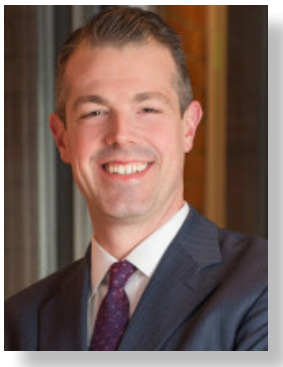
MASB
MICHIGAN ASSOCIATION OF SCHOOL BOARDS

Fall 2018

Council News

Michigan Council of School Attorneys

President's Letter



Robert T. Schindler, J.D.
Partner, Lusk Albertson

Welcome to the 2018-2019 school year! This marks my 12th school year practicing as a school law attorney. And to be honest, I feel as though I have gotten to practice in the golden age of school law—though maybe it should be the chaotic age. We have seen incredible legislative changes within the past decade, many of which we are still litigating and trying to interpret.

And it isn't just the Legislature making all of the changes. Societal and regulatory changes have been major in recent years. School law attorneys today have to deal regularly with issues that those in our field only 20 years ago likely never considered. From the locker room usage of transgender students, to service and comfort animals, open carry of guns in schools, school shootings and right-to-work. And now school lawyers are on the forefront of this changing landscape helping schools, as well as our state and nation, rethink education and the school environment in so many new ways.

It is for these reasons I have been glad to be a member of the Michigan Council of School Attorneys. It has been my pleasure to get to know so many of the school lawyers in this state. I believe that MCSA represents a group of dedicated professionals who truly believe in working toward the best interest of schools every day. I have found MCSA to be a great resource in gathering information to better serve my school clients. As a result, I am now honored to be president of MCSA to do my part in continuing this resource for others.

With that in mind, I hope you enjoy this edition of the Council News and have an enjoyable and prosperous 2018-2019 school year!

MCSA Fall Conference

8 a.m. – 3 p.m. · Nov. 1, 2018 · Amway Grand Plaza Hotel, Grand Rapids

What new school law issues will you face this year? Be prepared for your next legal challenge by attending the Michigan Council of School Attorneys' Fall Conference, where leaders in education law will share valuable information on crucial issues important to school attorneys and school officials. The 2018 edition of the Fall Conference includes two three-hour preconference sessions for MASB's Annual Leadership Conference that focus on the following school law topics:

Morning Sessions

- **Education Records and Student Data: Confidentiality Requirements and Best Practices**. The legal issues regarding the privacy of student data and education records continue to evolve due to new guidance issued by the federal government and additional requirements passed by the Michigan Legislature.

- **Student Discipline: Process, Process, Process.** Discussion will cover what due process and Michigan law requires and legal pitfalls to avoid when a school board conducts a student discipline hearing or appeal.

- **School Safety Panel Discussion: Legal Issues and Liability**. A panel of school attorneys will discuss multiple topics relating to school safety, including new laws or pending legislation, legal concerns associated with safety initiatives and liability issues.

Afternoon Sessions

- **Tenure Act Update: Layoffs, Recalls and Other Personnel Decisions**. Recent court decisions have provided new interpretations on the legal rights that tenured teachers have in regard to layoffs and recalls based on their evaluation outcomes.

- **Hot School Law Issues and Q & A Panel**. School law experts will share a short update on special education, employment law and other areas that they specialize in while also answering all of your legal questions.

- **Identifying and Managing Board Member Conflicts of Interest**. This session will cover the conflict of interest laws that apply to school board members and will provide guidance on identifying potential conflicts of interest and what steps are necessary to navigate the situation.

Who should attend? This conference is designed for attorneys, board members, superintendents, principals and others involved in the legal aspects of education. Cost will be $180 for attending both the morning and afternoon sessions (includes lunch) or $90 to attend either the morning or the afternoon session separately.

Download a registration form at www.masb.org/alc.

OFFICIAL NOTICE

MCSA ANNUAL MEMBERSHIP MEETING

The 2018 MCSA Membership Meeting will be held Thursday, Nov. 1, 2018, beginning immediately after the Fall Conference at the Amway Grand Plaza Hotel in Grand Rapids, Mich. Under Article V, Section 4 of the MCSA Bylaws, directors are elected by the members present and voting at this meeting.

Enforcing School Firearms Policies at Polling Places on School Property

Gary J. Collins, J.D. and William J. Blaha, J.D., Attorneys, Collins & Blaha, P.C.

In a historic and precedent-setting opinion decided July 27, 2018, the Michigan Supreme Court upheld the right of school districts to regulate firearms on school property. The Supreme Court issued the decision in two cases heard together before the court, *Michigan Gun Owners, Inc v Ann Arbor Public Schools and Michigan Open Carry, Inc v Clio Area School District.*

The Supreme Court specifically invited the Michigan Association of School Boards, as a representative of school districts throughout Michigan, to join Ann Arbor Public Schools by filing an amicus brief with the court. Subsequently, MASB and numerous other organizations, including the City of Ann Arbor, Brady Center to Prevent Gun Violence, Michigan Education Association, State Bar of Michigan Negligence Section, a public school academy and a student group called Engage 18, filed amicus briefs in support of Ann Arbor Public Schools and Clio Area School District.

The cases originated when both Ann Arbor Public Schools and Clio Area School District adopted policies to regulate open carry of firearms on school property. The plaintiffs, who were gun rights advocacy groups and parents of students in the respective school districts, asserted that the districts' policies were prohibited by the Michigan Firearms and Ammunition Act, which restricts local units of government from enacting or enforcing ordinances or regulations related to the ownership, registration, purchase, transportation or possession of firearms.[1]

The Supreme Court held that the Act does not prevent school districts from adopting policies that regulate firearms on school property since the Act's definition of "local unit of government" is limited to cities, villages, townships or counties.[2] The court found that the clear language in the statute made it unnecessary to conduct a field preemption analysis. The majority declined to decide whether the policies were barred by conflict preemption, finding that the plaintiffs had abandoned the issue. The court also did not decide whether the policies were barred due to conflict with other laws or legal rights, such as criminal laws or the constitutional right to vote.

In accordance with the Supreme Court's ruling, many school districts around the state have enacted policies regulating or prohibiting individuals from openly carrying firearms on school property. However, despite the court's decision, school districts may be limited in their authority to enforce firearm policies against individuals who enter school property to vote.

There are several reasons for such limitations. First, while there is no fundamental right to access school property, there is a fundamental right to vote.[3] Accordingly, any infringement on the right to vote will be evaluated by courts using the strict scrutiny standard of review, which would require school districts to establish that their firearm policies are narrowly tailored to advance a compelling governmental interest.

Second, polling places are regulated by cities, townships and counties, which are considered "local units of government" under the Act and, therefore, are expressly prohibited from regulating firearms.[4] In contrast, school districts are not classified as "local units of government" under the Act and, thus, are not expressly preempted from regulating firearms. This was an important component of the case presented to the Supreme Court.

Third, the cases presented to the Supreme Court justified school district regulation of firearms on the grounds that districts are obligated to provide for the safety and welfare of students and to minimize disruption to the educational environment, pursuant to the Revised School Code.[5] In the context of voting, the rights of school districts will be balanced against an individual's fundamental right to vote. This would present a case of first impression for the courts. Such a case may also include a discussion of conflict preemption, which the majority declined to consider in the Ann Arbor Public Schools case.

As an alternative to enforcing firearm policies at polling places, school districts could consider other approaches. For example, districts could eliminate the possibility of voters open carrying around students by not scheduling school on election days or by opting out of agreements with local municipalities to use school buildings as polling places. In the alternative, districts could implement additional security measures at the polls or segregate polls from the remainder of the school buildings with entrances and exits separate from students and school visitors.

[1]MCL 123.1102.
[2]MCL 123.1101(b).
[3]Reynolds v Sims, 377 US 533 (1964); Mejia v Holt Public Schools, 2002 WL 1492205 (WD Mich, 2002).
[4]MCL 123.1101-1102.
[5]MCL 380.11a(3)(a)-(b).

Examining the Potential Liability of Arming Teachers

Joel Gerring, J.D., Assistant Legal Counsel, Michigan Association of School Boards

With the July 27, 2018 Michigan Supreme Court decision regarding open carry in schools, some have suggested that security could be enhanced by statutes or policies that specifically allow district faculty or staff to carry a firearm. This article examines current relevant case law regarding some of the possible civil liability issues that would be relevant to such a policy.

Fact Pattern

For purposes of this article we will assume the following facts:

- A school district has created a policy in which certain teachers will be allowed to carry firearms (likely concealed) on a voluntary basis. This policy is passed as a general safety and security matter but is specifically meant to provide an armed response in an active shooter situation. It is unknown at this time what type of training might be offered to these volunteers, but we will assume that some form of training is developed and conducted by appropriate individuals familiar with applicable law enforcement and intervention techniques.
- After nearly two years without incident, a teacher who has been approved to carry a firearm on school property accidentally leaves the firearm in a bathroom stall. The firearm is then found by a student who, while showing it to a friend, discharges the weapon and injures another student.[1]

We will examine a few of the more likely theories of recovery a plaintiff might allege and attempt to ascertain what current case law these theories would be used as support.

Distinguishing Current School Shooting Litigation

A natural inclination when examining the liability implications of our fact pattern is to study the litigation outcomes of the school shooting situations we are already familiar with. In many of the cases involving third-party individuals who bring a firearm onto school property and then use that firearm to commit a violent act, the district at issue has faced some form of negligence lawsuit from the family of the victims. In virtually all such instances, the courts have held that public actors are not liable, whether it be under a primary theory of qualified immunity, discretionary immunity, lack of duty or lack of foreseeability. (See *Lewis v Newton Bd. Of Educ., 2018 Conn. Super. LEXIS 934 (Connecticut, 2018), Castaldo v Stone, 192 F. Supp. 2d 1124 (Colorado, 2001), Graham v Independent Sch. Dist. No. I-89, 22 F. 3d 991 (10th Cir, 1994), Kok v Tacoma Sch. Dist. No. 10, 179 Wn. App. 10 (Washington, 2013), James v Wilson, 95 S.W. 3d 875 (Kentucky, 1999), and Parmertor v Chardon Local Sch., 47 N.E. 3d 942 (Ohio, 2016).)*

Per the federal court in *Castaldo*, citing *Anderson v Creighton, 483 U.S. 635 (1987)*, "the linchpin of qualified immunity is objective reasonableness." In each case it was essentially found that imputing liability as to the district or to individual district employees was unreasonable given that the actions of the perpetrator were the sole intervening cause. In each case, the perpetrator supplied their own weapons and often, if not always, concealed those weapons until they began their attack, making a finding of liability not only "unreasonable" from an immunity standard but "unforeseeable" as to general or gross negligence.

While not always overtly discussed, the fact that the perpetrator of each incident gained access to the school via veiled or clandestine means and supplied their own weapons clearly factored into the reasonable/foreseeable analysis undertaken. In each case, the state actor defendants were never held accountable for being unaware of the presence of an otherwise concealed weapon prior to the perpetrator unveiling and using it. Every examination regarding the reasonableness of the actions taken by the state actors centered around:

- the policies and precautions in place in anticipation of such an event,
- any possible knowledge of the proclivities of the eventual perpetrators (if these individuals were known to the state actors, such as in the case of students or former students as perpetrators),
- or the state actor's actions in response to the events as they unfolded. See *Sanders v Bd. of County Comm'rs, 192 F.Supp. 2d 1094 (2001)*, where responders were held liable in the Columbine shooting for delaying medical attention to a wounded teacher for several hours, resulting in death, despite knowing that the danger had ceased.

What we do not have in the case law is an analysis of liability in situations where the perpetrator of the action, "the shooter," remains a third party, but the weapon used was supplied to the shooter via the conduct of a state actor (a teacher in our scenario).

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Ordinary Negligence

Aside from the public building exception and the negligent operation of a motor vehicle exception,[2] state actors (including school districts and their employees) can still be held liable under a general negligence theory in situations where the activity complained of does not involve a "uniquely governmental function," defined as an "activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." (See MCL 691.1401(b).) As it relates to schools, a uniquely governmental function would include the day-to-day running of the school as well as the hiring and supervision of staff, the administration of sports programs, operating a skilled trades program and so forth. These are all activities that are related to the public education mandate of the district, hence the district is immune from liability should an injury to an individual occur while carrying out those functions. (See *Deaner v Utica Community Sch Dist, 99 Mich App 103 (1980).*) In general, this mandate bars liability in all but the most unusual of circumstances. Given that "providing for the safety and welfare of pupils while at school or a school-sponsored activity" is specifically enumerated as a general powers' authority under the Revised School Code (MCL 380.11a(3)(b)), there is certainly a strong argument that any decision to arm teachers falls within the auspices of a governmental function decision. Whether or not this would be enough to overcome a possible finding of negligence, under the specifics of our fact pattern, must be explored more fully.

It should also be noted that the notion of what constitutes a "uniquely governmental function" within the context of public schools has historically been somewhat difficult to pin down. (See *Brosnan v Livonia Public Schools, 123 Mich. App. 377 (1983)* and *Tiggs v Flint Cmty. Schs., 2018 Mich. App. LEXIS 2119 (2018).*) Hence, districts cannot wholly rely on precedent in situations where the governmental function at issue is somewhat novel or has otherwise not been specifically addressed by a past court. This could also make the prospect of such a defense within our hypothetical somewhat more uncertain than it might otherwise seem.

A defendant district under our hypothetical would argue that the teacher at issue was allowed to carry a firearm as part of a district safety program and that undertaking steps to increase the safety and security of students while at school is clearly part of a district's government mandate. The fact that the instrument of safety was then mislaid, which in turn lead to a student injury, it would be argued, is irrelevant to the fact that the district is immune from liability when taking discretionary action to provide for student safety as part of its governmental role. Plaintiffs would likely counter that introducing a firearm into a school setting, regardless of the ostensible reasoning behind it, is an inherently dangerous and reckless decision in-and-of-itself, which outweighs the perceived benefit of stopping or otherwise limiting the comparatively rare occurrence of an active shooter situation. The plaintiff would likely propose that the district knew or should have known that the likelihood of harm far outweighed the possibility of benefit, likely highlighting the comparative lack of training a teacher would receive when compared to other individuals who are authorized to carry a firearm specifically as a means of protecting others (police officers).

At present there simply are no cases that are largely on-point with our fact pattern, hence predicting an outcome as to a general negligence theory is not absolute. Given current precedent, however, it is likely that a court would determine that school districts are free to carry out their responsibility of providing for the safety and welfare of students in any reasonable manner they see fit, and that having armed teachers is, at the very least, a plausible decision that falls within the scope of a district's governmental function thus barring liability under ordinary negligence.

Gross Negligence

Of course, in addition to an ordinary negligence theory, our hypothetical plaintiff would also argue that gross negligence occurred as well. This theory of recovery would insist that any teacher who allows a firearm to fall into the hands of a student has committed "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." (See MCL 691.1407(7)(a).) Based upon current precedent, including *Tarlea v Crabtree, 263 Mich. App. 80 (2004)*, it would appear that a gross negligence analysis would hinge upon the precautions taken by the teacher at issue in order to ensure that his or her firearm never fell into the hands of a student. In the *Tarlea* matter a student-athlete died after a football conditioning workout and the parents of the student sued alleging gross negligence against the coaches. Ultimately, it was concluded that gross negligence was not at issue, particularly because it was determined that the defendants took proper precautions to safeguard the athletes and therefore did not exhibit the "substantial lack of concern" necessary to send the matter to a jury.

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As it relates to our fact pattern, the question then becomes: what steps can a teacher take to ensure that their firearm is never misplaced in order to overcome a similar argument? As demonstrated above, significant anecdotal evidence exists that handgun owners do mislay or "lose track" of their guns to some degree. Such an occurrence would usually be ascribed to a lack of mindfulness or loss of concentration rather than due to the absence of any particular safety feature or precautionary measure (beyond the general habits that a gun carrier might develop regarding vigilance). One could argue that taking the gun out of the holster and setting it down, for any reason, is an example of a decision having been made that then implicates notions of foreseeability and likely outcomes.[4] Likewise, the fact that the gun was mislaid in the first place would be cited as evidence that any precautions taken to prevent such were inadequate. Unlike in the *Tarlea* case, where it can be plausibly argued that an athlete could become injured or even die during physical exertion no matter how many precautions are taken, in our fact pattern it can truly be stated that but for the teacher misplacing the gun the injury would not have happened.

Additionally, assuming that simply leaving a gun for a student to find constitutes recklessness, per the *Tarlea* decision, a showing that precautions were taken to minimize the likelihood of either losing the weapon or having it found and used by a student might be necessary. Of course, other than using a trigger lock or perhaps carrying the weapon unloaded (neither of which would make it an effective tool for immediately responding in an active shooter situation) there is little an armed teacher could do to prevent a gun that was lost in an area accessible to students from being found and used by a student. Hence, unlike the football coaches in *Tarlea*, who were able to demonstrate that they provided frequent water breaks to the players, as well as required medical clearance from each participant and held athletes with known medical conditions out of certain activities, it is difficult to discern what analogous steps could be taken to reduce the likelihood of injury in our scenario.

Moving past the notion of making the gun itself less dangerous to students, there remains the question of what steps a teacher could take to assist with "remembering not to forget" their gun should they set it down, even for a moment. Rules that would require that the firearm never be unholstered and remain on the person at all times (except when needed to be drawn and used) would obviously exist, and might absolve the district and administration from some or all liability, but would not solve the fundamental problem of a teacher who simply becomes distracted and sets the gun down inadvertently or for what was intended to only be a moment (perhaps to use the restroom in comfort or to adjust their holster or clothing) and then forgets to pick the gun back up before resuming their day.[5] In our hypothetical, it is quite likely that any teacher found to have mislaid a firearm in a school building that was then found by a student and used to injure another student, would be determined to have acted with the requisite "recklessness" (if not willfulness) to be susceptible to such a claim, regardless of how "innocent" such a mistake might otherwise have been.

Proximate Cause

Proximate cause is an element of every negligence theory and requires an examination of the foreseeability of consequences (as discussed above) as well as whether a defendant is legally responsible for those consequences. (See *Ray* below.) Although the courts have classically held that proximate cause must be "the one most immediate, efficient, and direct cause preceding an injury" (*Robinson v City of Detroit, 462 Mich 439 (2000)*), this does not mean that a proximate cause analysis is the same as a "but for" analysis.

In the matter of *Ray v Swager, 501 Mich. 52 (2017)*, the Michigan Supreme Court found that a cross-country track coach could be held liable for injuries that occurred after he instructed his runners to cross a two-lane road in the dark and despite a "Do Not Walk" symbol. The Court specifically noted that the plaintiff need not demonstrate that "but for" the actions of the defendant the injury would not have occurred; but rather only that the defendant's actions, while not the "immediate and direct" cause of injury, were "a cause in fact" of the injuries and that it was foreseeable that his instruction to have his athletes cross the street under those circumstances could lead to such a consequence, to wit:

Determining whether an actor's conduct was "the proximate cause" under the Governmental Tort Liability Act does not involve a weighing of factual causes. Instead, so long as the defendant is a factual cause of the plaintiff's injuries, then the court should address legal causation by assessing foreseeability and whether the defendant's conduct was the proximate cause.

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Foreseeability was a point of emphasis in the *Ray* case and would obviously be highlighted by a plaintiff in our fact pattern as well. The notion that it is foreseeable that a misplaced firearm in a school would be discovered by a student and then accidentally used to injure another student, it would be argued, is foreseeable if not likely. Moreover, any counterargument to this point would be defused by simply pointing to the likely training that each teacher would receive as part of their preparation for being authorized to carry; training that would no doubt discuss the dangers of students finding a mislaid weapon and emphasize that maintaining possession of the weapon at all times is paramount.

Distinctions between the facts of *Ray* and our hypothetical do, of course, exist. In *Ray*, the coach created a danger via an active decision to instruct his runners to cross the street despite conditions that should have dissuaded such. In our fact pattern, the hypothetical teacher has not so much "made a decision" that creates a danger so much as they have created a danger through inadvertence or mistake. We explore this concept more thoroughly below, but it may be a distinction without a difference.

As it relates to the district and its administrators, liability under our hypothetical scenario would lead to an examination of the policies and protocols in place regarding how teachers authorized to carry firearms conduct themselves with those firearms, as well as what steps they took to continue to train and monitor those individuals.[6] As discussed more extensively below, at present we simply cannot know what type of training would be considered adequate to provide teachers prior to arming them, therefore, we can only guess as to what type of training would pass muster during a judicial review of a district's possible blame. As a potential district defendant, this would of course be somewhat disconcerting. However, we can assume that providing some requisite minimum level of training, which should necessarily stress the importance of keeping possession of the firearm at all times, would mitigate a significant amount of culpability.

Likewise, it is of course completely unknown at this time what type of ongoing training, monitoring and follow-up would be considered adequate in order to achieve district and/or administrator dismissal from a lawsuit filed under our fact pattern. However, again, a showing of continued diligence with respect to training and, perhaps, frequent "inspections" of the weapon to ensure that it is continuously secured, would be crucial and would go a long way toward demonstrating that the district took all of the reasonable steps it could to prevent such an unfortunate event.

Due Process

In addition to basic theories of recovery involving the various negligence theories, under our hypothetical situation, there are also federal constitutional claims to be concerned with, most notably allegations that an injury occurring under said circumstances amounts to a depravation of liberty without due process of law. (See 42 USC §1983.)

The preeminent federal case regarding alleged state actor negligence resulting in a due process violation for personal injury is the U.S. Supreme Court matter of *DeShaney v Winnebago County Dep't of Social Services, 489 U.S. 189 (1988)*. The issue in *DeShaney* involved a child who was released into his father's care by county social services despite strong evidence that the father was abusive. The father subsequently beat the boy so severely that he suffered permanent mental impairments. The Court ultimately ruled in favor of the county, holding that state actors are not required to protect citizens from private violence or mishaps that are not "attributable to the conduct of its employees." In rendering this decision, however, the *DeShaney* Court specifically outlined that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." This case provided the framework that is most often used when plaintiffs asserting a due process claim against a state actor seek to defeat a qualified immunity argument. The plaintiff will assert either that a "special relationship" existed between the victim and the state actor giving rise to duty to protect on the part of the state actor against the harm at issue or assert that the state actor participated in the creation of the harm.

1. Special Relationship

In general, federal circuit courts, including the Sixth Circuit, have rejected the argument that a special relationship is created between school officials and students simply by virtue of the existence of compulsory attendance laws or even in situations where there is specific knowledge of a particular individual's vulnerability. (See *Stiles ex rel. D.S. v. Grainger Cty, Tenn., 819 F.3d 834, 848 (6th Cir. 2016).*) This is a theory of recovery that is more successfully argued in the context of prisons or other such institutions where the victim's

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presence was, in a sense, "forced" by the state. However, there is some possibility that a "special relationship" argument against a school district could gain some traction under certain circumstances.

In the very recent matter of *Doe v Hamilton County Bd. of Educ., 2018 U.S. Dist. LEXIS 135696 (August 2018)* the Sixth Circuit made reference to this possibility, noting that in the case of a basketball coach who was acting as a supervising chaperone on a trip during which some of his players were sexually assaulted by teammates, it "could be argued" that the school employee was not acting as a mere school official but also as a "care taker" with, presumably, heightened responsibilities (specifically citing *DeShaney*). Ultimately, the *Hamilton* Court did not examine this possibility further, finding that qualified immunity was an absolute bar to recovery because the defendant's failure was one of supervision only and therefore not an "affirmative act," but these comments remain dicta which should be considered when evaluating liability within the context of an employee who also becomes a designated and armed, "state-sponsored," protector. Certainly, it would be argued that losing a weapon in a school for a student to subsequently find is the type of "affirmative act" that was not present in *Hamilton*.

Interestingly, in its analysis, the *Hamilton* Court referenced an Eighth Circuit case, *Lee v Pine Bluff Sch Dist., 472 F3d. 1026 (8th Cir. 2007)* noting that a band director in that matter "had no special relationship duty to provide medical care to a student on school trip because the student voluntarily chose to attend the trip." Obviously, this particular point would not factor into a scenario involving an armed teacher in a classroom given that school attendance is not voluntary; which could be seen as an argument that is distinct, and therefore not undermined, by the general rule that compulsory attendance does not, in and of itself, create a *de facto* "special relationship." A plaintiff in our fact scenario would no doubt argue that when a teacher is given the explicit authority to carry a firearm as a safety precaution, that employee has now agreed to take on an "enhanced" role within the district which, in turn, demands a heightened responsibility for the safety of the district's students. It would be argued that this includes protecting those students from the enhanced dangers presented by the very firearm the teacher now carries.

Hence, while such a policy probably would not heighten the obligation owed to students in an active shooter situation (that is, simply because the school now has individuals who are equipped to respond with force in an active shooter situation, this does not mean that any failure to protect all students from injury in such a scenario imputes any increased liability as to the district). It very well could be concluded that the decision to allow the presence of an armed teacher does create a special relationship with students vis-à-vis that particular teacher or, perhaps more specifically, it heightens the care owed to the students in relation to that firearm. This argument would likely point out that students have very little, if any, input into such policies; thus, while a district is perhaps free to arm its teachers, they must also assume responsibility for the increased risk to students that results. This would be an interesting legal interplay with an outcome that is very difficult to predict. In the end, however, it is not the "special relationship" theory that most plaintiffs would pin their hopes on before a judge or jury.

2. State-Created Danger

Perhaps the strongest theory of recovery a plaintiff might assert in our hypothetical (from *DeShaney*), would be that the danger at issue was "created" by the district when it enacted a policy that provided for the introduction of a firearm into the classroom setting, as well as when the teacher agreed to take on the responsibility and then negligently lost possession and control of the firearm. The primary Sixth Circuit case dealing with the "state-created danger" theory is *Kallstrom v City of Columbus, 136 F.3d 1055 (6th Cir. 1998)*. In that case, the identities of several undercover police officers who testified against specific gang members in a criminal conspiracy case were released to the attorneys of those gang members, putting the lives of the officers and their families at substantial risk. The city claimed qualified immunity, however, the court found, in applying a balancing test, that even if a compelling state interest existed for having released the information this interest was far outweighed by the very serious potential consequences of their actions.[7]

Many other courts have since undertaken this same analysis but ultimately concluded that the state actor could still avail itself of governmental immunity protections, regardless of the "conscience shocking" details at issue.[8] In examining these cases, however, we see that this is generally because the state actor, at

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worst, was only ever guilty of having failed to provide protections that it otherwise *could* have provided but did not.[9] It is in matters similar to the *Kallstrom* facts where courts have drawn a distinction; determining that the state actor undertook an "active role" in creating the danger.

For additional guidance we can look to the case of *L.W. v Grubbs, 974 F. 2d 119 (9th Cir. 1992)*, in which an Oregon nurse who worked at a state-operated custodial institution for male offenders was sexually assaulted by a male inmate. She then brought a Constitutional due process claim against the facility's administrators. The facts of the case demonstrated that these administrators placed the plaintiff in a position of known danger by allowing her to work alone with a male inmate who was known to harbor extremely violent tendencies toward women. In its analysis, the court stated that the "danger creation" exception to qualified immunity "necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger" and contrasted this with the *DeShaney* ruling by noting that, unlike *DeShaney*, here the state officer was not merely placing the plaintiff in a situation she would have otherwise been in, but actually created the danger. Of additional importance is the court's recognition that the state actor did not have to foresee the risk to the plaintiff by allowing her to work alone with this particular inmate to be liable, but merely had to create "an opportunity" for the assault to occur "that would not have otherwise existed." The court noted that the defendants were not being held liable for the actions of the perpetrator, but rather for the acts that independently created the opportunity for the perpetrator to do what he did.

Obviously, any plaintiff advancing a federal due process argument under our fact pattern would advance similar theories, relying upon *Kallstrom* and *Grubbs*, among other cases, as precedent. In such a circumstance the theory of recovery could include not only due process violation allegation as to the teacher who misplaced the weapon, but also as to the district and its leadership for adopting and implementing a policy that allowed, and even encouraged, the presence of the weapon in the first place. This is particularly true if the plaintiff were to successfully convince the court to consider it axiomatic that persons who carry weapons occasionally mislay or misplace them (see footnote 1). In contrast to *DeShaney*, our plaintiff would assert that the injury only occurred because a state actor introduced a weapon into an environment where one otherwise would not have been present because that environment is populated largely by children. Our plaintiff would contend that such an act constitutes "affirmative conduct," which "created an opportunity" for injury that was not only foreseeable but likely. Such an argument certainly seems like a plausibly successful one from our current vantage point.

Conclusion

In this article we have undertaken an examination of only one aspect of potential liability as it relates to arming teachers: the "mislaid weapon" scenario. Other liability concerns, including hypotheticals involving a third party who carries a firearm onto district grounds with the approval of an administrator and then injures an individual with that weapon, were beyond the scope of this writing, but no doubt merit some exploration. We have also not explored the liability aspects of a teacher who accidentally shoots a bystander while engaged in an active shooter situation, nor the possibility of a teacher who accidentally discharges their weapon in school.[10] Obviously, the liability implications of arming teachers, and the fact scenarios under which such liability might be imputed, cannot be fully realized at present.

As it stands, there are certainly enough liability concerns to give pause to any district considering a policy of arming teachers. Obviously, any such policy would have to be very well thought out. Likewise, any legislative action along these lines would also need to be comprehensively crafted in order to provide the types of protections necessary to encourage individuals to take on such a responsibility. Even so, it would seem highly unlikely that any legislative initiative would provide immunity to a teacher who misplaces a weapon, regardless of the circumstances; meaning that any teacher volunteering for such a role would need to not only become fully informed regarding the liability risks but also be able to assess the general likelihood that, during a 180-day school year they will never, under any circumstance, lose possession of or otherwise misplace, their weapon at school. Certainly, it would be incumbent upon the district to provide comprehensive and ongoing training to these teachers, not only to enhance their effectiveness in their role as protector, but also as it relates to minimizing potential future liability in the manner described. The propriety and adequacy of that training would certainly be scrutinized by any court of law, and right now we simply cannot know what proper and adequate training might look like.

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Potential Liability, continued from Page 9

[1]Anecdotal evidence regarding the possibility of this type of occurrence is as follows:

9/11/14 – Teacher accidentally shoots herself in the leg with her gun while in school grounds; 12/5/14 – Teacher accidentally brings loaded gun to classroom, found by students; 9/12/16 – Teacher charged after leaving loaded gun in restroom, found by student; 9/13/16 – Elementary teacher leaves loaded gun in restroom, found by student; 10/14/16 – Security guard leaves loaded gun in restroom, found by student; 10/17/16 – Campus safety officer leaves loaded gun in a restroom, found by student; 12/29/16 – Michigan Deputy accidentally fires gun in school; 3/3/17 – School volunteer leaves loaded gun in restroom, found by student; 9/29/17 – Off-duty officer leaves loaded gun in a school library, found by student; 4/12/18 – Parkland Teacher arrested after leaving gun in public lavatory where it was found by a homeless man who then shot a round into a wall (this occurred two months after the Parkland shooting; this teacher volunteered to carry a gun in school after the Parkland shooting occurred); 3/15/18 – Teacher injures student during in school gun safety lesson; 3/13/18 – Michigan County Sheriff leaves loaded gun in locker at a middle school, found by student.

[2]Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. (See *Richardson v. Warren Consol. School Dist., 197 Mich. App. 697 (1992).*)

[3]The motor vehicle exception to governmental immunity provides that governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in 1949 Mich. Pub. Acts 300, as amended, being Mich. Comp. Laws §§ 257.1 to 257.923 (1948). Mich. Comp. Laws § 691.1405. In order to be in operation, the vehicle must be in a state of being at work or in the active exercise of some specific function by performing work or producing effects at the time and place the injury is inflicted. (*Dinh v. Forest Hills Public Schools, 129 Mich. App. 293 (1983).*)

[4]A defendant might, however, argue, that setting a gun down momentarily and then forgetting to pick it back up is an example of mere inadvertence, with no act of decisionmaking involved, and therefore does not implicate any active disregard of consequences. Whether a court would find this argument persuasive is anyone's guess, although it seems more probable than not that a trier of fact would conclude that setting the gun down in the first place, for whatever reason, constitutes the negligent act as it should be foreseeable that one would then forget to pick it back up again. This would be, essentially, a technical argument regarding first in time causality that would likely favor the plaintiff.

[5]Obviously, safety devices that could be incorporated into both the gun and an alert-type device (such as a Fitbit or Apple Watch) capable of alerting the gun owner when the device and the weapon are no longer in proximity would be the kind of precaution (if such even exists) that might overcome a gross negligence claim.

[6]The state of Texas has recently created a "school marshals" program made up of armed faculty and staff who volunteer to undergo what is described as an "extensive" course of training. This could potentially be looked at as a model. The program is "secret" therefore it is unclear at present just how many districts make use of these individuals (it is estimated to be between 20 and 50 largely rural districts that do not have nearby local law enforcement agencies). Many districts have openly indicated that they do not participate in the program. It will be years before there is any significant statistical evidence regarding the effectiveness of the program as it relates to mitigating active shooter situations. We also will not be able to assess the impact of incidents concerning misplaced weapons finding their way into the hands of students.

[7]The "compelling public purpose" in this case was said to be "furthering the public's understanding concerning the inner workings of law enforcement." Clearly, such a generalized and rather pedestrian statement of public purpose was not likely to overcome the damage that resulted when the identities of these undercover officers were shared with the very criminals they had helped put away.

[8]See *Sargi v Kent Bd. of Educ., 70 F.3d 907 (1995)* a case in which a student died as a result of cardiac arrest while the bus driver continued with the bus route, lending no assistance. Despite the bus driver's lack of action, the student's medical condition was found to be the proximate cause of death and no action or inaction by the district or its employee placed the decedent at any greater risk than she would have otherwise been in.

[9]Such as in the *DeShaney* case where, despite the knowledge that the father was likely abusive, the state merely placed the child back into the same position he would have always been in absent any sort of state intervention.

[10]Likewise, we have yet to hear from the insurance industry on this issue and how any decision to allow teachers to carry guns in schools might affect the costs of liability insurance premiums. Nor have we explored the criminal liability implications (child endangerment, etc.).

Michigan School Administrator Certification Rule Changes

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The Michigan Department of Education has promulgated new rules for school administrator certificates.

1. Who is subject to school administrator certification requirements?

a. Individuals employed in a Michigan school district, intermediate school district or public school academy as a superintendent, principal, assistant principal or other person whose primary responsibility is administering instructional programs. (See MCL 380.1246(1)(b); MCL 380.1536.)

b. Chief Business Officials:

i. If employed as a chief business official on or before Jan. 4, 2010 in a Michigan school district, ISD or PSA, an individual currently employed as a chief business official must obtain an Experience-Based School Administrator Certificate as discussed below. (See MCL 380.1246(1)(a); MCL 380.1536.)

ii. If employed as a chief business official for the first time in a Michigan school district, ISD or PSA after Jan. 4, 2010, an individual is not required to hold a school administrator certificate or satisfy continuing education requirements, provided the individual's primary responsibility is not administering instructional programs.[1]

c. Primary Responsibility is Administering Instructional Programs.

i. An individual is considered to be primarily responsible for administering instructional programs if his or her position description or day-to-day duties include any of the following elements, and specifically, **if the administrator has final or**

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executive decisionmaking responsibility in these areas:

1) Responsibility for curriculum.

2) Responsibility for overseeing district or school improvement plan design or implementation.

3) Oversight of instructional policies.

4) Executive-level reporting on academic progress to a governing authority.

5) Supervision and evaluation of direct reports responsible for instruction.[2]

ii. MDE has provided examples of some administrative positions that, depending on job responsibilities, may require administrator certification because the primary responsibility is administering instructional programs:

1) Early Education Services Director;

2) Assistant Director of Early Education Services;

3) Director of Technical and Education Center;

4) Technology, Employment and Community Services Director (if technology includes instructional technology);

5) Supervisor of Adult Education and Training Services;

6) Supervisors/Directors of Special Education;[3]

7) Supervisor of the Math and Science Center; and

8) Great Start Readiness Program Administrator.[4]

2. Under the **prior rules**, the following certification requirements applied to school administrators:

a. For an individual who was employed as a school administrator in a Michigan school district, ISD or PSA on or before Jan. 10, 2010, he or she was not required to hold an administrator certification or endorsement but was required to maintain his or her continuing education requirements.

b. For an individual who was initially employed as a school administrator in Michigan after Jan. 4, 2010, he or she was required to possess a valid Michigan school administrator's certificate or be enrolled in a program leading to certification as a school administrator no later than six months after he or she began employment. That individual then had three years to complete certification requirements, or the school district, ISD or PSA could not continue to employ the person as a school administrator.

3. MDE promulgated **new rules for school administrator certificates** that required public school administrator to have one of the following by Sept. 1, 2018:

a. **Experience-Based School Administrator Certificate.**[5] (See Mich Admin Code R 380.102(2); R 380.103.) **This adds a requirement for individuals hired on or before Jan. 4, 2010, who were previously "grandfathered in" and not required to hold an administrator certificate**. Under the new rules, beginning Sept. 1, 2018, an individual who was employed as a school administrator on or before Jan. 4, 2010, is required to hold an administrator certificate or an administrator substitute permit. The amended rule provides:

> [T]he superintendent of public instruction shall issue a school administrator (1246(1)(a)) certificate to an individual who was employed by a school district in this state on or before Jan. 4, 2010, as a superintendent, principal, assistant principal, other person whose primary responsibility was administering instructional programs, or chief business official if, during the five-year period immediately preceding the issuance of the certificate, the individual completed any combination of education-related professional learning hours, as defined in R 380.101, totaling 150 hours. [Mich Admin R 380.103(1).]

The initial Experience-Based School Administrator Certificate was issued **without a fee** from Jan. 1, 2018 through Sept. 1, 2018. As of Sept. 2, 2018, an application processing fee of $160 will be charged. Subsequent renewals will be consistent with MCL 380.1538 and the certificate fee structure.

The Experience-Based Certificate does not require an endorsement.

b. **Standard Administrator Certificate.**[6] (See Mich Admin Code R 380.102(3); R 380.103.) This

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amendment applies to an individual employed as an administrator in a Michigan school district, ISD or PSA after Jan. 4, 2010. **The amendments added language requiring individuals with a 1246(1)(b) certificate to have "the appropriate PK-12 building or central office endorsement."**

The traditional way to achieve the standard administrator certificate and appropriate endorsement requires:

i. For building administrators, (1) a master's degree or higher and (2) completion of an approved Michigan school administrator preparation program at least at the master's degree level, including at least 18 semester hours of graduate credit in PK-12 school administrator. (See R 380.104(1).)

ii. For central office administrators, (1) a master's degree or higher and (2) completion of at least 21 semester hours at the post-master's degree level in an approved Michigan school administrator preparation program, including advanced studies in PK-12 district level school administration. (See R 380.104(2).)

c. **Full-Year School Administrator Substitute Permit.** *Must be applied for and issued to the school district* when it hires an individual for an administrative position who is not appropriately certificated OR an individual who is employed pursuant to MCL 380.1246(3).

i. MCL 380.1246(3) allows a school district to hire an individual who enrolls in a program leading to certification as a school administrator no later than six months after beginning employment. The individual has three years to meet the certification requirements.

ii. To receive a substitute permit, the school district must certify that an appropriately certificated and endorsed school administrator is not available.

iii. Rule 380.116 includes information regarding granting, renewing and revoking full-year school administrator substitute permits.

4. Certificate Renewal Requirements. An administrator must complete any combination of **150 education-related professional learning hours** to renew an administrator certificate.

a. Under the **prior rules all administrators were required to complete**: a minimum of six semester credit hours or 180 state continuing education hours within each five-year period.

b. Under the **new rules all administrators are required to complete**: 150 education-related professional learning hours within the previous five-year period to renew their certificate. **Education-related professional learning hours** are defined as:

i. Satisfactory college semester credit hours relevant to professional development as a school administrator at a regionally accredited college or university, with one semester credit hour being equivalent to 25 education-related professional learning hours.

ii. State continuing education clock hours relevant to professional development as a school administrator.

iii. Michigan annual district professional development hours relevant to professional development as a school administrator.

5. Denial, Suspension and Revocation of Administrator Certificate. The rules governing administrator certificates were amended to provide additional notice and due process requirements when the superintendent of public instruction rescinds, suspends or revokes an administrator certificate for material misrepresentation, concealment or omission of fact in the application for or use of a school administrator certificate, or conviction of a crime listed in MCL 380.1535a.

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[1]See Memorandum re: School Administrator Certification and Chief Business Officials, MDE, March 8, 2018.

[2]See Memorandum re: Definition of "Administrating Instructional Programs," MDE, Feb. 23, 2017.

[3]An Administrator of Special Education who is considered to be "administering instructional programs" must hold both (1) a valid administrator certificate; and (2) an approval for Director or Supervisor of special education from the Office of Special Education. See Guidance from MDE titled "Special Education Director/ Supervisor: Administrator Certificate Requirements," Aug. 30, 2018.

[4]See Memorandum re: Requirements for Administrator Certification, MDE, Dec. 22, 2010.

[5]Also known as a 1246(1)(a) certificate.

[6]Also known as a 1246(1)(b) certificate.

Michigan School Administrator Certification Flowchart

The **red** numbers in each box below correspond with the same number in the preceding outline.

Administrator: #1

A superintendent, principal, assistant principal or other person whose primary responsibility is administering instructional programs. Individuals first employed in Michigan on or before Jan. 4, 2010 as chief business officials also must obtain an administrator certificate.

First employed as administrator in Michigan school district on or before Jan. 4, 2010.

OR

First employed as administrator in Michigan school district after Jan. 4, 2010.

Must obtain Experience-Based/1246(1)(a) Certificate by *Sept. 1, 2018* #3a

Requires:

- Completion of 150 education-related professional learning hours* during the five-year period immediately preceding issuance of the certificate.
- Beginning Sept. 2, 2018, the experience-based certificate will be issued with an application processing fee of $160.

OR

Full-Year Substitute Permit / R 380.116(1)(a-f) #3c
(Temporary Until Certification Obtained)

Requires all of the following and must be reissued each year:

a. Superintendent/other administrator applies on behalf of the school district, affirms under oath that the requirements (b-f below) for the substitute permit or renewal have been met, and holds the permit on behalf of the school district.

b. School district certifies that an appropriately certificated and endorsed school administrator is *not* available for the assignment.

c. Individual for whom the substitute permit is requested earned a bachelor's or higher degree at a regionally accredited college or university.

d. Employing school district assigns a mentor to the individual.

e. Permit is valid for the administrator position specified on the permit for the academic school year for which the permit is issued.

f. The permit fee is paid prior to the individual's first day in the assignment.

Must obtain Standard/1246(1)(a) Certificate #3b

Requires:

- Certificate must be renewed every five years.
- **No Sept. 1, 2018 deadline; renewal deadline based on when certificate first issued.**
- Renewal can be requested any time after Jan. 1 of the expiration year.
- Renewal requires completion of 150 education-related professional learning hours.*

OR

Full-Year Substitute Permit / R 380.116(1)(g); MCL 380.1246(3) #3c
(Temporary Until Certification Obtained)

Requires:

1. Enrollment in a program leading to an administrator certification **no later than six months after he or she begins employment as an administrator.**
2. Completion of program and issuance of certification within three years.

***Education-related professional learning**: an educational opportunity intended to improve a school administrator's practice and capacity to perform the work within the profession of education and is categorized as one or more of the following: #4b

1. Satisfactory college semester credit hours relevant to professional development as a school administrator at a regionally accredited college or university (one semester hour = 25 education-related professional learning hours).
2. State continuing education clock hours relevant to professional development as a school administrator.
3. Michigan annual district provided professional development hours relevant to professional development as a school administrator.