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SERVICE-LEARNING AND THE LAW:
AN ANALYSIS

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE GRADUATE SCHOOL
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

DEPARTMENT OF CURRICULUM, INSTRUCTION AND EDUCATIONAL
PSYCHOLOGY

BY
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Somewhere along the way I read that Ralph Waldo Emerson greeted old friends by asking, "What's become clear to you since we last met?" To that query I'd have to respond that a project of this magnitude reaches completion because many people have contributed to the process.

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Thank you with all my heart! Without each of you today would not have come. That has become very clear to me since we last met.
DEDICATION

To Dad, who walked me to the library that first time so long ago. This all began that day.
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ABSTRACT

The fear of legal entanglements deters many school administrators from instituting service-learning programs in secondary and postsecondary schools. This paper reviews the legal status of students enrolled in service-learning programs which are required for conferral of a diploma or four-year degree. The effects of negligence, school codes, federal labor laws, worker compensation determinations and volunteer status on service-learners is examined. Mandatory service in secondary schools is discussed; and insurance, waivers and risk management for programs are considered.
CHAPTER I

SERVICE LEARNERS AND THE LAW: AN ANALYSIS

Introduction

Service-learning is a philosophy of reciprocal learning: "all parties in service learning --- those serving and those served --- are learners and have influence in determining what is to be learned."¹ Using this definition, service-learning encompasses a wide variety of experience-based programs which may include career development, academic knowledge, skill development or some combination of these for which students may or may not receive compensation.

The critical instructional value of these experience-based programs derives from the service performance of the students and "the outcomes of these activities for those off campus who are the recipients of the services."² The educational value for the student performing the service should lead to a beneficial value for the individual or group that is the recipient of the service and hopefully result in

² Id. at 66.
more effective participation in the larger society for both the student service-provider and the recipient of the service.

Secondary school and higher education students enrolled in these programs function at the tangent of two legal worlds --- the law of education and the law of labor. As subjects of the law of education, these students are exposed to a myriad of rules, regulations and policy statements from the advent of their expressed interest in the institution of choice through matriculation and unto conferral of a diploma or degree. Although they are expected to read, comprehend and act on and in accordance with these documents, many students refer to these materials only during periods of registration and file them on bookshelves without ever reading these documents between terms. Consequently students are not fully cognizant of the obligations and duties emanating from their contracts of enrollment, much less from any agreements arising out of program-imposed placements which may create employment relationships and subject students to yet another legal arena, the law of labor.

This paper examines the legal status of the constituencies engaged in service-learning placements which are required for conferral of a diploma or degree. It attempts to clarify the status of the service-learner, student or employee, for purposes of liability, compensation and insurance. Because much of the law of education and the law of labor is based on state codes which are constructed to meet
the needs of local populations, a deliberate effort was made to limit this discussion to states included in the seventh circuit. However, a dearth of related case law in this circuit compelled the writer to consider judicial issues arising outside these jurisdictions when the legal cases provided interpretations germane to this inquiry.

It is also important to note that in this paper, service-learning refers to only those required experiences which are incorporated into the curriculum and is not synonymous with community service or volunteerism which is separate and distinct from course requirements.

Procedure

This study was initiated with a key word search using service and learning. After reading journal articles related to service and learning, the descriptors were combined and delimited by the term legal issues. At this point, the focus of the review of literature turned to law review articles. To better identify appropriate articles, the writer utilized the Index to Legal Periodicals (I.L.P.), Current Law Index (C.L.I.), Legal Resources Index (L.R.I.) and Current Index to Legal Periodicals (C.I.L.P.). Where law review articles were cited in court decisions, Shepard's Law Review Citations were used for cross referencing and to locate additional related readings. Other finding tools included the two major legal encyclopedias, American Jurisprudence 2d (Am Jur 2d) and
Corpus Juris Secundum (CJS), which were useful for concept development. *Words and Phrases* enabled the writer to create links between ideas when none were apparent.

Each of the cases reported in this paper can be located through the *West Digest Systems*. Where state statutes are cited, they were verified by locating the statutes for the particular state and reading the annotated versions whenever possible.

The legal analysis which follows is the final phase in a multi-faceted study of service-learning. The initial stages of the study determined: (1) the effect of tutoring on the tutors’ related class achievement; (2) the effect of tutoring on the tutees; and (3) the change in the tutors’ perceptions of the socio-economic factors that influence student learning. This phase of the writer’s study was undertaken to determine the legal status of service-learners relative to the institutions that sponsor them and the institutions that host them.

The review of literature and legal cases in Chapter II establish a framework for the legal relationships between students and their institutions in higher education and secondary education. An understanding of this relationship is germane to assignment of liability when cases arise out of negligence. In Chapter III the writer explores common legal issues which arise in several categories of service-learning. These include skill-based programs which often are fraught
with issues based in negligence; school codes which in some instances define the legal status of teachers, student teachers and other school personnel relative to service-learning placements and clearly codify the student-school relationship in secondary education; the terms and conditions of the Fair Labor Standards Act which clarifies the federal government's interpretations of who is an employee and employer; Workers' Compensation Board determinations which shed light on who receives benefits and when; and legal problems related to service-learners classified as volunteers. Issues brought under the United States Constitution are dealt with in Chapter IV which examines the novel concept of service-learning as a form of slavery forbidden under the Thirteenth Amendment. Chapter V looks at insurance, waivers, and risk management for service-learning programs; and the final chapter summarizes the findings.
CHAPTER II
STUDENT-SCHOOL RELATIONSHIPS

In Higher Education

The law of higher education, still in its infancy, is premised on the existence of a contract of enrollment which defines the student-university relationship. Although most

courts since the late nineteenth century have construed the student-university relationship as contractual, an examination of relevant court cases reveals a notable lack of agreement on almost any application of contract law. Still


Douglas Drushal, Comment, Consumer Protection and Higher Education---Student Suits Against Schools, 37 Ohio St.L.J. 608 at 612 (citing State ex re. Stallard v. White, 82 Ind. 278 (1882) as one of the earliest contract cases in American higher education).


contract analogy remains the favored approach for dispute resolution between students and private colleges, and occasionally it applies to public colleges also. Moreover, courts currently disallow rigid application of contract law because of the uniqueness of the student-university relationship.

As more flexible interpretations of contract law gained acceptance, the complexity of the contract increased and its ambit was expanded to include numerous published institutional sources and the oral representations of faculty and other university representatives. Gradually implied-in-law

5(...continued)

6 Samuel Bell, Contracts---Paynter v. New York University: How Discretionary Are the Inherent Powers of Universities, XXI DePaul L. Rev.861 (1972) at 869 stating that students attend private institutions under strictly contractual agreements.

7 See Anderson v Regents of University of California, 22 Cal App 3d 763, 99 Cal Rptr 531 (1972).

8 Slaughter v. Brigham Young University, 514 F.2d 622, 626 (1975) stating "some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and university to provide some framework into which to put the problem...This does not mean that 'contract law' must be rigidly applied in all its aspects...The student-university relationship is unique, and it should not be stuffed into one doctrinal category. It may also be different at different schools."

contracts emerged as the "dominant concept" in court decisions. However, these contracts, prepared by the school (the dominant party) to be signed by the student (the weaker party) who has no voice in the terms, manifest as contracts of adhesion when utilized by students in suits against their universities.

With full knowledge of the unequal relationship between the parties, courts continue to analyze cases under a variety of legal theories displaying a distinct preference for contract theory. Judgements of these courts represent "a remarkably solid common law tradition favoring institutional discretion." The only undisputed legal principle emanating from these decisions acknowledges students and their institutions as parties to a somewhat amorphous higher education contract.

10 Black, at 135 stating that one of the reasons for an implied-in-law contract is "because of some special relationship between [the parties]."


Case law defines a contract as "an agreement between competent parties, upon consideration sufficient in law, to do or not to do a particular thing."\textsuperscript{14} Though the college or university catalog is not labelled a contract and the parties don't sign it, the catalog represents the nucleus of the agreement between a university and its students.\textsuperscript{15} In courts the catalog signifies the legal document which apprises students of an institution's course offerings, admissions requirements, pertinent financial aid and registration information, and the rules and regulations which govern academic and disciplinary matters.

As a contract the catalog creates duties for the institution and its enrolled students.\textsuperscript{16} Duties, commonly referred to as tort obligations, are created by law, separate from the expressed or implied intentions of the parties to a contract.\textsuperscript{17} When these duties are arbitrarily disregarded, they may be judicially enforced as a consequence of an action

\textsuperscript{14} People v. Drummer (1916), 274 Ill. 637, 640 as cited in Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 329 (Dec. 1977).

\textsuperscript{15} See supra note 3; \textbf{also} recall that contract terms could work in favor of either party, school or student, as could terms of the contract that are nowhere spelled out explicitly but are understood by most people associated with higher education or a particular educational institution.

\textsuperscript{16} DeMarco v. University Health Sciences (1976), 40 Ill. App.3d 474, 480 discussing contract in relations to a private institution.

\textsuperscript{17} W. Page Keeton et al., Prosser and Keeton on the Law of Torts, sec. 92 at 656 (5th ed. 1984).
based in tort.\textsuperscript{18}

Tort is derived from the Latin word "tortus," which means "a twisting"\textsuperscript{19}. When applied to conduct, tort refers to improper or crooked conduct.\textsuperscript{20} Defined broadly, a tort becomes a civil wrong other than a breach of contract\textsuperscript{21} for which a court will provide a remedy. The remedy may be an action for damages, although other remedies may also be available.\textsuperscript{22} To discourage interference with the interest of a service-learner, an educational institution, or any other legal entity that is entitled to legal protection, the law imposes tort obligations.\textsuperscript{23}

\textsuperscript{18} Id.


\textsuperscript{20} Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans, The American Law of Torts (1983) sec. 1:20 defining tort as a "breach of duty imposed either by statute or by case law and not by contract."

\textsuperscript{21} See Prosser stating that "Contract liability is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed. Quasi-contractual liability is created for the prevention of unjust enrichment of one person at the expense of another and the restitution of benefits which in good conscience belong to the plaintiff;" see also Speiser et al., supra note 17 indicating that a contract breach arises from agreement of the parties whereas a tort is a violation of a duty which is fixed by law independent of a contract or the will of the parties.


\textsuperscript{23} Id., sec. 92 at 656; see also supra notes 17, 18.
Because tort obligations or duties are created primarily on the basis of public policy reasons, liability in tort actions stems from conduct against public policy, conduct which is socially unreasonable. As noted above, the law entitles a student to protection for duties which are not upheld. This protection is a manifestation that the policy reflected in a given situation has received consideration.

In the current milieu of higher education, some courts do not recognize any university duty to students. This interpretation flows from the decisions in Bradshaw and Rabel in which both courts preconditioned the imposition of

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24 Id., sec.92 at 655.

25 Id. at 6; see also Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, The Law of Torts (second Ed.) Vol. 3 (1986) sec.16.1 stating that negligence is unreasonably dangerous conduct which whether by act or by omission of an act must be voluntary (e.g. not premeditated) and exists under two theories: (1) conduct theory which if respected in a court of law would exclude as irrelevant evidence introduced to show an actor's state of mind and (2) state of mind theory which if accepted tends to appropriate a closer correspondence between legal liability and the moral culpability of the actor and requires a finding of indifference or inadvertence or that anxious care precluded the negligence.


27 Bradshaw v. Rawlings, 612 F.2d 135, 138-140 (3rd Cir. 1979) discussing society's acceptance of the college student as an adult as changing the relationships which underlie tort analysis in student-university suits in the context of student activities.

28 Rabel v. Ill. Wesleyan University, 161 Ill. App. 3d 348, 359 (1987) stating that "[f]or purposes of examining fundamental relationships that underlie tort liability, competing interests of student and institution of higher learning are much different today than they were in the..."
a duty upon a university to act with reasonable care for the
safety of its students on the existence of a custodial
relationship between a student and the university. Applying
the reasoning of Bradshaw and Rabel, since a college no longer
stands "in loco parentis" to its students, its duty
recedes. Courts which accept this line of reasoning
recognize no duty of care by a college/university to its
students. This perspective is tenuous.

Restatement (Second) of Torts indicates a special
relationship can give rise to duty in the absence of
"custody." Since the law recognizes the relationship
between colleges and their students as unique, then by
definition this relationship is special and therefore can give
rise to duty. Furthermore, "...the law appears ...to be
working slowly toward a recognition of the duty to aid or
protect in any relation of dependence or mutual
dependence."

For an action in tort to be successful the factual
setting must be proper. That an institution has a duty to

28 (...continued)
past...the change has occurred because society considers the
modern college student an adult, not a child of tender years."

29 See Bradshaw v. Rawlings, 612 F.2d 135, 138-140 (3rd
Cir.1979).

30 Restatement, sec. 314-328.

31 Slaughter, 514 F.2d 622, 626.

32 Restatement, sec. 314A, comment(b).
prevent a service-learner from exposure to unreasonable harm must be established under the law or by fact. While duty may be plausible in the context of the student-university relationship, it may be difficult to sustain because no widely accepted test exists to prove the existence of duty.\textsuperscript{33} It is determined by whether a student is deserving of legal protection;\textsuperscript{34} and as noted earlier, duty is premised on considerations of public policy which lead the law to say a particular learner is entitled to protection.\textsuperscript{35}

Once it is established that a duty exists, it must be shown that the institution failed to conform to standards of care provided by other institutions in similar circumstances.\textsuperscript{36} Next the service-learner must prove that the university, through its agents, acted unreasonably; and these unreasonable actions exposed the student to undue risk of harm. For tort based on negligence to exist, this connection must be substantiated.

Finally, a causal relationship must be established between the injury the learner experiences and the misconduct

\textsuperscript{33} Drushal, supra note 2, at 619.

\textsuperscript{34} Keeton et al., supra note 21, sec.92.

\textsuperscript{35} Id. at sec. 53.

\textsuperscript{36} Id. at sec. 30 - 33.
perpetrated by the institution. In other words, it must be shown that the injury suffered or the loss experienced was a result of the institution's misconduct and that this misconduct was the proximate cause of the harm to the student.

Non-contractual suits involving service-learning which are brought against post-secondary degree-granting institutions most likely would be founded on negligence because service-learning requirements in the context of education encompass programs which involve experience-based or field-based components. Programs with these components may require complex arrangements to provide adequate supervision for university students as well as protection for receiving and sending institutions and third party recipients of services.

In Secondary Schools

While the law of higher education continues to evolve

37 It is usually the responsibility of a jury to determine what precautions are appropriate to the harm at issue.

38 See Roberts v. Robertson County Board of Education, 692 S.W.2d 870 quoting from the Supreme Court of Tennessee that proximate cause is "an act or omission occurring or concurring with another which, if it had not happened, the injury would not have been inflicted;" and that the proximate cause need not be the sole nor last cause of injury nor the only cause and that recovery from multiple parties separately or jointly is possible.

39 Keeton et al., supra note 121 at sec. 30.
premised upon the existence of a contract between the student and the institution, the law of public education as applied to legal issues originating in lower schools accepts the student-institution relationship as "in loco parentis." Where contracts control (typically in private schools), they generally are viewed as quasi-contracts; and actions in tort at this level of education usually are rooted in negligence premised on lack of or improper supervision.

As in higher education, service-learning in secondary schools presents problems which may be spawned by joint venture control or aberration of control with an intent to shift liability by one of the parties, lack of clear delineations of responsibilities and rights between and among the parties, or unclear legal theories in the area of school law. At all levels of education, context and circumstance bear directly upon the issues. However, the ages of students are of particular significance to the circumstances bearing upon legal issues which originate in secondary schools. Consequently in these arenas, rights of students may be truncated as the responsibilities of faculty, staff and administration for control and supervision may be increased.

As early as 1905 the Supreme Court began hearing cases related to student rights under the Fourteenth Amendment. In that year, it affirmed the right of a state to require all
community inhabitants to be vaccinated. 40 By 1922 the Court had affirmed the right of a city to require vaccination as a condition of enrollment in public and private schools. 41 As the boundaries of students' rights evolved, other courts recognized the validity of compulsory school attendance statutes. 42 Although immunization statutes and compulsory attendance laws had been affirmed, required participation in activities which conflict with students' ideological positions or denial of a right to engage in activities which affirm their ideological beliefs resulted in mixed outcomes until the 1943 Barnette decision disallowing required participation in the flag pledge and salute at the risk of punishment or expulsion 43 and indicating that a state law which impinges

139 Jacobson v. Massachusetts, 197 U.S. 11 (1905) holding that a board of health had the right to require all community inhabitants to be immunized and exempt those children who for medical reasons could not withstand vaccination.


43 Compare Minerville School District v. Gobitis, 310 U.S. 586 (1940) (finding a mandatory flag salute constitutional) with Taylor v. Mississippi, 319 U.S. 583 (1943) (holding it unconstitutional for a state to punish those who for religious convictions urge and even advise others not to salute the national and state flags) and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (holding that students who refuse to salute and pledge allegiance to the flag may not be suspended or expelled from school) which effectively overruled the Court's decision in Gobitis three years earlier; see also Sherman v. Community Consolidated District 21 of Wheeling Township, 714 F. Supp. 932 (N.D. Ill. 1989) for a recent case where a student who objected to the Pledge of Allegiance on religious grounds stated a cause for action.
upon Constitutional rights will be sustained only if the state law is narrowly tailored to serve a compelling state interest.

However, by the late 1960s and into the early 1970s student challenges to the First and Fourteenth Amendment had progressed from issues centered on required participation to limitations on protected expressive conduct which the Supreme Court determined as subject for strict scrutiny. Later in the decade, under certain conditions daytime school attendance in at least one state could be used as a predictable and economical basis for determining ineligibility for unemployment benefits for otherwise eligible persons without violating the equal protection clause of the Fourteenth Amendment. However, this same statute did not assign ineligibility status on otherwise eligible night school attendees.

During the 80s, the Supreme Court determined that school officials could discipline students for speech which was plainly offensive to students and teachers. Where in 1943

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44 See Tinker v. Des Moines Independent Community School District 393 U.S. 503 (1969) for a case in public school secondary education which held that disciplining students for peaceful wearing of armbands, the issue in this case, or other peaceful symbolic expression of opinion was unconstitutional unless it could be shown that material disruption or substantial interference with the educational process did or would result; see also Heady v James, 408 U.S. 169 (1972) for a case in higher education that extended the Tinker decision to the associational rights of college students.

45 Idaho Department of Employment v. Smith, 434 U.S. 100 (1977)
students in Taylor  

students in Taylor 46 were granted the right to advocate for their religious beliefs which were not found subversive to government, the Court now balanced students' rights to advocate unpopular and controversial views against the school's interest in teaching students the fundamental values of the community which included socially acceptable behavior. Because some students in secondary schools are minors, the Court based its opinion on precedent that valued protecting minors from exposure to language identified as vulgar and offensive.47

The Court further bounded the school's authority to limit the expressive conduct of its students when in 1988 it was asked to determine the extent of a principal's authority to edit the content of a school newspaper written and produced as part of a journalism class.48 Using Tinker49 and Fraser50, the Court identified the public school as a special context for the First Amendment and determined that schools need not tolerate student speech that is inconsistent with the basic purposes of public school education as long as the speech

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occurs as part of the school curriculum or in an activity
sponsored by the school. The Court also distinguished
between truncated expressive conduct permissible in a
classroom forum and the "wider latitude" accorded speech in a
public forum which includes student government as a segment of
the public. Furthermore no clear-cut rule emerged to delineate
when public school programs conflict with parental rights; and
currently no case law designates education a fundamental
right. Consequently only a common law right continues to

51 For a discussion of the First Amendment rights of
students in relationship to library materials, see Board of
Education, Island Trees Union Free School District No. 26 v.
Pico, 457 U.S. 853 (1982) (indicating that while school boards
have broad discretion in controlling library content, when
materials proven to have educational value are removed because
the board disagrees with the content and acts to impose its
own point of view the act of removing the materials violates
students' First Amendment rights); see also Pratt v.
Independent School District Number 831, Forest Lake, 670 F.2d
771 (8th Cir. 1982) (declaring unconstitutional under the
First Amendment a board's decision to remove a certain film
from the high school curriculum based on the board's
ideology).

52 Compare Pierce v. Society of Sisters, 268 U.S. 510
(1925) (stating that a state may require school attendance and
while it may not restrict that attendance to only public
institutions, it may regulate all schools within reason) which
premised its holding in part on the Fourteenth Amendment
protection of persons from arbitrary state action impairing
parents' liberty interest to direct the education of their
children with Wisconsin v. Yoder, 406 U.S. 205 (1972) (stating
that compulsory secondary school attendance cannot be imposed
on parents in an Amish community where this requirement will
display a detrimental effect on a way of life in which
religious belief and practice are inseparable from daily
living which has been shown to produce responsible, self-
sufficient citizens) which based its holding on the free
exercise clause of the First Amendment; both cases while
protecting parents' rights to direct the education of their
children find their support in different Amendments because
the issues were presented from different perspectives.
exist for parents to excuse their offspring from certain classes when they raise objections based on a values conflict. Mandating community service in secondary schools has raised such objections.
Negligence

The term negligence, as used in court cases, may cause confusion because of its dual meanings. Often negligence is defined as a tort characterized by four previously described elements: (1) Z owes a duty of reasonable care to Y; (2) A breach of that duty occurs; (3) Y receives injury or harm; and (4) The harm or injury to Y results from the breach of duty by Z. When a student or group of students bringing a tort claim based in negligence proves each of these conditions, damages may be awarded.

However, in a more restrictive sense, negligence means a breach of duty, the failure to live up to the standard of expected care. This is the second element of a tort claim based in negligent conduct. A student alleging that a faculty member or other school employee or a legal entity "is negligent" means that the named person or group failed to exercise appropriate care under the circumstances. What constitutes appropriate care is a question of fact for a court of law to determine.

Liability for the tort of negligence is contingent on the negligent conduct causing injury. However, a teacher may be
negligent without being liable for negligence. To comprehend this concept, it is important to differentiate between the tort of negligence (see par. 1 above) and the more limited concept of negligence, the breach of the duty of reasonable care (see par. 2 above). Court cases seldom distinguish these two concepts of negligence.

The duty of reasonable care may give rise to further confusion. It does not require a teacher to avoid all injury to a student. Instead, the duty of reasonable care only compels that a teacher avoids injuring a student or group of students by carelessness in the teacher's actions. This negligence may result in two ways: (1) The teacher may omit to act in a manner consistent with the ordinary actions of a reasonable person in a similar context; or (2) The teacher may act in a manner that a reasonable and prudent person usually would not act under similar circumstances.

To illustrate the feasibility of a reasonable person, consider the thought process of such a teacher, a teacher who unfailingly chooses to act with moderation and to appropriately evaluate her own actions as well as the actions of others in everything she undertakes. Since she represents the incredible breadth of human experience, her relevant characteristics vary by situations. She knows the "qualities and habits of human beings...and the characteristics and capacities of things and forces which are common knowledge at the time and in the particular community...[as well as] the
common law, legislative enactments and general customs..."that are likely to affect the conduct of others..." including third parties.53 However, her primary consideration always is whether her actions will impose injury on another(s). In other words, she weighs the "foreseeability of the risk of injury" which may arise from her action.

Just as all negligence does not impose liability, all acts which involve risk of harm are not necessarily so laden with danger that they must be avoided. Therefore before acting, this reasonable teacher balances the usefulness of her activity against its potential to harm and the extent of the possible risk of harm to another. Obviously, this reasonable person is a fictitious ideal who always makes good choices in her conduct.

Court review of cases involving negligence considers the actions of both parties but sets the standard of reasonable care to protect the student(s) bringing suit, not the school employee(s) against whom allegations are raised. The conduct of the student(s) bringing suit is assessed in terms of the standard of care one is required to exhibit to protect oneself. The acts of the school employee(s) alleged to have breached a duty of care are assessed in terms of a reasonable teacher who is reasonably considerate of the safety of

53 Restatement Second of Torts, secs. 285, 288C, 288C(a), 290.
students.\textsuperscript{54}

When a student under the age of 16 years is a party to a negligence action, the reasonable person standard still applies. Here the conduct of the minor is compared to that of a reasonable person of the same age, intelligence and experience acting under like circumstances. The child's judgement is not questioned because judgement is an exercise of intelligence; it is not synonymous with intelligence. Sometimes a young child may escape liability for negligent acts because the law requires a young child to conform to the standard of the reasonable person only when the risk inherent in the act and the injurious character of the act are identifiable by a child of the same age, intelligence, and experience.\textsuperscript{55}

Where adult students with mental deficiencies or physical disabilities are concerned, these conditions become part of the circumstance. Thus the conduct of adult students with mental deficiencies or physical disabilities is compared to the conduct of reasonable adult persons in the same physical or mental circumstances, of similar age, intelligence and experience. Also when a person voluntarily assists another, the person providing the voluntary assistance is bound to exercise the same degree of care that our reasonable person in

\textsuperscript{54} Id. secs. 283(f), 291, 293.

\textsuperscript{55} Id. secs. 283A, 284(b).
the same circumstance would exhibit.\textsuperscript{56} Awareness of the attributes of the reasonable person, a person of similar age, intelligence, experience and circumstance, raises the next question: How is the conduct standard of this fictitious ideal determined?

The minimum standard of conduct for a reasonable person is determined in four ways. First, specific statutes, legislative mandates or administrative rules provide for the standard. Second, when the established standard can't be applied to the facts of a case, courts adopt the standard from enactments or regulations which do not provide for one. Third, appellate decisions establish the standard. Finally, where no standard exists, a trial judge or jury creates a standard to apply to the facts of a case because a conclusion was reached that a duty ought to exist under the circumstances.

Should a situation arise where a reasonable person would take additional precautions, compliance with existing statutes, enactments, or regulations will not bar a finding of negligence because these enumerate only a minimum standard of reasonable care.\textsuperscript{57} Remember, "legal duties are not discoverable facts of nature[. They are] conclusory expressions that, in cases of a particular type, liability

\textsuperscript{56} Id. secs. 283B, 283C.

\textsuperscript{57} Id. secs. 285, 285(d), 288C, 288C(a).
should be imposed for damages done. 68

Selected Legal Cases Involving Negligence

Now let's take a closer look at negligence in the context of educational institutions. In most elementary and secondary school cases, duty is premised on the fact that school officials acting "in loco parentis" possess full knowledge of their students' needs for protection. However, teachers of adult students don't stand "in loco parentis!" Furthermore, public school personnel engaged in teaching or supervisory activities usually are entitled to tort liability immunity. However, teacher immunity for tort liability may not necessarily apply in a vocational-technical school district. 59 The following cases illustrate various negligence claims against schools or school personnel arising from student injuries which occurred in vocational programs which could be classified as service-learning programs.

In a 1990 New York case, a court found for the school when a learning disabled 19-year-old student was injured while working with lumber under the direct supervision of a company to which he had been assigned for work-study. He severed two fingers and injured a third while working with a saw with which he was familiar. The school asserted no duty to control

58 Tarasoff v. The Regents of the University of California, 551 P.2d 334, 342 (Cal.1976).
59 See 78A C.J.S.sec.470.
the acts of the student because the student was a legal adult
and also because his mother, not the school, had encouraged
his participation in the program. The trial court ruled that
schools are not insurers of student safety, that the standard
of reasonable care for a 19-year-old student was less
demanding than the standard for a young child, and that there
was no evidence that the machinery the student was using was
unsafe. Therefore, the school was not negligent. 60

In another instance, a high school student enrolled in a
Missouri vocational agricultural class sustained injuries when
a nail struck him in the eye while he and fellow classmates
were constructing a hard oak feed bin as part of a curriculum
project 61. The student was not wearing safety glasses; and
the injury caused permanent loss of normal vision. On the day
of the injury, the school district had secured liability
insurance covering at least a portion of the damages. The
trial court granted summary judgment to the school board, the
district and its named employees.

A unanimous appellate court affirmed the decision with
respect to the school board. It noted that in Missouri,
"purchase of liability insurance does not estop a [school
district] from asserting the defense of sovereign

60 Kennedy v. Waterville Cent.Dist., 555 N.Y.S.2d 224
(Sup.1990).

61 Lehman v. Wansing, 624 S.W.2d 1 (Mo.banc 1981).
immunity."\textsuperscript{62} However, where a student avers that the school district employees named in his suit were "acting individually...,"\textsuperscript{63} the student may be trying to establish a cause of action for tortious conduct against each of the named parties. Therefore, "the trial court erred in granting summary judgment [for the employees] based on sovereign immunity. As the liability of each [employee] will depend on the degree of care each owes in the fact situation alleged, the [students] may be able to plead the breach of personal duty as to each [employee] in [the wrongful actions or omissions of actions] averred."\textsuperscript{64} Furthermore, the court indicated in a split decision that in situations like this, a student should be given an opportunity to state his precise claim against the school officials named in the suit. The judgment favoring the superintendent, principal, division supervisor and teacher was reversed and remanded.

In a similar fact situation, a high school senior enrolled in the second semester of a building trades class was injured as he attempted to hammer a nail into a piece of plywood while on a house construction site.\textsuperscript{65} He was not wearing safety glasses at the time of injury; and the teacher

\textsuperscript{62} Id. at 2 citing Spearman v. University City Public School District, 617 S.W.2d 68, 69-70 (Mo.1981).

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 3.

\textsuperscript{65} Regulski v. Murphy, 326 N.W.2d 528 (Mich.App.)
left the students unsupervised at the job site for a short duration. The building project was part of the school curriculum; and when completed, it was to be sold to a private party. Although the student alleged causes of carelessness, wrongdoing, and negligence in leaving the students unsupervised and failing to dismiss students after the accident, the trial court granted summary judgment for the school district finding that conducting the class was part of the curriculum thereby entitling the district to governmental immunity. Furthermore, as district employees, the teacher and the supervisor, also, were entitled to governmental immunity.

On appeal the question for the court, whether granting of summary judgment to the school district was correct, was affirmed based on case law, statutory law, and analogy to the case which established the law. Resolution affirming summary judgment for the teacher and supervisor was achieved by reviewing relevant case law which indicates that in Michigan when teachers are engaged in teaching which is part of the curriculum, they are functioning in a governmental capacity and therefore entitled to governmental immunity for

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66 Id. at 529 citing Weaver v. Duff Norton Co., 115 Mich.App. 286, 320 N.W.2d 248 (1982) which found "that a public school district's operation of a vocational education program is a governmental function within the meaning of M.C.L. sec. 691.1407 and M.S.A. sec. 3.996(107), the governmental immunity statute" and based its holding on Sec.1287(1) of the School Code of 1976, M.C.L. sec. 380.1287(1); M.S.A. sec.15.41287(1) which authorize school boards to establish vocational education programs and that vocational education is an integral part of the modern curriculum.
tort liability.

The student appealed; and the case was reviewed by the Michigan Supreme Court as part of a consolidated suit\(^{67}\) examining the extent of immunity from tort liability to be provided to the state and its agencies, local governmental agencies, and the officers, agents, and employees of these agencies. As a result of this review, it was determined: (1) that since the purpose of the class was primarily educational, the operation of the building trades class did not expose the school district to tort liability for the student's eye injury; (2) that since the class was expressly authorized, proper instruction and supervision of students, including provision of proper safety instruction, equipment and measures for the protection of the students were also authorized expressly or impliedly, and since the employees were engaged in a governmental function (teaching) when the accident occurred, the district was entitled to immunity from tort liability; (3) that the method of daily instruction and supervision of students, being non-discretionary, exposed the teacher and program supervisor to tort liability for their alleged negligence in instructing, warning and supervising the student who was injured; (4) that determination of a school policy for protective eye wear, first-aid, etc. were "discretionary-decisional" acts for which the persons making

decisions were immune from tort liability; and (5) that failure to comply with school safety policies and statutory safety requirements for students in industrial arts classes exposed the teacher and program director to tort liability because compliance activities were ministerial functions, not discretionary acts.

The above cases indicate that school districts and school administrators are exempt from tort liability for acts of policy determination such as protective eye wear policies. However, when teachers do not enforce school district safety policies, they may lose their statutorily granted immunity. Additionally, they may be liable for breach of statutory duty if the policy flows from a state mandate.

Further clarification of the reasonable person standard results from the holding in Payne v. Dept. of Human Resources, 382 S.E.2d 449 (N.C.App. 1989) in which a deaf vocational education student enrolled in a residential school which provided a school handbook to shop students brought suit against a teacher for negligent supervision when the student's injury occurred partially due to insubordination. First the court determined that imposing a duty on a teacher to foresee that a student in this circumstance would leave his assignment when the teacher is summoned to another area for a brief time would impose a burden on the teacher beyond that of reasonable foreseeability.68 Second, a teacher's duty to warn a student

68 Id. at 452.
about dangers is not so expansive as to require that warnings be given about any and all dangers that might arise in the situation. This requirement, too, would extend beyond the standard of reasonable foreseeability. Finally, students are responsible to know the safety rules and warnings included in a school handbook.

In an Ohio high school vocational construction class, students cut a hole in the floor of a community member's dining room as part of a class project. When class ended for the day, the hole was covered with insulating paper and "a bookcase, table, and two chairs were placed by the two exposed sides of the hole." Despite these precautions and a warning by the class instructor, the owner of the home fell through the hole into the basement where she was found. Later that night she died.

The trial court granted the teacher immunity under Ohio R.C. 2744.03(A)(6) which provides immunity for political subdivision employees. However, the daughter of the decedent appealed based on the exception in R.C. 2744.03(A)(6)(b) which does not grant immunity if the employee's "acts or omissions were with malicious purpose, in bad faith, or in a wanton or

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69 Id. at 453.
70 Id.
reckless manner." 72 Although the teacher did not abide by the applicable building codes, which the family of the decedent thought should have been done, the appellate court based the determination on foreseeability and ruled that in light of the other precautions taken the teacher's conduct did not rise to the level of maliciousness, wantonness or recklessness. He further noted that even though the parties differed in their views of the level of the teacher's fault, assignment of the level of culpability is a legal conclusion for the court to determine, not a statement of fact to be presented by either of the parties.

Roberts v. Robertson County Board of Education 73 provided an extended explanation of duty in an educational setting. In defining duty under Tennessee law, the court noted that teachers and school districts are not insurers of students; and teachers are not expected to supervise students in all their activities at all times. Furthermore, the court noted that in other jurisdictions where injuries to students in shop classes were considered, "teachers, and through them their local school systems, are required to exercise such care as ordinarily reasonable and prudent persons would exercise under the same or similar circumstances." [citations omitted]

Furthermore the reasonable person standard adopted in other Tennessee cases involving safety relates the standard to

72 Id. at 386.
73 692 S.W.2d 870
the nature of the person to whom duty is owed and the context in which the duty arises. Acting upon these precedents, the court ruled that a "high school vocational teacher has the duty to take those precautions that any ordinarily reasonable and prudent person would take to protect his shop students from the unreasonable risk of injury. The extent of these precautions must be determined with reference to the age and inexperience of the students involved, their less than mature judgment with regard to their conduct and the inherently dangerous nature of the power driven equipment available for their use in the shop. In order to discharge this duty, it is incumbent upon a teacher, at minimum, to instruct his students in the safe and proper use of the equipment, to warn the students of known dangers, and to supervise the students to the extent necessary for the enforcement of adequate rules of shop safety."

Quoting from the Supreme Court of Tennessee, proximate cause is "an act or omission occurring or concurring with another which, if it had not happened, the injury would not have been inflicted." It does not have to be the sole or last cause for the injury, and there can be more than one cause for an injury. It is also possible to recover from multiple

parties separately or jointly.\textsuperscript{75}

In Illinois it has been established that a shop teacher's control over his students is not the same as that in an employer-employee relationship. When a decedent student's estate brought an appeal based on \textit{respondeat superior}\textsuperscript{76}, the appellate court indicated that the difference in the relationship was sufficient for the appeal to fail. For the suit to have succeeded, the actions of the teacher would have to have been wilful or wanton.

Since the claim against the district alleged only incompetence or failure to act, the lower court had properly dismissed the suit in which death resulted from an unauthorized student being thrown to the pavement while riding the hood of a car being driven through the school parking lot at high speed. The student driver's counter suit alleging contribution by the school district was also dismissed.\textsuperscript{77}

Compare the above decision to this one in which two individuals perished in, or as a result of, a fire which originated in a defective electrical cord on a window air conditioner. The air conditioner had been purchased from a

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Respondeat superior} is a "common law doctrine which holds the master or principal liable for the employee's or agent's" reasonable and foreseeable actions (including torts) that an employee "engages in while carrying out the employer's business." (Black's Law Dictionary, Pocket Edition 1996 at 546 and 564)

\textsuperscript{77} Knapp v. Hill, 627 N.E.2d 1068 (Ill.App.1st Dist.1995)
student at a postsecondary area vocational technical school. The trial court granted a judgment favoring the school and against the family survivors, the building management company, and its insurer. The parties appealed.

A building manager advised his tenants that air conditioners could be purchased at the area vocational technical school. The students at the school repaired air conditioners as part of a class. The air conditioners were brought to the school by students or donated by others. The unit alleged to have caused the fire was purchased at the school from the student owner who had been working on it the time of purchase. At the time of installation the cord of the unit had been taped and spliced. However, there were no apparent problems for several months and there was no evidence that the resulting problems were related to the spliced electrical cord. Under Louisiana Civil Code Articles, the question on appeal was inter alia whether the school is liable to the survivors, the building management company and its insurers.\textsuperscript{78} Since the other counts are beyond the scope of this paper, they will not be discussed.

Testimony indicated that the school had a known policy against selling appliances at the school. Students could sell repaired items from their homes, but not from the school. The school also had an expressed policy against the use of spliced

\textsuperscript{78} Levine v. Live Oak Masonic Housing, Inc. 491 So.2d 489 (La.App.3 Cir. 1986).
electrical cords. Louisiana Civil Code Article 2320, provides in pertinent part:

"...Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches when the masters, or employers, teachers, and artisans, might have prevented the act which caused the damage, and have not done it."

Therefore, for the instructor and school to be liable, it must be established that the instructor could have prevented the act which caused the damage if he had exercised proper care under the circumstances; that he failed to exercise proper care; that damage occurred; and that the damage was caused by the instructor's improper exercise of care.

The appellate court reasoned that since the students were mature young men, both over 18 years, they should have been able to follow instructions given to them by the instructor without the instructor's direct supervision. Since the student who sold the air conditioner deliberately violated two school policies, both without the knowledge of the instructor, the instructor was free of negligence and no school liability resulting from the instructor's conduct existed. 79

The above cases applying the various principles of the law of negligence suggest that school administrators may be liable for negligent supervision if it can be shown that they failed to exercise reasonable care in overseeing the

79 Id. at 494.
development, design, and administration of a school's service-learning curriculum or in supervising faculty and other personnel with responsibility for academic programs. Inadequate supervision of students also may expose vocational education administrators to tort liability. However, such liability may be highly subjective and limited by narrowly defined scope of applicable duties.

Because teachers are nearest to students in the chain of liability, they may have the greatest legal responsibility for accidents that occur to students while they are involved in activities to which the teachers are assigned. Even when educational institutions and their officials are not held liable, teachers may be liable for accidents which result from teacher negligence. Resulting damages many times greater than the actual medical costs may be awarded as a result of liability imposed on teachers;⁸⁰ and when constitutional

⁸⁰ See McKnight v. City of Philadelphia, 445 A. 2d 778 (Pa. Super. 1982) in which a trial court's $95,000 award to a student whose one finger was amputated and another severely injured while using a saw without a guard was affirmed by the appellate court which indicated that proximate cause, the point where legal responsibility attaches for harm to a student resulting from acts of a teacher, may be established by evidence that the teacher's negligent act or failure to act was a substantial factor, not the only factor, in causing harm to the student and that testimony by the principal who at the time of the accident was an administrative assistant to the superintendent that he knew and recognized the responsibility of the principal for the safety of the students and under ordinary circumstances everything else in the building was sufficient to establish that the principal's failure to correct the situation constituted negligence; see also Cotton v. Gering Pub. Schools, 511 N.W. 2d 549 (Neb. App. 1993) (affirming a $32,000 award for damages to a student whose medical bills amounted to less than 10% of the award.)
torts against teachers are not proven, the teacher may be granted summary judgement and entitled to recover all court costs from the student plaintiff.\textsuperscript{81}

\textbf{Legal Principles Derived From Selected Cases}

In the cases reviewed above, most reached the appellate level because the lower courts had granted summary judgment for schools and their employees. The immunity from tort liability at the district level generally was premised in statutory laws designed to minimize fear of litigation for personnel charged with policy-making responsibilities. However, when an administrator violated school safety policies, the court recognized this violation of policy and found the administrator negligent for not correcting a dangerous situation which he knew about or should have known about.\textsuperscript{82}

An appellate court is likely to affirm a trial court's decision against a teacher when a student is exposed to unreasonable risk of injury.\textsuperscript{83} Teachers are expected to


\textsuperscript{82} See McKnight, \textit{supra} note 65 and accompanying text.

\textsuperscript{83} See Barbin on Behalf of Barbin v. State, 506 So. 2d 888 (La. App. 1st Cir. 1987) awarding a deaf minor in a special placement who uses manual communication $185,00 in damages as a result of the physical and emotional harm sustained by cutting his right index finger longitudinally from the tip into the proximal interphalangeal joint while participating in a class under the supervision of a teacher who argued that the

(continued...
foresee the danger in selecting activities. They also are expected to modify the course curriculum and exclude use of dangerous equipment when the school district does not repair or replace the defective equipment.

When an adult student brings a negligence claim against a teacher, the court's analysis places less emphasis on the conduct of the teacher and increases scrutiny of the student's action. Age of the student, not location of the program in a high school or postsecondary school, is a determining factor. 84

Where contribution is a factor in the decisions, holdings vary. For example, in North Carolina, if evidence indicates beyond a doubt that a student contributed to his own injury, a nonsuit may be declared. 85 Some courts may reduce a student's award in proportion to his contribution to his own injury, 86 and a Louisiana court may use the student's age as

83(...continued)
student’s momentary inattention contributed to the student’s injury and therefore the teacher should not be considered negligent; the case also considers the fault of the state in strict liability as custodian of defective things and indemnity of the teacher and the insurance company, all of which are beyond the scope of this paper.

84 Contrast Levine, supra note 63 (discussing an adult student in a postsecondary program) with Kennedy, supra note 45 (discussing a 19-year-old student enrolled in a high school program) and accompanying texts.


a determining factor for contribution.\textsuperscript{87} Also, apportionment of student negligence is not appropriate when the teacher and the school district are found not guilty.\textsuperscript{88}

While each of the states presents a unique set of circumstances related to vocational education which qualifies as service-learning, some general agreement on principles emerges: (1) Determination of teacher negligence, the level of culpability, and whether contribution was present and to what degree are generally questions for juries, not matters of law for judges to decide. (2) Courts distinguish between liability based on negligence and liability based on maintenance of

\textsuperscript{86}(...continued)
(Neb.App.1993); see also Marcantel v. Allen Parish School Bd., 490 So.2d 1162 (La.App.3d Cir.1986) discussing contribution by students participating in a makeshift football game.

\textsuperscript{87} Barbin on Behalf of Barbin v. State, 506 So.2d 888, (La.App. 1 Cir. 1987).

\textsuperscript{88} See Fontenot v. State through Dept. of Educ., 635 So. 2d 627 (La. App. 3d Cir. 1994) in which a severe hand laceration to a student in a special education class did not create liability for the teacher even though the student charged the teacher with two counts of wilful negligence and quoting at 628 from Prier v. Horace Mann Insurance Co., 351 So.2d 265 (La. App. 3d Cir.) writ denied, 352 So. 2d 1042, 1045 (La. 1977) "[s]chool teachers charged with the duty of superintending children in the school must exercise reasonable supervision over them, commensurate with the age...and the attendant circumstances. A greater degree of care must be exercised if the student is required to use or to come in contact with an inherently dangerous object, or to engage in an activity where it is reasonably foreseeable that an accident or injury may occur. The teacher is not liable ...unless it is shown that...might have prevented the act which caused the damage, and did not do so. It is also essential to recovery that there be proof of negligence in failing to provide the required supervision and proof of a causal connection between the lack of supervision and its accident...(citations omitted)."
defective equipment. (3) The "in loco parentis" status of elementary and secondary school teachers in most states acts as a shield in claims of ordinary negligence. (4) Where injured students prove teachers or other school employees' acts were wilful, wanton, or reckless, statutory bars to immunity from tort liability generally will not apply. (5) Vicarious liability based on a master-servant relationship usually does not apply in the student-teacher relationship. (6) A state code granting immunity from tort to teachers does not bar a tort claim under the due process clause of the U.S. Constitution. (7) Purchase of liability insurance by an educational institution does not necessarily estop it from a plea of sovereign or governmental immunity where statutory entitlement exists.

Usually, negligence is considered an unintentional tort.\textsuperscript{89} At the university level, this opens the door for a plea by the university of not guilty based on lack of scienter. This could excuse the case against the university even though duty is the issue. However, if negligence is redefined as failure to meet an acceptable standard of care, then intentional and unintentional torts would be included.\textsuperscript{90} This could provide enhanced protection for students without jeopardizing the position of educational institutions.

\textsuperscript{89} Drushal, supra note 2, at 619 n.62 relating the tort of negligence to the student as consumer.

\textsuperscript{90} Id. at 619.
Furthermore, an institution could not be liable if its standards were equal to or exceeded those of like institutions in similar circumstances.

School Codes

In Illinois, student teachers, teachers and other specifically enumerated classes of school-related personnel are explicitly covered under 105 ILCS 5/10.20.20 which protects them from suit. When acting within the regular scope of their authority as vested in them by the school board through the building principal and the cooperating classroom teacher, student teachers cannot be sued for injuries to others. However, the statute dictates a loss of immunity from suit in cases where injury arises from acts or omissions of acts which are deemed wilful and wanton. While in the past, wilful and wanton action was the equivalent of an intentional tort, in modern Illinois case law wilful and wanton action is a point on the continuum between unintentional and intentional tort but tending to weigh closer to an intentional tortious act or omission.

Illinois Boards of Education also are charged with the responsibility to purchase liability insurance and include student teachers in those covered under the policy. The policy protects against any loss or liability arising out of civil rights claims and suits, constitutional rights claims and suits, and death and bodily injury and property damage
claims and suits. This insurance may cover the costs for defenses when damages are sought for acts which are alleged to be negligent or wrongful and are committed within the scope of employment or under the direction of the school board. The insurer must be licensed to write school liability coverage within this state (105 ILCS 5/10.22.3). Note that in this section of the code the language implies that student teachers are either employees or performing functions as authorized by the school board. A literal construction of the language in this section suggests student teachers may be employees or actors under the direction of the board, but they are not simultaneously employees and actors under the direction of the board. Generally, the student teacher’s presence in an Illinois school is authorized by the board but supervision and control of teaching activities occur at the building level.

When adult students are injured or cause injury to third parties or to property while participating in school-related events that involve complex relationships, court analyses focus on education law in conjunction with other areas of law. If the student is classified as a service-learner, the student’s role as learner or employee isn’t always defined under the law. Therefore the laws of labor may need to be considered.

Federal Labor Laws
Most of the statutory framework of American labor law which includes the child labor laws, legislation regulating the workplace and legislation seeking to protect workers' interests, emerged during the first half of the twentieth century. Today's law of the workplace is implemented under the general framework of federal labor statutes and the more specific labor statutes which vary from state to state.

The federal statutory framework was established under the Fair Labor Standards Act (FLSA). In Walling, Mr. Justice Black stated that the "Fair Labor Standards Act fixes the minimum wage that employers must pay employees who work in activities covered by the Act...[I]n determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance." While the Act does not expressly include or exclude students or persons working without expectation of compensation, "...there is no indication from the legislation...that Congress intended to outlaw such relationships as these." While schools,

91 Michael B. Goldstein and Peter Wolk, Legal Rights and Obligations of Students, Employees, and Institutions in K.G. Ryder, Education in a New Era: Understanding and Strengthening the Links Between College and the Workplace 169 (1987).

92 Id.


94 Walling, 330 U.S. 148, 150.

95 Id. 330 U.S. 148, 152.
colleges, and universities are covered under the Act,\footnote{Goldstein, supra note 43.} 
"...work experience programs that are closely related to a student's academic program and are conducted under the auspices of an educational institution would not ordinarily fall within the Fair Labor Standards Act, absent extenuating circumstances."\footnote{Letter to Ms. Louise Wasson of Seattle Public Schools from Michael Goldstein of Dow, Lohnes & Albertson 3 (January 29, 1985) on file with the National Society for Experiential Education [copy on file with author].}

Although the FLSA has generated much litigation, no clear definition of the employer-employee relationship has emerged.\footnote{Arnold Rehmann, \textit{Legal Issues in Experience-Based Career Education} (research report submitted to the Career Education Program, National Institute of Education, (Pursuant to Contract OEC-0-72-5240) May 1, 1974 and reprinted with permission of Aries Corporation, 4930 W 77th Street, Minneapolis, Minnesota) at 52 indicating that Goldberg v. Wade Lahan Construction Co., 290 F.2d 408 (1961) cites 30 Supreme Court cases dealing with the definition of the employer-employee relationship.} However, five criteria which may transform a volunteer into an employee under the FLSA have been identified.\footnote{Suzanne Tufts, Charles Tremper, Anna Seidman, and Jeffrey Kahn, \textit{Legal Barriers to Volunteer Service}, (Nonprofit Risk Management Center, 1994) 4.} These include:

1. Receiving payment (monetary or in-kind)
2. Providing a service which competes with or forces displacement of a worker;
3. Volunteering to one's employer if the voluntary task is equivalent to the work performed during the regular employment period;
(4) Earning a livelihood from the organization for which the volunteer service is performed;

(5) Doing work which benefits the organization itself rather than the stated recipients of the volunteer assignment.\textsuperscript{100}

Generally, the FLSA does not apply to persons working to accomplish "public service, religious, or humanitarian " goals if their donated services are not causing the displacement of workers.\textsuperscript{101}

However, it has been established that what constitutes work is a question of law;\textsuperscript{102} and all who provide services are not necessarily employees.\textsuperscript{103} When determining the existence of an employer-employee relationship, the power to control a service provider's conduct is considered the most significant element.\textsuperscript{104} If the existence of an employment relationship is present, the analysis must turn to the nature of the service provided and whether it is "commercial" or "charitable" work.\textsuperscript{105}

\textsuperscript{100} Id. noting that these criteria were developed by interpreting multiple Labor Department documents; see also Michael B. Goldstein, \textit{Legal Issues in Combining Service and Learning} in Jane C. Kendall and Associates, \textit{Combining Service and Learning: A Resource Book for Community and Public Service}, Volume II (1990) stating that "the Fair Labor Standards Act implies that one cannot [be employed without being paid for the work] but the decisions remain unclear."

\textsuperscript{101} Tufts \textit{et al.}, supra note 47, at 5.

\textsuperscript{102} Amicus brief for petitioner, Tennessee C.I. & R. Co. v. Muscoda, 88 L. Ed. 949, 951b; but see Justice Roberts' dissent stating "...what Congress meant by work was...the actual service rendered to the employer for which he pays wages in conformity to custom or agreement" at 962a.

\textsuperscript{103} United States v. Silk, 331 U.S. 704, 712 (1947); 91 L.Ed. 1757, 1767b.

\textsuperscript{104} See NLRB v. Hearst Pub., Inc., 88 L. Ed. 1170 (1944) at 1173a (defining terms in accordance with the National Labor (continued...)}
relationship is determined by the National Labor Relations Board (N.L.R.B.), this determination is regarded as conclusive when supported by the evidence;\textsuperscript{105} case law defines the employment relationship under the FLSA and the Social Security Act.\textsuperscript{106}

Under the Wage-Hour Administrative Ruling WH-70, a multipart test is used to determine whether work an intern performs constitutes employment under the FLSA.\textsuperscript{107} If all the conditions of the test are satisfied, an academic

\textsuperscript{104}(...continued)
Relations Act); Bartels v. Birmingham, 332 U.S. 126, (1947) at 127a (stating "...person having the right of control over the services to be rendered is the employer of those over whom he has such right of control, and it is entirely immaterial and irrelevant whether or not he exercises that control"); United States v. Silk, 331 U.S. 704 (1947) at 712 (indicating that absence of an expressly reserved right of control in a single feature [of the work] may become the criterion for deciding who is the employer); Rutherford Food Corp. v. McComb, 331 U.S. 722 (for the statutory definitions of employer and employee for the FLSA and also indicating that determination of an employment relationship depends on the whole activity and not isolated factors); Goldstein, supra note 43, at 172.

\textsuperscript{105} See N.L.R.B. v. Hearst Publishing, Inc. 322 U.S. 111, 131 (stating that the role of the courts is limited when an agency has the duty of initial review); 88 L.Ed. 1170, 1170b, 1180b (indicating that N.L.R.B. decisions do not depend on state law to determine existence of employer-employee relationships).

\textsuperscript{106} Rehmann, supra note 48, at 51 - 54.

\textsuperscript{107} Letter to Ms Wasson, supra note 47, at 2 (indicating that primary benefit of work performed must flow to the student; that work must be under the auspices [e.g., protection or patronage according to Webster’s Dictionary] of the educational institution; that compensation was not a consideration at the inception of the internship; that no anticipation of regular employment existed at the completion of the program.)
internship is exempted from the FLSA coverage because the primary benefit of the experience flows to the student.\textsuperscript{108} When a court emphasizes the \textit{value} of the training as the benefit flowing to the student, a situation analogous to traditional forms of compensation may be created and thus establish an employment relationship.\textsuperscript{109} Also, in one state there is a possibility that students in experienced-based learning situations who are reimbursed for out-of-pocket expenses could be considered employees.\textsuperscript{110}

\textbf{Workers' Compensation Rules}

Determination of status as an employee is critical for receipt of workmen's compensation which provides financial assistance to an employee who sustains a work-related injury, regardless of the cause of the injury.\textsuperscript{111} However, employee or salary status is not the only requisite condition for

\textsuperscript{108} \textit{Id.} at 2; see also note 48, 50 and accompanying text.

\textsuperscript{109} \textit{See infra} note 61 discussing appellate decision in Barragan \textit{v. Worker's Compensation Appeals Bd, 240 Cal, Rptr. 811 (1987); see also Rehmann, supra note 46, at 69.}

\textsuperscript{110} Whitepaper from Office of Experiential Education, University of Kentucky, Kentucky Workmen's Compensation and Experiential Learning Situations, (May 6, 1974).

\textsuperscript{111} Michael B. Goldstein, \textit{Liability for Volunteers' Injuries}, Synergist 42 - 44 (Winter 1979) indicating workmen's compensation is a form of statutory insurance paid for by an employer and provides recovery for medical costs and lost earnings resulting from injury due to employee's own or employer's negligence.
entitlement to compensation. Sometimes, if an employment relationship can be determined, a volunteer, as an employee, may be protected under workmen's compensation. Students participating in the University of Kentucky Experiential Education Program possess statutory entitlement to the state compensation program if they incur a placement-related injury. This "no-fault-type" insurance exists in every state, but the workers covered under the law vary.

Under the pertinent paragraphs of the Worker's Compensation Act of Illinois (820 ILCS 305/1) "employer" and

112 Rehmann, supra note 46, at 76.

113 See Barragan v. Worker's Compensation Board 240 Cal. Rptr. 811 (1987) where a student in a degree-required internship was injured during the course of performing service and was refused compensation by the hospital because she was not an employee; where the determination was overturned by the California Court of Appeals which found four reasons that entitled the student intern to compensation: (1) an employer-employee relationship was created when the student performed a service (assisting patients) and was rewarded by the hospital (receiving training and instruction); (2) the hospital directed all her service and accorded her the same treatment as all other employees; (3) no exclusions for students were included in the state's worker's compensation statute; (4) the student was not a true volunteer because the internship was a degree requirement; see also Goldstein, supra note 59, at 43c; Tufts et al., supra note 48 at 4.

114 Under Kentucky Revised Statute (KRS) 342.640 everyone who is under an express or implied contract of hire is an employee except those specifically exempted under KRS 342.650. Kentucky students working out of state can collect in Kentucky so long as the employment contract is made in Kentucky, and the student can be classified as an employee in Kentucky; or the student can also file in the employer's state.

115 Rehmann, supra note 46, at 76.
"employee" are defined as follows:

(a) The term "employer" as used in this Act means:

1. The State and each county, city, town, township, incorporated village, school district, body politic, or municipal corporation therein.

2. Every person, firm, public, or private corporation, including hospitals, public service, eleemosynary, religious or charitable corporations or associations who has any person in service or under any contract of hire, express or implied, oral or written, and who is engaged in any of the enterprises or businesses enumerated in Section 3 of this Act, or who... has elected to become subject to the provisions of this Act, and who has not, prior to such accident, effected a withdrawal of such election in the manner provided in this Act.

(b) The term "employee" as used in this Act means:

1. Every person in the service of the State, including members of the General Assembly, members of the Commerce Commission, members of the Industrial Commission, and all persons in the service of the University of Illinois, county, including city, town, township, incorporated village or school district, body politic, or municipal corporation therein, whether by election, under appointment or contract of hire, express or implied, oral or written,... and including any official of the State, any county, city town, township, incorporated village school district, body politic or municipal corporation therein except...is an employee under this Act only with respect to claims brought under paragraph (c) of Section (8).

One employed by a contractor who has contracted with the State, or a county, city, town, township, incorporated village, school district, body politic or municipal corporation therein, through its representatives, is not considered as an employee of the State, county, city, town, township, incorporated village, school district, body politic or municipal corporation which made the contract.

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State
of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made, and including aliens, and minors who, for the purposes of this Act are considered the same and have the same powers to contract, receive payments and give quittances therefor (sic), as adult employees.

Determination of "employee" status sufficient to activate state worker's compensation benefits must be resolved by reference to the history and fundamental purposes of the act not simply the technical contractual or common law conceptions of employment. The following cases should clarify this point.

A student at the University of Illinois was partially paralyzed due to spinal cord or nervous system injury sustained making a fire dive at a water circus in the gymnasium swimming pool. The student filed a claim under the Workmen's Compensation Act against the University's Board of Trustees and the Athletic Association, both corporations. The hearing officer for the Industrial Commission dismissed the petition for want of

116 82 Am Jur 2d, sec. 143

117 Athletic Association of the University of Illinois v. Industrial Commission, 384 Ill. 208.

118 Record by Petitioners at 244, Athletic Association of the University of Illinois v. Industrial Commission 384 Ill. 208 (Sup.Ct., January Term, A.D. 1943) (No. 27032).
jurisdiction.  

On appeal to the Industrial Commission a certified copy of the Athletic Association charter was included with the evidence. Based on the evidence presented to the arbitrator, including the certified copy of the organization’s charter, the Industrial Commission entered a determination in the form of monetary compensation for the student. The case was reviewed by the Circuit Court on certiorari, and the decision of the Industrial Commission was approved and confirmed.

The opinion of the circuit court, focused on the relationship between the University and the Athletic Association and concluded that the evidence indicated the Association existed as an "entirely independent corporation" chartered under the nonprofit statutes of the state. Furthermore, since Association funds were held solely in the name of the Association and not the University, a judgement against the Association would not "control the action of the State or subject it to liability." Finally, citing to 16 C.J.S. 374, 375 and McDermott v. A.B.C. Oil Burner Sales Corp,

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119 Id. accepting the opinion of University counsel that the Association was an agency of the University which was an arm of the State which claims were to be heard by the Courts of Claims.

120 Id. at 245.

121 Record, supra note 67, at 251.

122 Id. at 252.
266 Ill.App. 115, 121, the opinion concluded that the "Association ... is only liable for its own acts and a judgement against it has no legal effect whatever against the University."\textsuperscript{123}

After resolving the issue of the Athletic Association's relationship to the University, the employer-employee relationship was analyzed in terms of the Association charter, organizational insurance for employee injury, and the status of the petitioner (student). Then referring to the Workmen's Compensation Act in force at the time of litigation, citing supporting case law and providing a lengthy discussion of the relationships of the parties, the opinion concludes: (1) that petitioner is an employee; (2) that the Association controls the activity; and (3) that the activity fell under the usual course of trade or business of the Association.\textsuperscript{124} Under Illinois Statutes\textsuperscript{125} and case law\textsuperscript{126} this is an appropriate

\textsuperscript{123} Id.

\textsuperscript{124} Id. at 254 - 269.

\textsuperscript{125} Ill. Bar R.S. 1941, Ch. 48, Sec. 156 (f) states: "The decision of the industrial commission acting within its powers... shall, in the absence of fraud, be conclusive unless reviewed as in this paragraph hereinafter provided." The following section says: "(1). The Circuit Court ...shall by writ of certiorari to the Industrial Commission have power to review all questions of law and fact presented by such record."

\textsuperscript{126} See Brief for Respondent at 49, Athletic Association of the University of Illinois v. Industrial Commission, 384 Ill. 208 discussing Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 501-02, 113 N.E. 976, 978 (stating that the Circuit and Supreme courts can only review questions of law (continued...)}
outcome. However, the Illinois Supreme Court reviewed the decision on a writ of error and reversed the award.

This court determined that the analysis of the lower courts created a strained construction of the term 'employee' for purposes of the Act. The court distinguished between liberal construction and a strained construction designed to extend the scope of the Act to employments or occupations not fairly within the Act. The principle of law then is that the term "employee" must be construed to reflect the legislative intent of the Act.

Nearly 30 years later, in The Board of Education of the City of Chicago v. Industrial Commission et al., the Supreme Court of Illinois held that where the 100 hours of clinical observation performed by an education student were a university requirement which students were expected to complete in the course of their training, a student who was injured in the course of completing these hours was not an

126(...continued)
when reviewing proceedings of the Industrial Commission and if the evidence supports the decision of the commission, it is out of the province of the courts to comment upon the weight or the sufficiency of the evidence); quoting Chicago & Midland Ry. Co. v. Industrial Commission, 362 Ill. 257. 261, 199 N.E. 828, 830(stating that the Supreme Court has a duty to consider the evidence; will not substitute its judgement for that of the Industrial Commission especially where the decision of the Commission has received the endorsement of the circuit court unless the judgement is clearly and manifestly against the weight of the evidence); and Perkins Products Co. v. Industrial Commission, 379 Ill. 115, 117, 39 N.E. (2d) 372, 373(quoting Chief Justice Smith to the same effect).

127 53 Ill.2d 167, 290 N.E. 2d 247.
'employee' of the Chicago Board of Education and therefore not entitled to receive compensation for the injuries she sustained when she fell down the stairs.\textsuperscript{128} To support its position, the court referred to the social policy involved stating that the purpose of compensation in this state and others is to restore lost wages "for workers whose earning power is interrupted or terminated as a consequence of injuries arising out of and in the course of their employment."\textsuperscript{129} Also that throughout the country the interpretations involving compensation laws have uniformly excluded gratuitous workers from coverage.\textsuperscript{130} Receipt of wages is a determining factor for entitlement to workers' compensation benefits.

A third Illinois case, an appeal from the decision of the circuit court, serves to emphasize the need for assent to employment by the parties as a condition for receiving compensation for a job-related injury. This claimant applied for compensation benefits for injuries sustained in a fall while supervising lunchroom activities. For this service she

\textsuperscript{128} Chgo Bd. of Ed. v. Industrial Com. 53 Ill.2d 167

\textsuperscript{129} Id. at 171 citing to Coclasure v. Industrial Com. (1958), 14 Ill.2d 455; Lambert v. Industrial Com. (1952), 411 Ill. 593).

\textsuperscript{130} Id. at 171 citing to discussion and cases in 1A A. Larson, Workmen's Compensation Law (1967), sec. 47.10 et seq.; 99 C.J.S., Workmen's Compensation, sec. 64; but see Orphant v. St. Louis State Hospital (Mo.1969), 441 S.W. 2d 355 where the statute embodied contrary legislative intent.
received $52 per month from the school PTA.\textsuperscript{131} Claimant was a volunteer in the school at other times of the day. The school principal attested to knowledge of the claimant's pay from the PTA for lunchroom supervision services, that she and the assistant principal supervised the claimant's work and that she had the power to terminate claimant's services should they prove unsatisfactory. The claimant was under the control and supervision of the principal, not the PTA.\textsuperscript{132} Board knowledge was immaterial because the principal as agent for the Board was acting within the scope of her authority. The decision of the circuit court denying an award for compensation benefits was reversed and the award of the Commission reinstated.

The Supreme Court of Illinois distinguished the instant case from the prior case on two counts: (1) The Board offered the education student no consideration for her services. (2) The student did not consider herself to be an employee, nor did the Board consider her as a Board of Education employee even though the principal directed and controlled the student teacher's activities at the school. The legal principle that emerges is that students participating in curriculum-imposed activities and receiving no wages for their services are

\textsuperscript{131} The Board of Education of the City of Chicago v. The Industrial Commission et al., 57 Ill. 2d 339, 312 N.E. 2d 244 (1974).

\textsuperscript{132} Id. at 245.
volunteers, not employees based on Illinois law in 1972.

In the instant case, a school volunteer acting as the school's lunchroom supervisor, an activity for which she received a monetary compensation, was an employee in her capacity as supervisor. Citing its decision against the student claimant, the Illinois Supreme Court reiterated that 'it is generally recognized that a true employer-employee relationship does not exist in the absence of the payment or expected payment of consideration in some form by employer to employee.' Although the payment was indirect (The PTA paid for the lunchroom supervisor's services), the Court cited its holding in Forest Preserve District v. Industrial Com. (1934), 357 Ill.389, 192 N.E.342 which determined that an employer need not pay an employee if the employer is aware that a third party is paying the employee for the services performed for the employer.\(^{133}\) It also quoted from 1A A.Larson, Law of Workmen's Compensation (1973), sec. 47.41n.1 cited in Forest Preserve District, that 'so long as there is some kind of pay, it is not essential that the payment come from the employer.'\(^{134}\)

Authority supporting student teachers as employees is in conflict. In some states, student teachers who are injured in the course of student teaching assignments may be employees of

\(^{133}\) Id. at 246.

\(^{134}\) Id.
their colleges;\textsuperscript{135} in other states, they may be employees of the school districts to which they are assigned for purposes of worker's compensation;\textsuperscript{136} or their status may be undefined.

Bringing service-learners within the meaning of "employee" under state workmen's compensation statutes may result in a "win-win" situation for both the student and the organization which accepts the student. In the event of injury to the student, the organization's liability is limited because a covered employee cannot sue for negligence except under limited and unusual circumstances.\textsuperscript{137} The covered employee who is injured usually receives remuneration for lost compensation and/or medical costs.\textsuperscript{138} Thus, only those in limited and unusual circumstances or those not covered by compensation statutes would be inclined to bring an action for the tort of negligence against the organization which acts as

\textsuperscript{135} See School Dist. No.60 v. Industrial Commission, Colc.App., 601 P.2d 651 where under Colorado statute the student teacher was determined to be an 'employee' of the state university which he attended and had been 'placed with an employer' when he was assigned by the college to a public school district and was injured when supervising playground activities and therefore entitled compensation.

\textsuperscript{136} Illinois and California in particular; although analogous situations may exist in other states

\textsuperscript{137} Supra note 73; see also Goldstein, supra note 59 at 44a.

\textsuperscript{138} Id.
an employer.\textsuperscript{139}

Decisions in other jurisdictions generally have affirmed the principles presented above. Student nurses who pay tuition but are required to work regular shifts in addition to attending classes and serve without pay under the direction of the supervisory staff of the hospital while they are working are employees within the compensation act when they receive room and board which represent remuneration.\textsuperscript{140} However, student nurse trainees who do not receive wages of some statutorily acceptable form may not be employees as a matter of law even where prejudicial authority recognizing training and control as wages exists.\textsuperscript{141} There is also authority to

\textsuperscript{139} Diane L. Banks, Legal Issues in International Cooperative Education, XXI Journal of Cooperative Education 3:34 - 35 (1985) noting also that domestic legal issues are complicated when American students are assigned to international cooperative education programs. Problems arising include non-coverage under workmen's compensation programs, compliance with governing statutes, labor laws, immigration laws, and import-export laws of the respective countries as well as the contractual issues between institutions or students and landlords.

\textsuperscript{140} In Re Brewer's Case, 141 N.E.2d 281; see also Caraway Methodist Hospital v. Pitts, 57 So.2d 96, 100 for other cases indicating that the relationship between a student nurse and a hospital under a similar fact situation is that of employer to employee.

\textsuperscript{141} Salvation Army v. Mathews, Ky. App 847 S.W.2d 751 (1993) where female enrolled in a school program leading to licensure for practical nurses, paid the required tuition for full-time study, and worked at a designated hospital, under supervision of the teacher or person affiliated with the nursing school, to fulfill the practical training requirement sustained injuries as the result of a fall; where student claim under the Kentucky Worker's Compensation Act was denied based on her non-employee status and on appeal via memorandum (continued...)}
support the non-employee status of nurse's aide trainees who receive uncompensated training in hospitals with no promise of positions upon completion of the training.\textsuperscript{142}

While the job status of apprentice medical-related personnel may be problematic and require determination on a case by case basis, it is possible that these personnel may be students for some purposes and employees for others.\textsuperscript{143}

\textsuperscript{141}(...continued) argued that she was an 'apprentice' under applicable statutes; where review board responded that instant case which provided no remuneration whereas cases brought in other health facilities demonstrated receipt of some form of in-kind compensation determined claimant to be a non-employee for purposes of compensation; where claimant appealed to compensation board which cited Mississippi case law accepting student nurse training as compensation based on statutes of that state coupled with control exercised over clinical training to qualify Mississippi student nurse for compensation benefits and awarded benefits to Kentucky student stating that training alone was sufficient under KRS 342.0011(17) to qualify student nurse as employee for compensation benefits; where hospital appealed decision based on definitions in state compensation act indicating that wages were a critical factor for determination of an employment relationship under Kentucky statutes and court agreed indicating that under statutory provision KRS342.640 contracts for apprenticeships also required remuneration to provide protection under compensation statutes.

\textsuperscript{142} Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429 (1970) where judge reviewing the industrial commissioner's determination held that the evidence that trainee had received neither compensation nor a promise of future employment was sufficient to determine that trainee was not employee at time of injury and affirmed denial of award.

\textsuperscript{143} See Cedars-Sinai Medical Center and Cedars-Sinai Housestaff Association, 223 N.L.R.B. No.57 (March 19, 1976) which is frequently cited for its determination that interns, residents and clinical fellows are "primarily students" and therefore not employees subject to the N.L.R.A. collective bargaining provision; but see an earlier case, City of Miami (continued...)
technician trainees, one group of medical-related personnel, may be apprentices at the hospitals where they provide services and qualified as employees of the hospital for compensation benefits when injured in the course of the training.\textsuperscript{144}

There have also been claims that persons enrolled in programs for medical-related personnel occupy a dual status, simultaneous student-employee status.\textsuperscript{145} One such claimant enrolled in an accredited nursing school under a federal

\textsuperscript{143}(...continued)

v. Oates, 10 So.2d 721 (Dec. 1, 1942) which determined that a hospital, organized under statute and operated by a municipality, is liable for the negligent acts of an interne, as it is for those of a nurse, under "respondeat superior" because both are employees and that acts of negligence by a nurse are answerable in damages.

\textsuperscript{144} Wilson Memorial Hospital, Inc., 226 S.E. 2d 225 where a student attending a technical institute was assigned to a cooperating hospital for on-the-job training as a lab-technician pursuant to a curriculum requirement received on-site training and free laundry service while working 40 hours per week without wages and performed tests, analyses, and procedures as a hospital agent as did full-time employees in this department was determined to be an apprentice within the meaning of the applicable North Carolina statute and providing the clarification that the court found "these trainees not to be primarily students, but rather to be apprentice employees within the meaning of the Workmen's Compensation Act"; and noting that although the record indicates the trainees were covered by the Act, the agreement between the school and the hospital did not have a provision to effect the Act and the agreement between the school and hospital did not contain a provision for indemnification to secure the hospital against loss or damage that could result from trainee injury.

program which provided the claimant with tuition and a weekly maintenance allowance and paid the school for each hour of formal instruction it provided to her. One of the requirements for licensure, clinical experience, could only be attained in a hospital setting (Cal.Adm.Code, Title 16, sec. 2557). The teacher in the nursing program had to be acceptable to the hospital and received her salary from the hospital. Additionally the hospital paid the school an hourly per student rate for time spent by each student in the hospital. Daily training was 25% academic and 75% clinical. Activities were commensurate with experience and progressed from routine patient care to administration of medicine and changing dressing.

146 Anaheim General Hosp. v. Workmen’s Comp. App. Bd., 83 Cal. Rptr. 495 (1970); but see Otten v. State et al., 40 N.W. 2d 81 (Dec.9, 1949) for an earlier case on appeal where a student nurse at a state university taking courses under the United States Cadet Nurses Corps program which covered tuition, fees, and other expenses and received a monthly stipend from the University and non-monetary compensation from the affiliates where she received her clinical training including the hospital where she contracted a disease causing a disability and where the University maintained full control over her on-campus program, assignments to clinical rotations and her personal conduct and deportment was deemed an employee of the state university at the onset of disease because factors considered as decisive (hiring, payment of compensation, the right to hire and fire, and the right to control the means and manner of the performance of the work) were all under the control of the university which never relinquished control of supervision or assignment of rotations to affiliate sites and as an employee of the university claimant was entitled to recover compensation only from it.

147 Id. at 496,

148 Id. at 497.
There was no evidence of a contract between the student and the hospital. However, the claimant’s services benefitted the hospital. Although no actual wages were received, the hourly rate the hospital paid to the school represented "consideration in the form of the school’s willingness to accept her as a student despite the eventuality it might not be paid for the full course by the government in the event she dropped out."\textsuperscript{149}

In its determination of whether a student who receives on-the-job training is an employee of a 3rd party, the court emphasized three findings. (1) Valid consideration for an employment contract existed because the hospital benefitted from the services of the student and because of the conditions under which the hospital paid the school for the attendance of each student trainee. (2) The hospital maintained exclusive control and direction over the work the student performed including the teacher which the school provided. (3) Because the hospital had complete control over the work including the supervision of the teacher, the court inferred that the student could be terminated for infraction of its rules or unsatisfactory service. As a result of these findings, the court held that an implied contract of employment existed and that the dual status of student-employee at time of injury entitled the student nurse to compensation benefits. The court also opined that for worker’s compensation benefits, it is

\textsuperscript{149} Id.
better to view student teachers and student nurses as employees.\textsuperscript{150}

**Volunteers**

Service-learners classified as volunteers retain vulnerability to lawsuits in approximately half of the states.\textsuperscript{151} In Illinois limited volunteer liability is extended for service provided for any corporation which is organized under the Illinois Nonprofit Corporations Act and which qualifies for tax exemption under Internal Revenue Code, sec. 501(c)(3). Usually coverage applies to charitable organizations or to other groups which include homeowners' associations, licensed medical facilities, and other organizations that would be tax exempt but for legislative or political activities.\textsuperscript{152} Exceptions are enumerated in the statute. To bring suit for a cause of action, the involved conduct must be wilful and wanton; and persons bringing suit must be serving without compensation other than for actual [author's emphasis] expenses.\textsuperscript{153}

Under provisions of the Illinois Compiled Statutes, 745

\textsuperscript{150} Id. at 298.

\textsuperscript{151} Nonprofit Risk Management Center, *Two Paths to Volunteer Protection*, 4 Community Risk Management & Insurance 9 (September 1995).

\textsuperscript{152} 805 Illinois Compiled Statutes (ILCS) 105/108.70 (Smith-Hurd).

\textsuperscript{153} Id.
ILCS 80/1 (Smith-Hurd), sports volunteers may be compensated for reasonable expenses; and umpires or referees are allowed to accept a modest honorarium. While the statute lists persons covered and the parameters of their participation, there is no protection from civil liability; and conduct falling "substantially below" accepted practice and standards is not protected. Other exclusions are enumerated.

Volunteers providing medical services in medical clinics must be licensed to practice the treatment of humans in any state or territory of the United States. They, like most other volunteers, must be uncompensated and are not protected from civil liability. As a point of distinction, the limitations of liability for volunteers providing medical services apply only if they are posted in the free medical clinic. Other exclusions and conditions exist.\textsuperscript{154}

Because their roles are not clearly defined under the law, students who attempt to recover damages under state compensation statutes for injuries sustained in the course of participation in university events may find themselves in uncertain and complex legal arenas.

\textsuperscript{154} 225 ILCS 60/31 (Smith-Hurd).
CHAPTER IV

MANDATORY COMMUNITY SERVICE IN SECONDARY SCHOOLS

USA Today, September 15, 1993, reported that polls indicate in excess of 60% of American youth ages twelve to seventeen years engage in volunteer work. While it is unclear whether or not these figures represent the growing number of school districts which require mandatory community service, it should be noted that at the present time at least seventeen states have some type of youth service policy for high school students. In several school districts

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156 See Nancy Murphy, *European Council of International Schools, 1996 Autumn Conference*, Nice, France, listing 14 states and the District of Columbia [Arkansas Act 648 (1993); California Community Service Pilot Projects legislation passed, but appropriations denied (1990) and Challenge School District Initiative (1996) requiring that by 2004 all high school students will participate in at least one course service-learning course before graduation from high school; Connecticut (1988); District of Columbia; Hawaii (1996); Kentucky links service-learning to state education reform (1990); Maryland requires community service for graduation from all public high schools (1992); Massachusetts (1994); Minnesota (1987, 1993); Ohio House Bill 396 (1992); Oklahoma Senate Bill 680 allows school districts to award credit for community service (1992); Oregon HB 3293 authorized the Department of Education to create community service programs (1989); Pennsylvania (1993); South Carolina (1994); Utah (1988)]; see also Eastern Regional Information Center, *Implementing Community Service in K-12 Schools: A Report on Policies and Practices in the Eastern Region* (June 1997) which (continued...)

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mandatory community service policies have been instituted.\textsuperscript{157}

Opponents of the service-learning requirement have challenged its constitutionality on three grounds. First, required community service infringes on expressive conduct as proscribed under the First Amendment. Second, compelled free service violates protection against involuntary servitude guaranteed by the Thirteenth Amendment. Third, parents' rights to control the education of their children as secured under the Fourteenth Amendment are usurped. Proponents of the requirement usually cite policy or altruistic reasons.\textsuperscript{158}

At this time, no service-learning suit has been litigated in Illinois or in the Seventh Judicial Circuit. However, recent decisions in cases from other jurisdictions, although not establishing precedent, create persuasive authority for

\textsuperscript{156}(...continued)

identifies the states of South Carolina, New Hampshire and Vermont.

\textsuperscript{157} N. Murphy, \textit{Resource Sheet: Mandatory Service}, European Council of International Schools, 1996 Autumn Conference, Nice, France reports the following although others may exist: Bethlehem, Pennsylvania; Atlanta, Georgia; Chatham, Georgia; Canaw County, West Virginia; Mason City, West Virginia; Chapel Hill-Carrboro, North Carolina; Bloomfield Hills, Michigan; Rye High School, Rye, New York; Detroit Public Schools, Detroit, Michigan; District of Columbia, Washington, D.C.; Westchester County, New York; Raleigh, North Carolina; Dade County (Miami), Florida; San Antonio, Texas; Corpus Christi, Texas; Cincinnati, Ohio; and Jefferson Parish, Louisiana.

\textsuperscript{158} Examples of reasons for service-learning or community service requirements for graduation include active involvement in learning, excellent preparation for responsible citizenship, a need for exposure to service so that students will not neglect it later in life, to instill a positive feeling about service to others, etc.
the analyses that may be shaping the development of legal theories related to service-learning in secondary and lower schools.

The earliest on-point case in the secondary schools is *Steirer v. Bethlehem Area School District.* This case raises two issues. First it considers whether a requirement that students perform community service to be entitled to graduate from high school compels students to engage in expressive conduct that infringes on their First Amendment freedom. Next, it seeks to determine whether the requirement constitutes "involuntary servitude" which is forbidden under the Thirteenth Amendment.

In *Steirer* the public school district adopted a graduation requirement that all high school students, except those enrolled in special education classes, must complete sixty hours of unpaid community service. Students could provide services in one of three programs: (1) a program operated by a school-district-approved agency; (2) an independent program selected by the school district; or (3) an independent program or "experiential activity" designed by the student and approved by appropriate school officials. Although no classroom instruction or discussion was involved, credit was awarded; and any student not completing the program

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satisfactorily would not receive a diploma from a district high school.

Two students and their parents brought suit in the United States District Court challenging the constitutionality of the program and seeking a permanent injunction\(^\text{161}\) against enforcement of the community service requirement for high school graduation. The district court found for the school district on all counts.

In 1995, parents and students in the Rye Neck School District of New York brought suit against the district on grounds of violation of parent rights, student liberty and student privacy, and Thirteenth Amendment challenges. Using Steirer as precedent, this court also found for the school district.\(^\text{162}\)

More recently, parents and students in the Chapel Hill-Carrboro City School District brought an action challenging completion of the district’s community service requirement in order to graduate.\(^\text{163}\) Beginning with the graduating class of 1997, students in the Chapel Hill-Carrboro School System are required to complete fifty (50) hours of unpaid community service for high school credit while attending in order to be

\(^{161}\) A permanent injunction is a court order which is granted after a final hearing on the merits. See Black at 316 indicating that a permanent injunction does not last forever.


\(^{163}\) See Herndon by Herndon v. Chapel Hill-Carrboro, 89 F. 3d 174 (4th Cir. 1996).
eligible for graduation; service hours for transferees are prorated. The program permits neither an opt-out provision nor a credit substitution for objectors. Additionally, the service must be performed on the students' own time.

Minimally, two types of service are required and hours spent performing clerical work or fund raising are limited. A program coordinator maintains a list of approved placements reflecting a wide variety of purposes and philosophies. The coordinator also may approve any placement selections not appearing on the approved list. However, the principal is the final decision-maker.

Acceptable contexts for the service are delineated in the program description. The external agencies for which students provide services are responsible for training, supervision and verification of service hours. Students must submit the verified time sheets and a one-to-two-page reflective paper based on journal responses written after each particular service experience.

Parents in the Chapel Hill Carrboro School System objected to the community service requirement for three reasons: (1) It violates the Thirteenth Amendment prohibition against involuntary servitude. (2) It violates the parents' right to direct the education of their children as secured under the Fourteenth Amendment. (3) It is an infringement of freedom from compulsory service guaranteed under the substantive due process clause of the Fourteenth Amendment.
The decision of the district court favoring the school district on all three counts was upheld at the appellate level.

A strained interpretation of Constitutional issues surfaces from a careful reading of the Steirer, Rye-Neck, and Chapel Hill cases cited above. The holdings should be grounded in solid legal reasoning. Instead they rely heavily on policy considerations which lack objective bases.\footnote{In Steirer the court did not even consider the possibility that the required community service could be considered expressive conduct even though plaintiffs provided examples of similar conduct in Barnette, 319 U.S. 624, 633 (1943) and Wooley, 430 U.S. 705, 715 (1977) and similar cases where the acts were declared violative by the Supreme Court. By summarily concluding no involvement of expressive conduct present in required community service and ignoring even the possibility of involvement of expressive conduct the court avoided analysis of compelling affirmation which determination would have forced the court to find a sufficiently important governmental interest to justify even an incidental limitation of students' free speech rights guaranteed under the First Amendment. Hence the courts' deference based on a public policy attitude that all school programs compel submission to some value-based judgements and that value-based judgements in all programs are similar emerges as persuasive even though this conclusion is based on an incomplete argument. Furthermore, no rationale exists for the inconsistencies in the supporting examples (health education and substance abuse education) which include a classroom component with no active participation and the community service program which involves active participation with no classroom component. Which begs the question, "Is a credit program involving no classroom component truly part of the curriculum or is it a mandatory extra-curricular requirement (clearly an oxymoron) for which credit has been designated as a justification for curricular status which public policy exempts from serious court scrutiny?" The holding is premised on the validity of the defendants comparison of the community service requirement to selective service, jury duty, and alternative sentencing programs for criminal offenses. In each of those instances, there is a recognized civic duty involved. Do students have a civic duty which compels them to perform altruistic and self-}
decisions in these cases, which challenged required service-learning programs in lower schools, reflect a pattern of deference to school discretion which Ray, Bickel and Dodd each identified in the resolution of issues emanating from contract disputes in higher education, institution over individual.\(^ {165}\)

Earlier it was noted that Dodd espouses balancing institutional duties to students against students' expectations of duty as a means to determine outcomes of student challenges in higher education contract suits. In cases emanating from challenges in lower schools, the parents usually request the courts to balance the important parental liberty to control the education of their off-spring (what parents expect of state education) against the state's interest in educating for responsible citizenship (the state's duty to educate).\(^ {166}\) In the Steirer decision, the court circumvented its opportunity to establish the parameters\(^ {167}\)

\(^{164}\)(...continued)

sacrificing acts? And if they do, would omission of these acts justify a school district from withholding a high-school diploma if all other graduation requirements are successfully completed and no alternative to the service requirement is provided?

\(^{165}\) Ray, supra note 17 at 163; Bickel, supra note 22 at 261; and Dodd, supra note 1 at 710.

\(^{166}\) Brief for Appellants at 149, Herndon, et al., v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) (No. 95-2525).

\(^{167}\) Steirer, 987 F.2d 989 (3rd Cir. 1993) at 997 stating "[h]aving decided that the Program does not compel expression protected by the First Amendment, it is unnecessary to (continued...)"
for determining issues which seem to conflict with parents' rights to educate as guaranteed under the Fourteenth Amendment.

At all levels of education, court decisions involving students and schools usually express a reluctance to interfere with the administration of schools. However, this deference is limited. Schools generally are endowed with discretion in curricular matters but possess much less authority over activities outside of school. This is especially evident where students are minors.\textsuperscript{168} Recall that in Herndon, the service was to be performed on the students' own time with no classroom component.

The mandatory community service requirement also has been challenged as a violation of the Thirteenth Amendment which prohibits involuntary servitude. The arguments for and against this position center on interpretations of the phrase "involuntary servitude." Proponents of the service-learning requirement for graduation insist that the intent of the

\textsuperscript{167}(...continued) consider whether the state has a compelling interest in implementing a mandatory community service graduation requirement" and affirming summary judgement for the defendants that the mandatory community service requirement did not infringe on the First Amendment rights of students to expressive conduct nor did it infringe on the Fourteenth Amendment rights of parents to control and direct the education of their children.

\textsuperscript{168} See E. Edmund Reutter, Jr. 760 (1994) stating that "it is...legally more difficult to enforce a rule of conduct outside of school than inside because of potential conflicts with the rights of parents..."
Thirteenth Amendment prohibition encompasses a broad understanding of the terms whereas opponents of the requirement restrict the meaning of the terms to acts akin to slavery. The language of the Amendment itself empowers courts to interpret "involuntary servitude" as compelled service for which no pay is rendered.\textsuperscript{169}

Furthermore in the \textit{Steirer} decision, the court determined that although students who resist completion of the service-learning requirement are denied the right to graduate from a public high school, no coercion results because there are other alternatives available for completion of a high school.

\textsuperscript{169} The Thirteenth Amendment reads as follows: "Section 1 - Neither slavery nor involuntary servitude, except as punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2 - Congress shall have the power to enforce this article by appropriate legislation."

Careful analysis of the language in the opening phrase of Section 1 indicates that the drafters of the Amendment by their inclusion of the word \textit{nor} between slavery and involuntary intended to distinguish between slavery and other forms of involuntary servitude. Slavery references people held in bondage as chattel whereas involuntary servitude alludes to people not owned but forced to perform service against their will. This broader interpretation is supported in Bailey v. Alabama, 219 U.S. 240 (1911) (stating that \text{[t]}he words involuntary servitude have a larger meaning than slavery); U.S. v. Booker, 655 F. 2d 562 (4th Cir. 1981) (stating that \text{[t]}he Amendment and the legislation were intended to eradicate not merely the formal system of slavery...but all forms of compulsory involuntary service); United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984) (stating that the design of this Amendment and the statutes which enforce it are not limited to the classic form of slavery but apply to various circumstances and conditions).
education. The court also held that since no party disputed the presence of educational value in the community service requirement, authority to remove the requirement rests with the state legislature rather than the judiciary. To those opposing the community service requirement, this appellate court holding represents yet another example of court deference to institutions.

The Supreme Court decisions consistently have recognized education as an important right of parents and as


171 Steirer, 987 F.2d 998 - 1000 (3rd Cir. 1993) (noting that although it does not regard the district court reasoning in Bobilin as persuasive, it [the Third Circuit court of Appeals] is "unprepared...at this time, to accept the proposition that the Thirteenth Amendment is inapplicable merely because the mandatory service requirement provides a public benefit by saving the taxpayers money" and therefore postpones the public benefit argument choosing instead to emulate the contextual analysis in Supreme Court decisions which demonstrate that the critical factor in finding involuntary servitude is "that the victim's only choice is between performing the labor on the one hand and physical and/or legal sanctions on the other" and that even this choice at times does not constitute involuntary servitude as in the instances where government requires established civic duties such as military duty, jury duty, and road building with legal sanctions imposed for failure to comply; and embellishing this analysis with modern day examples of involuntary servitude and with non-examples of involuntary servitude which include a state requirement of pro bono service from attorneys as a condition of licensure, similar pro bono circumstances in medical fields, and work-release program participation for prisoners; and finally stating that an alternative need not be appealing; it must merely exist for choice to be present.) In effect, the Court of Appeals, by not addressing the argument on the grounds presented by appellant, also circumvents the issue.
an essential concern of the state to insure an educated citizenry. However, the Court has never recognized a fundamental right of parents to have their children exempt from a state educational requirement on secular grounds.\footnote{172} Yet this is the very issue that parents raise when requesting that their offspring be excused from mandatory service requirements. As noted earlier, this also is the very issue that the analysis in Steirer avoided. Yet the subsequent decisions concerning mandatory service use Steirer as persuasive authority.

\footnote{172} See Aric Herndon, et al. v. Chapel Hill Carrboro City Board of Education, et al., Brief of Appellees, United States Court of Appeals 4th Cir. Record No. 95-2525 citing Runyon v. McCrary, 427 U.S. 160, 178 (1976) (explaining that the Supreme Court "has repeatedly stressed that...[parents] have no constitutional right to provide their children with ... education unfettered by reasonable government regulation"); Wisconsin v. Yoder, 406 U.S. 213 (1972) (stating that [t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education");
CHAPTER V
INSURANCE, WAIVERS, AND RISK MANAGEMENT

Risk managers recommend verification of site insurance before placing a student at an off-campus site for school-related experiences. When a school signs an indemnification agreement that passes responsibility for negligence from the agency hosting service-learners to the school which sends the service-learners, the educational institution must be certain that its insurance carrier will honor the transfer of liability. Not clearing this transfer of liability may result in the school bearing responsibility without insurance coverage.

When the indemnification agreement is reversed so that the responsibility passes from the school to the receiving agency, the school still must be wary. If an agency has little or no insurance, the educational institution which placed the

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173 BLACK defines an indemnity agreement as an arrangement to compensate for a loss, damage or liability; for purposes of insurance law this is the principle that the insurance policy should not confer a benefit greater in value than the loss sustained by the insured. In the case of service-learning programs, indemnity insurance would be an institution's policy that applies to the institution itself or the property belonging to the institution.

174 The Campus Compact Newsletter, v4 n4, Spring/Summer 1990 at 3.
student still may be sued under the deep pockets theory.\textsuperscript{175} However, if the agency in question is a public agency, it usually is protected from suit by law.

For students placed in international service-learning programs, insurance also is recommended. Although the U.S. Code 1961 places responsibility for insuring students in these programs on the administering program, the Mutual Security Act of 1954 which provides for the programs does not provide protection for students in international service-learning placements.\textsuperscript{176}

When students in international service-learning programs attempt to make claims, if the insured student is the same nationality as the insurer, the claim is handled as a domestic claim under domestic law. However, rules of nationality are governed by international law.\textsuperscript{177} For American students abroad disposition of this problem is a concern. However, Meron reports that international interest in the problem is limited to double claims.\textsuperscript{178}

Schools which are non-profits organizations must be

\textsuperscript{175} A legal theory of recovery; a party or entity with substantial assets against which a claim or judgement may be taken, like an insurance company, even though that party or entity is not responsible for the harm.

\textsuperscript{176} L.Diane Banks, \textit{Legal Issues in International Cooperative Education}, XXI Jrnl Coop Ed 3:36.

\textsuperscript{177} Id.

especially careful of situations in which service-learners may be inclined to transport community members by car. Even when the student is classified as a volunteer, not an employee, the institution can be sued if the driver is found to be negligent or to have caused damage to property while providing service. In such an instance, a court will be have to determine if the school had the right to control the student driver, even if the right had never been exercised.\textsuperscript{179} This may result in an insurance problem.

According to the September 1995 issue of \textit{Community Risk Management \& Insurance}, in such an instance, a "yes" reply to any one of the following questions may be sufficient evidence of the school's right of control of an activity: (1) Who or what entity decided to conduct the activity? (2) Who or what entity planned the scope of the activity? (3) Who or what entity asked the particular student to drive? (4) Was the driver's performance supervised by the school? (5) Was the driving necessary? (6) Could the driving have been assigned to someone else?

Additionally, questions related to scope of employment may also be used to determine the extent of a school's liability for the acts of a driver who is a service-learner. These questions would include the relationship of the activity to the mission of the school, the regularity with which the activity occurred, whether driving was permitted under the

\textsuperscript{179} See supra n170.
policies and procedures of the service-learning program, whether the school authorized the driving, and whether the driving was related to or incidental to the normal duties of the service-learner.

Although not a legal case premised on service-learning, the principles from *Baxter v Morningside, Inc.* (Wash App) 521 P2d 946, 82 ALR3d 1206 clearly illustrate how an organization can be vicariously liable for the acts of its service-learners who are classified as volunteers. In this case a volunteer "expressed a willingness to run errands and perform other tasks as a volunteer, contingent upon need and his availability."\(^{180}\) Morningside, Inc. accepted the volunteer’s offer and on several occasions solicited and accepted the driver’s gratuitous services. Because Morningside, Inc. called and requested the driver’s assistance on the morning of the accident in question, and because the court determined the accident was caused by the negligence of the volunteer driver, Morningside’s right to control the work of the volunteer driver was examined.

This court examined the "effect of volunteer status upon the existence of the master-servant relationship" and determined that status as a volunteer "does not necessarily preclude a finding that a master-servant relationship existed."\(^{181}\) The court found that when there is mutual

\(^{180}\) Baxter, 82 ALR3d 1209

\(^{181}\) Id. at 1210.
agreement controlling time, destination, and purpose of a trip, requisite conditions for the right of control are present. 182 Therefore, a master-servant relationship existed; the volunteer driver was acting within the scope of a master-servant relationship; and Morningside, Inc. was vicariously liable for the acts of its volunteer driver.

If driving is required as part of a service-learning placement, the school should define whether and what type of driving is within the scope of the service-learner’s position. The educational institution should also delineate who is authorized to drive, the type of vehicle that is to be used, and for what the service-learner is allowed to drive. Clear guidelines for driving will limit organizational liability should an accident occur.

While some institutions may be inclined to require waivers from service-learners, some discourage use of waivers for institutional protection. Disagreement arises because waivers cannot release a school from liability for its own negligence. Waivers only will protect the educational institution when the risks students incur are reasonable and foreseeable and not caused by institutional negligence.

A waiver is a signed document indicating that the sponsoring entity will not be held responsible in case of injury or damage during an activity or event. Where children are the litigants, courts are almost unanimous in holding that

182 Id. at 1211.
waivers do not release schools from liability for injury or damages which the school could have prevented during an event or activity in which the student was a participant. Courts hold that parents or guardians cannot sign away a child's right to sue for future injury.

However, when adults are participants, courts have interpreted waivers in different ways. In a case involving a proprietary school, a federal court ruled that the release signed by a patron of a beauty school was an enforceable contract, and adults have the right to contract away their right to sue others for negligence. But case law involving the use of waivers by colleges and universities has met with judicial disapproval. The arguments for this position are premised on the public policy position that acceptance of waivers creates a potential to allow future negligent acts by encouraging acceptance of faulty precautionary measures which would contribute to injuries and damage.

In a 1981 case involving the dental school at Emory University, a dental student broke a patient's jaw. The patient sued and the university claimed no responsibility because the patient had signed a release which the university termed "informed consent." Because those supervising the activities of the dental student, who for purposes of this

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paper is considered a service-learner, are professional under the laws of the State of Georgia, the Supreme Court of that state ruled that a written contract, even though termed "informed consent" does not and cannot excuse professionals from the standard of care owed to their clients.¹⁸⁴

Other cases exist indicating that for release forms to be valid, the language and circumstance must reveal that the parties clearly understand the definition and extent of the liability that is being waived. While differing court opinions on waivers exist, they still may be valuable in some circumstances. These signed documents serve as an advance warning to participants of inherent danger in an activity or event. Thus they may be used to argue that adults voluntarily assumed the specified risk. These forms also may discourage some injured parties from instituting suits against schools or be used by the schools to show that adequate warning was provided.

When students are placed off-campus for service-learning experiences, schools are wise to negotiate for supervision by the staff of the host site. Generally speaking, the school's duty to care or protect increases in direct proportion to the degree of supervision provided. Inspection is one way to evaluate risks at an off-campus placement site. However, on-site inspection programs can raise legal questions as the

¹⁸⁴ See Emory University v. Porubiansky, 282 S.E.2d 903.
following case, "unique in U.S. Law"\textsuperscript{185} illustrates. The issue concerns a coordinator's responsibility during a cooperative education placement, a form of service-learning.

According to the facts of this case, an engineering aide working in a foundry was injured in an industrial accident and subsequently hospitalized. At the time of injury, he was a second-year mechanical engineering student on his first cooperative assignment. Following release from the hospital, the student changed majors and graduated from Drexel University. However, at the time of the court case he had made no attempt at securing employment citing psychological impairments, physical limitations and physical pain as reasons; he lived with his parents and had not participated in State-offered job training rehabilitation programs.

According to testimony, the purpose of the program was to provide students with practical experience related to their educational studies. The school provided the site with program related literature, and the site informed the university coordinator of the number of openings but not the specific openings. The university coordinator usually made two trips to the site. One was to discuss ways in which the foundry and the student might receive maximum benefit from the cooperative education program. The university coordinator

made no inquiries related to dangers at the job site, and training and supervision were the responsibility of the foundry.

Expert testimony regarding the university coordinator’s role was divided. If the placement was an internship, then the university which placed the student would have direct supervisory obligations. If the placement was for work-experience, supervision and direction by the employer necessarily would exceed that which normally characterizes student-teacher relationships. 186

Counsel for the university argued that there was no causal relationship between the alleged breach of duty on the part of the university and the accident which involved the engineering student. A unanimous jury found the university and its cooperative education coordinator were not negligent and that no breach of contract occurred between the university and the student. According to one commentator, a contrary decision might have caused educational institutions to reconsider commitments to work-experience programs. 187

The cases cited above suggest that school administrator fears of litigation involving service-learning programs may be unfounded. Most institutions granting diplomas or degrees have had extensive experience placing students in work-study, cooperative education, and internship-type programs which are

186 Id. at 21.
187 Id. at 22.
required for program completion. These programs have established procedures for insurance coverage, transportation agreements, and placement-site insurance coverage. Some institutions which offer service-learning options or mandates have already tapped into existing insurance programs to provide coverage for all students participating in course-related service-learning programs. Schools that plan to incorporate service-learning into their curricula may be able to use policies and procedures that are already in place.

The key concern for schools which are reluctant to incorporate service-learning into their curricula is the risk of liability for negligence. As indicated earlier, negligence charges against education institutions generally arise from lack of or improper supervision. These concerns can be minimized by implementing policies and procedures that reduce risks and exposure to dangers. For example, preparing handbooks which clearly state the responsibilities and rights of all parties; requiring documented training of personnel; providing consistent supervision of participants; and evaluating personnel.

The threat of lawsuits for organizations which have chosen to mandate service-learning is certainly an Achilles heel. Charges of negligence are of primary concern. However, in 1975, the National Association of Secondary School Principals outlined some principles for school administrators to abide by if they are to avoid involvement in a suit for
negligence. These principles, which remain valid today, may be useful in developing policies and procedures to avert or reduce negligence in service-learning placements:

1. Exercise due care: The administrator of the program or educational institution should attempt to foresee dangers to students and take whatever precautions seem reasonable to avoid them.

2. Establish rules for the guidance of staff.

3. Assign adequate supervision for the activity. Courts do not expect schools to be insurers of student safety, but supervision is expected to be adequate for the circumstances.

4. Increase efforts to assure student safety in proportion to the potential for danger to result in injury or harm.

5. Acknowledge the direct correlation between and an activity’s relationship to the school program and accountability; and prepare administrators to be held accountable for student well-being when the activity is closely related to the purposes and program of the sponsoring education institution.

6. Provide additional safeguards to insure that students are not placed or brought into circumstances that are fraught with inherent danger. If the potential for danger is known in advance, adult students must be apprised of it; and parents of non-adult students must be informed of it prior to their children’s involvement in the service-learning experience.

7. Educate the service-learning staff to the reality that the degree of expected care under the law and the degree of required supervision based on age are inversely proportional.

8. Remember that the location in which a student is injured is only one of the factors used in determining whether negligence exists and the subsequent extent of administrative liability.

In addition to the NASSP suggestions above, others suggest that good community relations, proper orientation and training

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189 Ibid.
may be the best ways of diffusing the problem of liability.¹⁹⁰

¹⁹⁰ "Liability: A Growing Concern," The Campus Compact Newsletter 4:4, Spring/Summer 1990 indicating that no lawsuits or threats of suits arose from the placement of 20,000 students with volunteer agencies and attributing this success to an "effective, well-regarded program that communicates well with students, staff, and the community...because good will goes beyond the legal ramifications of the situation."
CHAPTER VI
SUMMARY AND RECOMMENDATIONS

From this educator's perspective, the legal status of service-learners as a designated student group remains unclear. However, certain trends are emerging and are likely to become more evident as the body of related case law expands. This chapter will summarize the findings of the research for this paper, draw conclusions based on those findings, and make recommendations for future research and policy development.

Secondary Schools

For secondary school students enrolled in required service-learning programs, current case law suggests that schools have the right to require service-learning experiences as for-credit graduation requirements without infringing on students' or parents' Constitutional rights. The determination in *Steirer*¹⁹¹, though arrived at through incomplete reasoning,¹⁹² seems to have settled the Constitutional issues


¹⁹² See *supra* n164 discussing the limitations of the argument used to arrive at the holding in Steirer.
at this level of education.

Also at this time, service-learning requirements which are part of the secondary school curriculum create no labor law entanglements because of the general acceptance of "in loco parentis" status for teachers of children and interpretations of the language structures in the Thirteenth Amendment. Furthermore, risk managers suggest that concerns for liability issues related to service-learning programs may be minimized by incorporating risk management plans for these programs into existing plans for cooperative, work-study and community-based education programs which possess long histories of successful risk management in secondary education curricula.

Alternatively, schools could model the procedures and policies for service-learning programs after those of the aforementioned existing programs or subsume the policies and procedures of all experience-based education programs into comprehensive new plans using the most successful components of the various existing individual plans. Additionally, because community service is a recognized curricular strategy for developing good citizens, as service-learning programs are articulated, the goal for school personnel should be to identify methods of protection that complement service rather than prohibit it.

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193 Independent Sector, "Liability" 3.

194 4 Campus Compact Newsletter 4:1, Spring/Summer 1990
It is generally recognized that the Fourteenth Amendment protects the right of parents to direct the education of their children. However, this right to direct the education of offspring has not, as yet, been clearly designated a fundamental right. Because this right is not a fundamental right, review of parent claims to direct the education of their children is classified under rational basis review except where the challenge is premised in religious belief or when parents are requesting some degree of control over their children’s education. These latter conditions both require review under strict scrutiny or a balance of parents' and state’s interests, as noted in Chapel Hill.195 Under rational basis review, a court is only required to determine whether a challenged public school requirement for students has a valid educational purpose. Worded another way, the question becomes, "Is the required service against public policy?"

The value of the service, a policy position, is not at issue in this case. The question is whether or not the service infringes on student rights to guaranteed protection from involuntary servitude under the Thirteenth Amendment and their rights to free expression as guaranteed under the First and Fourteenth Amendments along with their parents’ rights to direct their education.

195 Appellants Reply Brief at 5, Chapel Hill (No.95-2525).
While the involuntary servitude concern was addressed by the various courts, the analogies used to rationalize court positions leave room for reconsideration of the issue.\textsuperscript{196} The free expression concerns were never adequately addressed. Yet, the courts in \textit{Rye Neck} and \textit{Chapel Hill} accepted the holding in \textit{Steirer} as persuasive authority. In this milieu, a key issue for courts should be the reexamination of mandatory service programs for secondary school graduation in light of previous Supreme Court decisions which interpret protection of student rights to free expression.\textsuperscript{197} While \textit{Steirer} closed the discussion, it accomplished its task without a sound legal argument grounded in Constitutional principles enunciated through previous First Amendment decisions by the Supreme Court.

Another issue not addressed by the \textit{Steirer} court is whether or not the requirement was part of the academic curriculum of the school. Here the question to be answered remains: Is non-compliance with a secondary school service requirement for graduation which needs administrative approval, receives no faculty direction, is not a course requirement, and must be done on the student's own time a valid condition for denial of a secondary school diploma? Is this a curricular requirement? If it is not, then is the

\textsuperscript{196} The analogies used by the courts included mandated substance abuse programs, public duty exceptions, required community service for criminal offenders.

\textsuperscript{197} See supra nn44, 46 - 49 and accompanying text.
service really an extra-curricular activity for which credit is given?

By definition extra-curricular means not part of the required curriculum. Can a school compel participation in an activity which is not part of the curriculum by awarding credit for completion of the activity? Can it provide credit for completion of that activity which is not part of the prescribed curriculum and then deny the right to graduate to a student who does not receive credit for completion of that activity which is extra-curricular, not part of the required curriculum?

Schools possess the right to establish curriculum and graduation requirements within state and/or system frameworks. However, the Steirer court never reviewed the manner in which the requirement was to be met. Instead it addressed the policy issue, the value of the service requirement, which never was disputed by the students or their parents.

Because of the quasi-contractual nature of the relationship of students and schools in private secondary education, it is likely that courts would recognize the school's authority to dismiss students who opposed the mandatory service-learning requirement as presented in the cases discussed above. However, even in this arena, the fairness of structuring a for-credit graduation requirement to be completed on one's own time without faculty direction or course relationship remains a valid concern which might
trigger a legal issue.

**Higher Education**

Generally the law recognizes higher education students as adults. However, this recognition continues to create dissonance in the student-university relationship. While most courts accept the relationship as contractual, Prosser indicates movement in society and the law toward a duty relationship between all parties with unequal bargaining power. Even where duty, not contract, is the issue, writers and commentators acknowledge that courts defer to colleges and universities. As a result of this pattern, some students do not receive fair treatment in the courts because of their unequal bargaining positions relative to institutions of higher education.

While it is generally accepted that the "in loco parentis" principle does not apply to adult students, some courts apply the principle based on the status of the educational institution as college rather than university. This pattern of incongruent decisions suggests the student-

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199 See Victoria J. Dodd, 33 Kan.L.Rev. 702 at 730 stating, "...the tort argument as presented in the student's case is generally not explored in the opinion, nor is the issue ruled upon;" but there is a "growing tendency to impose tort liability on schools for failing to properly control third parties" in instances of dormitory safety.
The college/university relationship may require closer analysis to define the specific parameters of the relationship before formulating generalizations about the legal status of all postsecondary service-learners. However, some trends may be valid.

In jurisdictions where contracts of enrollment direct the student-institution relationship, contracts between students and educational institutions should be clearly articulated so that students understand the extent and limits of their responsibilities and rights and those that belong to the institutions in which they have matriculated. As a general rule, contracts in higher education tend to be contracts of adhesion of which students have limited awareness. Furthermore, contracts negotiated with community sites on behalf of students also should be written and explained to students in language that is understandable.

Where an institutional duty to protect students has been recognized, placement sites should be selected with student safety as a consideration. However, to protect itself, the educational institution which places the student should negotiate to place responsibility for training, supervision, and evaluation of the service-learner with the host site. By shifting this responsibility from the school to the site, if a service-learner is injured in the course of providing

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200 Id. at 714 - 718.
201 Ray, supra n13.
service, the characteristics of the employer-employee relationship arise out of the student-site relationship rather than the school-student relationship. The school merely acts as a referral service for the student.202 Such an arrangement limits the potential for legal action against the school and its agents while protecting the student in the event of injury on the site.

Education Students

Authority recognizing student teachers as employees is in conflict.203 Student status in these programs ranges from employee of a state university to employee of the school district in which the student is placed to undefined. Therefore it is important for placement directors and receiving school districts and schools to understand the limits of protection guaranteed to student teachers in their states and to educate these service-learners about the parameters of their rights and responsibilities under the laws of the state in which they are serving. This is especially important in programs which require students to student teach in a day school and a residential school before they are

202 See supra n185 and accompanying text.

203 See supra n132 and accompanying text indicating that student teachers placed from state universities in Colorado are employees of the state university and when placed in a school and injured in the course of their student teaching experience are therefore employees; see also supra n133 indicating student teachers are employees of the district in which they are placed for Workers' Compensation benefits.
certified because these students often complete their requirements in two different states.

In Illinois, California and Colorado, student teachers usually are protected under Workmen’s Compensation Rules in the event of injury during a student teaching placement. However, students injured during pre-service observation periods may or may not be protected under school codes. In states where these students are classified as volunteers, clinical observation students are protected only to the same extent as other volunteers acting in similar situations.

As a result of case law, pre-service clinical observation students in Illinois are classified as volunteers. As such, they may be covered under compensation laws if it can be shown that at the time of injury the work being done by the student arose out of an employment relationship. However, the burden of proof rests with the student. If it can be shown that the primary benefit of the student’s work flows to the school rather than the education student him/herself, the school also may be considered the employer; the student then may be entitled to worker’s compensation.

When a service-learner, while in the course of a university placement in a school, commits a wilful and wanton

204 See supra n127 and accompanying text which discusses an Industrial Commission determination indicating that the 100 hours of clinical observation performed by an education student to complete a state-imposed university requirement did not qualify the student for compensation when the student was injured in a fall at the school in the course of completing those hours.
act which results in injury to another or damage to property, the limited protection the person is entitled to as a volunteer is forfeited under Illinois law (805 ILCS 105/108.70). If the student is not compensated for the service being performed in the school and if the act is not wilful and wanton, the student will receive some protection under the law. However, if this same service-learner provides service to a park district sports team instead of a school, he may receive compensation for reasonable expenses or a modest honorarium for services as a referee or umpire (745 ILCS 80/1) and remain classified as a volunteer under the law. If this same volunteer furnishes medical services in a free clinic, he must be licensed to provide medical care to humans. Additionally, the lawful limits on liability for this volunteer must be posted at the clinical site. If they are not posted, they do not apply (225 ILCS 60/31).

Considering the above distinctions which apply to service-learners in volunteer roles in Illinois, institutions of higher education which place students in required service-learning situations should be aware of the circumstances and contexts in which the students are volunteering. Even though persons responsible for identifying or approving service-learning placements for students may consider all volunteer positions analogous, the previously enumerated statutes indicate that in Illinois, at least these three types of service-learners are treated differently under the law.
Lack of familiarity with volunteer statutes may jeopardize the security of student service-learners, educational institutions, and placement sites or their clients in the event of injury or damage to property. Depending on the language and structure of statutes related to volunteers, this also may be true in other states. Therefore a systematic review of these statutes and their interpretations on a state-by-state basis may be necessary to clarify the roles of service-learners classified as volunteers.

Also, classification of students as volunteers does not mean the law will view them as non-employees. As noted in *Barragan v. Worker's Compensation Board*, 240 Cal Rptr 811 (1987), students who are injured in the course of degree-required internships may be employees under the law if the service is rewarded by training and instruction, the service site directs the activities of the students and accords the students the same treatment as other employees, and no exclusions for students exist under state statute.

**Medical Students**

The legal arena for service-learners classified as interns and residents is equally complex. In California for example, medical residents may be simultaneously students and employees. This may be true in other states, too. Depending on the terms of their enrollment, students in

\[205\] See *supra* n145 and accompanying text.
nursing programs may or may not be employees within compensation acts.\textsuperscript{206} However, medical technician trainees and nurse’s aide trainees who receive uncompensated training in hospitals usually are considered non-employees. Therefore, these service-learners usually are classified as students for purposes of insurance, compensation and liability. While most case law focuses on issues of control and supervision,\textsuperscript{207} analyses of who benefits most from the work of the medical service-learners could amplify understanding of the distinctions between service-learners who are employees and service-learners classified as non-employees.\textsuperscript{208}

\textbf{Liability}

For purposes of liability based on negligence, the law requires all actors to respond in a manner consistent with persons of the same age in similar circumstances and similar contexts. (The only exception may be very young children.) Central to liability premised on negligence is the principle

\textsuperscript{206} See \textit{supra} nn137 - 147 and accompanying text.

\textsuperscript{207} \textit{Id}.

\textsuperscript{208} Analysis of this issue is beyond the scope of this paper. However, if one considers that various aspects of hospital activities are run solely by residents and interns, it is obvious that the organization receives an important economic benefit from the work of these service-learners. Whereas the activities performed by service-learners as technicians and aides usually provides greater benefit to the students than to the hospital because these service-learners generally do not function in isolation and usually do not possess decision-making authority as do residents.
that the legal burden on students increases in proportion to their age and experience. This principle is demonstrated in the legal cases cited involving skill acquisition by vocational students\textsuperscript{209} and should be made known to all service-learners.

For teachers and administrators it is important to realize that although statutory law in each state is unique, determination of negligence always is a question for a jury; it is not a matter of law for a judge to decide.\textsuperscript{210} Furthermore, the level of culpability in a negligence suit is to be determined by the court; it is not a statement of fact.\textsuperscript{211}

It is generally agreed that teachers are not insurers of student safety. Case law exists supporting this principle for service-learning programs in secondary schools\textsuperscript{212} and postsecondary schools.\textsuperscript{213}

What is important to bear in mind is that teachers at all levels of education are responsible for supervision of their students. However, as the age of the students increases, the level of supervision expected of the teachers diminishes.

\textsuperscript{209} See supra nn58 - 88 and accompanying text.

\textsuperscript{210} Hackathorne v. Preisse, 661 N.E.2d 384 (Ohio App. 9 Dist. 1995).

\textsuperscript{211} Id. where this is explicated under Ohio law.

\textsuperscript{212} See supra nn60 - 77, 80 - 83, 85 - 88 and accompanying texts.

\textsuperscript{213} See supra nn78, 79, 84 and accompanying texts.
When students are adults, courts expect that they will be able to follow certain types of directions given by an instructor without the instructor's direct supervision.\textsuperscript{214} This concept has important ramifications for higher education. It may limit teacher culpability when direct supervision is not provided to a service-learner if evidence supports a finding that directions were given prior to the placement.

Where inadequate supervision of service-learners in skill acquisition placements may expose schools to tort liability, it is important for institutions and students to recognize that such liability may be limited by a scope of duties which are narrowly defined. Also, such liability may be highly subjective. The essential concern for administrators should be to prudently oversee the development, design, and administration of a school's service-learning curriculum and to provide appropriate training and supervision for faculty or staff who bear responsibility for the program.

Where liability under \textit{respondeat superior} is at issue, case law exists suggesting that secondary schools and college/universities may have the law on their side. In Illinois a vocational education teacher's control over students who may be considered service-learners is not the same as an employer's control over an employee.\textsuperscript{215} Further

\textsuperscript{214} Levine v. Live Oak Masonic Housing, Inc. 491 So.2d 489 (La.App.3 Cir. 1986).

research is necessary to determine if this is true in other states also.

In California a student-athlete is not considered an employee of his/her institution of higher education.\textsuperscript{216} While this case is not on-point, the clearly articulated reasoning of the court indicates the role of public policy in court decisions and suggests that court decisions arising out of service-learning also may be resolved in favor of institutions. As the \textit{Townsend} court stated, "From the standpoint of public policy consideration, exposing [private and public institutions of higher education] to vicarious liability for torts committed in athletic competition would create a severe drain on the State’s precious education resources." Using this statement as persuasive authority, a court, one day, might reason that service-learners also should not be considered employees of their colleges\textbackslash universities.

In the 1970s cooperative education and work-study programs were advised to negotiate agreements that place training, supervision, control and evaluation of these students with the host site to avoid the labor law entanglements that could arise as a result of student placements in states outside the state in which the

\textsuperscript{216} Townsend v. State, 237 Cal. Rptr. 146 (Cal. App. 2 Dist. 1987).
educational institution is situated.\textsuperscript{217} This remains prudent advice even today.

However, the caveat that placing institutions should ascertain the safety of placement sites must not be overlooked. Additionally risk managers recommend good community relations, adequate insurance coverage and appropriate staff training and evaluation as key components in a program designed to limit potential risks for organizations and their service-learners. As at the secondary level, rulings affecting traditional cooperative education, work-study and pro-bono placements which are required for four year degree-seeking students also suggest addressing the potential liability concerns under existing program policies and procedures which already have taken into account potential programmatic risks.

While risk managers continue to suggest increasing insurance coverage to protect institutions and students, a cost-benefit analysis may generate some new insights into the effect of increased insurance coverage for students and institutions involved in service-learning programs which may include but are not limited to experience-based programs in career development, academic knowledge, skill development or some combination for which students may or may not be compensated. Finally, as in secondary education, the goal of

\textsuperscript{217} See supra n185 and accompanying text discussing this point in the context of Wuerffel v. Westinghouse Corporation, 148 N.J.Super. 327, 372 A.2d 659.
any risk management plan related to service-learning in higher education should be identification of protection methods that complement service-learning which has been verified as a legitimate curriculum strategy to foster good citizenship.

For the time being, the legal status of service-learning is settled at the secondary level; concerns continue to exist at the college/university level. At both levels, liability based in negligence and the level of culpability will be determined by the reasonable person standard which compares the behavior of the tortfeasor to a person of the same age, in a similar circumstance and context. Employee status for worker's compensation benefits generally is determined by state codes; but assignment of vicarious liability under respondeat superior will probably be directed by public policy. Finally for purposes of risk management, inclusion of service-learners in institutional insurance policies is advisable.

Recommendations
1. Include the community stakeholders in the development of service-learning policies which clearly delineate the mission, vision, and goals of the programs.
2. Provide site-specific training for school personnel who have supervisory responsibility at sites.
3. Document all training and evaluation.
4. Develop, distribute, and adhere to policies and
procedures articulated in program-specific handbooks.

5. Review and update handbooks regularly.

6. Negotiate to transfer responsibility for training, supervision and evaluation of service-learners from the sending institution to the receiving institution.

7. Develop a list of acceptable placements and allow students to select their own placements.

8. Inform students and program personnel of applicable laws (state school codes; state workers’ compensation and volunteer statutes; and federal labor and wage/hour laws)

9. Inform service-learners of their status as volunteers or employees whenever it is known.

10. Be sure your volunteers are respected as volunteers and not allowed to replace employees or function at the same level as site employees unless the volunteer activity as implemented is specifically protected under the law.

10. Remember that you and your institution may be vicariously liable for the negligence of a service-learner under respondeat superior if your institution shares training, supervisory, and evaluatory responsibilities with a host site.

11. Include all service-learners and related personnel under your institution’s liability insurance policy.

12. Develop good community relations which include fostering awareness of the mission, vision, and goals of your service-learning program.
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The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of DOCTOR OF PHILOSOPHY.

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