (29 U.S.C. §206(d)) (1994); 20 U.S.C. §1681-1688 (1994) (Title IX); Immigration Reform and Control Act (8 U.S.C. § 1324(b)); Age Discrimination in Employment Act 29 U.S.C. §§ 621-634 (1994); Act Prohibiting Unjust Discrimination in Employment Because of Age, NEB. REV. STAT. § 48-1001-1010; Pregnancy Discrimination Act (42 U.S.C. § 2000e(k)) (1994); Bankruptcy Act 11 U.S.C. § 525; Vietnam Era Veteran's Readjustment Assistance Act (38 U.S.C. § 4311); Americans With Disabilities Act (42 U.S.C. § 12101 et seq.); NEB. REV. STAT. § 20-131.

61. *See City of Fort Calhoun v. Collins*, 243 Neb. 528, 500 N.W.2d 822 (1993); *Graves v. Women's Professional Rodeo Ass'n*, 907 F.2d 71 (8th Cir. 1990) (Title VII case); *Hall v. Delaware Council on Crime & Justice*, 780 F. Supp. 241 (D. Del. 1992); *Tadros v. Coleman*, 717 F. Supp. 996, 1004 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 186 (1990); *EEOC v. Pettegrove Truck Service, Inc.*, 716 F. Supp. 1430 (S.D. Fla. 1989); *Shoenbaum v. Orange County Ctr. for Performing Arts*, 677 F. Supp. 1036 (C.D. Cal. 1987); *Smith v. Berks Community Television*, 657 F. Supp. 794 (E.D. Pa. 1987); *Beverly v. Douglas*, 591 F. Supp. 1321 (S.D.N.Y. 1984); Diane C. Desautels, Note, *Discrimination Law-Statutory Protection for Volunteers Against Discrimination*, 11 W. NEW ENG. L. REV. 93 (1989). *But see Haavistola v. Community Fire Co.*, 6 F.3d 211, 222 (4th Cir. 1993) (stating that in the event a volunteer receives "indirect but significant remuneration" in exchange for services, the volunteer may qualify as an employee under Title VII).

to the extent public agencies, such as public school districts, are involved.<sup>62</sup> Under Title III of the ADA, individuals with disabilities cannot be denied the opportunity to participate in or benefit from the activities of public accommodations.<sup>63</sup> Individuals with disabilities who desire to participate in volunteer activities must be permitted to do so on an equal basis to that afforded other individuals.

## V. STEPS TO TAKE IN USE OF VOLUNTEERS

### A. The Selection Process

- (1) Determine the number and type of volunteer positions to be used.
- (2) Develop "job descriptions" for volunteers, detailing essential functions, qualifications, and authority of the volunteers.
- (3) Screen potential volunteers: (a) medical examinations where appropriate; (b) criminal background checks where appropriate; and (c) reference checks — all using similar processes as for selecting employees.
- (4) Execute a written volunteer agreement.
- (5) Train volunteers on school policies and safety issues.
- (6) Determine process to "terminate" the volunteers and include it in the written volunteer agreement.

### B. The "Pay" Issues

- (1) Determine what, if any, benefits and expenses are to be paid or reimbursed.
- (2) Develop a volunteer agreement, setting forth the benefits and expenses to be provided.

### C. The Liability Protection Issues

- (1) Determine what liability insurance coverage exists and if there is a need to expand coverage.
- (2) Determine what releases/indemnification agreement to include in the written volunteer agreement.

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62. 42 U.S.C. § 12101 (1990); *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794.

63. *See* 42 U.S.C. §§ 12181 to 12189.