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AI Goes to School—Implications for School District Liability

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School districts increasingly and controversially require students to use school-provided technology that tracks every sentence students write and every website students visit, whether from school or at home.[1] Although the pedagogic advantages are many, the privacy concerns are profound given the pervasive information at the fingertips of teachers and school administrators.[2] As students increasingly use the

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1. Alexandra Chachkevitch, *Privacy Concerns Arise Over Monitoring Software,* CHICAGO TRIBUNE (Feb. 27, 2014), https://www.chicagotribune.com/suburbs/glenview/ct-xpm-2014-02-27-ct-schools-monitoring-software-tl-n-20140227-story.html. The software tracks students' navigation as long as the student uses school-provided hardware or signs in through the school portal.

2. Frida Alim, Nate Cardozo, Gennie Gebhart, Karen Gullo & Amul Kalia, *Spying on Students: School-Issued Devices and Student* Privacy, ELECTRONIC FRONTIER FOUNDATION (Apr. 13, 2017). Some parents have lashed back at the increased focus on online initiatives, fearing that their children use the Web excessively as it is. *See, e.g.*, Nellie Bowles, *Silicon Valley Came to Kansas Schools. That Started a Rebellion*, N.Y. TIMES (Apr. 21, 2019).

Internet,[3] the most intimate details of their lives are exposed to school officials.

Because of the vast information now at school administrators' fingertips, schools have turned to technology companies to install software—termed safety management platforms (SMPs)—that alert school districts to risks of suicide or bullying.[4] The software uses Artificial Intelligence (AI) to comb through a student's word usage and online navigation to notify school administrators of concerns warranting intervention.[5] Indeed, the third-party providers boast that their technology is essential to preventing violence.[6] For instance, a leading SMP, Bark for Schools, recently asserted that its combination of technology and process had thwarted "16 plausible school shootings" in the preceding year.[7] Another market leader, Gaggle, claims "to have stopped 447 deaths by suicide" between July 2018 and February 2019.[8] Not surprisingly, school districts have flocked to adopt the technology. As of February 2019,

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3. Marielle Gilbert, *4 Ways to Protect Kids from Cyberbulling*, GOGUARDIAN BLOG (Oct. 2, 2017), https://blog.goguardian.com/4-ways-to-protect-kids-from-cyberbullying.

4. Simone Stolzoff, *Schools are Using AI to Track What Students Write on Their Computers*, QUARTZ (Aug. 19, 2018), https://qz.com/1318758/schools-are-using-ai-to-track-what-students-write-on-their-computers/. Some schools may adopt the technology as well in an effort to comply with the Children's Internet Protection Act (CIPA), which requires schools and libraries to certify that they have an Internet safety policy that includes technology protection measures. The protection measures must block or filter access to pictures that are (a) obscene; (b) child pornography; or (c) harmful to minors.

5. *Id.*

6. *See, e.g.*, Larry Magid, *School Software Walks the Line Between Safety Monitor and "Parent Over the Shoulder,"* FORBES (Apr. 14, 2016), https://www.forbes.com/sites/larrymagid/2016/04/14/straddling-the-line-between-spying-and-protecting-students/#69847327df93 (reporting on GoGuardian's assertions of prowess).

7. Edward C. Baig, *Can Artificial Intelligence Prevent the Next Parkland Shooting?*, USA TODAY (Feb. 13, 2019), https://www.usatoday.com/story/tech/2019/02/13/preventing-next-parkland-artificial-intelligence-may-help/2801369002/.

8. *Id.*

approximately 4,500 school districts deploy one of three SMPs—Securly, Gaggle, and Bark for Schools.[9] School districts rely on SMPs to keep students safe.[10]

Lost in the shuffle has been the potential impact on school liability if a tragedy ensues. Traditionally, immunity doctrines under state law (and restrictive Section 1983 jurisprudence under federal law) have protected school districts from liability in all but the most shocking cases. On the one hand, school districts will likely avoid liability if they follow the protocols suggested by the SMPs. On the other, however, school districts may be liable if they fail to act on the alerts provided by the third-party software provider, for that omission will likely be considered ministerial and open the schools to liability. Moreover, utilization of an SMP may lull students and their parents into taking fewer precautions. This might lead courts to hold school districts liable for failing to warn of dangers of which the districts should have been aware. Finally, as the efficacy of SMPs increases and the cost decreases, a public school might be liable for failing to use an SMP.

Part I traces the development and functionality of the safety management platforms in question. Part II then canvasses the doctrines that have emerged exposing school districts to limited liability for failing to protect children. As the basis for liability has shifted from custody to special relationship between a school and its students, the scope of liability has broadened. In Part III, we argue that utilization of SMPs will protect school districts when they adhere to the warnings indicated by the SMP. But if a school district ignores the SMP's alert, then the school district opens itself to liability because a failure to act on concrete alerts will be considered ministerial. And, as SMPs become the norm, a

9. Baig, *supra* note 7 (stating a combined total of approximately 2,000 school districts use Securly, 1,400 use Gaggle, and 1,100 use Bark for Schools).

10. Rebecca Sadwick, *Why Aren't Schools Doing More to Prevent Suicide?*, FORBES (Sept. 10, 2015), https://www.forbes.com/sites/rebeccasadwick/2015/09/10/why-arent-schools-doing-more-to-prevent-suicide/#19fce02c4727.

failure to use an SMP may itself fall beneath a standard of reasonable care. Finally, in Part IV, we conclude that, for the most part, schools will escape liability for failing to sufficiently supervise the technology company utilizing the SMP, but schools should take care to treat such companies as independent contractors.

I. FUNCTIONALITY OF SAFETY MANAGEMENT PLATFORMS

Contemporary K-12 classroom technologies[11] empower teachers to track a student's academic progress on homework assignments and observe a student's behavior online.[12] Much of the software allows the school not only to monitor computer use at school, but also at home.[13]

Given the potential intrusiveness of such software, schools have turned to Safety Management Platforms to monitor students' online activity for suicidal behaviors, cyberbullying, and other threats of violence. To prevent such harm, SMPs typically use "natural-language processing to scan through the millions of words typed on . . . computers"—school or personal—as long as the student uses school-supplied hardware or signs in through the school portal.[14] When the technology flags a concerning word or phrase, a team of human reviewers working on behalf of the technology companies evaluates the severity of the flagged

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11. *See, e.g.*, Ben Cahoon, *Choosing the Right Classroom Management Software Solution*, SOUTHEAST EDUCATION NETWORK (Mar. 21, 2011), https://www.seenmagazine.us/Articles/Article-Detail/articleid/1332/choosing-the-right-classroom-management-software-solution.

12. *See id.*

13. Anya Kamenetz, *Software Flags 'Suicidal' Students, Presenting Privacy Dilemma,* NPRED (March 28, 2016), https://www.npr.org/sections/ed/2016/03/28/470840270/when-school-installed-software-stops-a-suicide; Cody Walker, *How Our District Uses Tech to Fight Cyberbullying*, ESCHOOL NEWS (Oct. 18, 2018), https://www.eschoolnews.com/2018/10/18/how-our-district-uses-tech-to-fight-cyberbullying. Impero Education Pro allows teachers and other school officials to go back and pull up screenshots and time stamped videos of students' online activity, regardless of when that online activity occurred.

14. Stolzoff, *supra* note 4.

material.[15] If the human reviewers determine that the indication meets certain requirements—requirements typically known only to the technology company itself—the company will alert school personnel.[16] The functionality of different SMPs varies slightly,[17] but this general approach remains the same across platforms.

School districts typically work with the technology company to tailor the software to their specific needs—selecting which words and phrases will be considered "language of harm."[18] For instance, gang nicknames vary from jurisdiction to jurisdiction, as does slang for particular drugs. Moreover, schools have experienced different histories, whether shootings or suicides, that should be factored in.[19] Overall, SMPs are seen as a vital way of preventing harm before it happens, especially in an era in which school shootings, student suicides, bullying, and depression are on the rise.[20]

A. *Suicide Alerts*

SMPs that monitor for suicide ideation and planning

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15. *See id.*; *see also Bark for Schools*, BARK, https://www.bark.us/schools.

16. *See* Stolzoff, *supra* note 4; *see also Gaggle Safety Management*, GAGGLE, https://www.gaggle.net/product/gaggle-safety-management/.

17. For example, platforms like Gaggle, Bark for Schools, and Securly use humans as a line of first review in determining which alerts merit sharing with school personnel, while platforms like GoGuardian, Beacon, and Social Sentinel rely only on the technology itself. *See, e.g.*, *Gaggle Safety Management, supra* note 16; *see also Bark for Schools, supra* note 15; *24 by Securly*, SECURLY, https://www.securly.com/products/24; *Go Guardian Beacon*, GOGUARDIAN, https://www.goguardian.com/beacon.html; *One Central Platform*, SOCIAL SENTINEL, https://www.socialsentinel.com/one-central-platform/.

18. Lisa Mullins, *To Detect Threats and Prevent Suicides, Schools Pay Company to Scan Social Media Posts*, WBUR NEWS (March 22, 2018), https://www.wbur.org/news/2018/03/22/school-threats-suicide-prevention-tech.

19. *See* Eli Zimmerman, *GoGuardian Develops a New AI-Enabled Cloud Filter for K-12 Schools*, EDTECH MAGAZINE (Feb. 11, 2019), https://edtechmagazine.com/k12/article/2019/02/goguardian-develops-new-ai-enabled-cloud-filter-k-12-schools.

20. Stolzoff, *supra* note 4.

advertise themselves as a response to the reality that suicide is now the second-leading cause of death among teenagers.[21] Since 2007, the suicide rate has increased thirty percent for boys and has doubled for girls ages fifteen to nineteen.[22]

To provide one example, GoGuardian's newest product, Beacon, alerts school officials and parents to students at risk of committing suicide.[23] GoGuardian prides itself on having developed the K–12 software with mental health and suicide prevention experts, such as the American Foundation for Suicide Prevention and the American Association of Suicidology.[24] Like other SMPs, Beacon scans for certain words, phrases, and content. Beacon relies on school districts to tailor the software to their specific needs,[25] and school districts choose who gets the alerts and how alerts are created.[26]

Although data from Beacon indicate that eighty percent of at-risk notifications were generated during school hours, the software does not stop at the classroom.[27] Beacon conducts real-time scans across the entire internet and continues to scan even after the student goes home and uses a personal device.[28] The software's cloud-based capability allows it to scan all mobile and personal devices connected to

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21. Brian Resnick, *A Promising New Clue to Prevent Teen Suicide: Empower Adults Who Care*, VOX (Feb. 28, 2019), https://www.vox.com/science-and-health/2019/2/28/18234667/teen-suicide-prevention.

22. *GoGuardian Announces Beacon, a Suicide and Self-Harm Prevention Tool for Schools*, BUSINESS WIRE (August 27, 2018), https://www.businesswire.com/news/home/20180827005160/en/GoGuardian-Announces-Beacon-Suicide-Self-Harm-Prevention-Tool [hereinafter *GoGuardian Announces Beacon*].

23. GoGuardian, *GoGuardian Launches New Suicide Prevention Technology Allowing Schools to Help At-Risk Students*, AMERICAN FOUNDATION FOR SUICIDE PREVENTION, https://afsp.org/goguardian-launches-new-suicide-prevention-technology-allowing-schools-to-help-at-risk-students/.

24. *Id.*

25. Kamenetz, *supra* note 13.

26. *See GoGuardian Announces Beacon, supra* note 22.

27. *Id.*

28. *Id.*

school networks.[29] The software also monitors chat, social media, and emails 24/7.[30] The company advertises the benefits of expansive monitoring to permit schools to identify warning signs that other services might miss by scanning only school-provided devices.[31]

Beacon also advertises that it has fewer false positives because the software separates the student's online activity into "phases."[32] First, the software monitors students' online activity and devices for behavior indicative of suicide ideation and self-harm.[33] Second, the software creates an alert of concerning activity[34] and notifies designated recipients, including school officials, parents and students.[35] The alerts can escalate until action is taken, and the alerts can occur at any time.[36] The student can also be messaged directly with suicide help and prevention resources.[37]

B. *Bullying and Threats of Violence*

In addition to teen suicide, SMPs also address the nationwide concern for bullying in schools.[38] Bullying ranks among the top worries of parents and students, and takes place in all schools.[39] In 2017 alone, over thirteen million American children were bullied or cyberbullied.[40] According

29. Zimmerman, *supra* note 19.

30. *GoGuardian Announces Beacon*, *supra* note 22.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.*

38. Mary Ann Azevedo, *New Apps Aim to Deter, Stop Bullying*, CISCO: THE NETWORK (May 21, 2015), https://newsroom.cisco.com/feature-content?articleId=1630360.

39. *Id.*

40. Tina Meier, *AI Technology Helps Protect Teens from Cyberbullying*, IBM

to the National Center for Education Statistics, one out of every five children in grades six through twelve reported that they had been bullied,[41] and the impact may be more severe.[42] Along with its suicide prevention tools, GoGuardian has Smart Alert.[43] Smart Alert monitors online behavior and alerts administrators when students are "victimized online."[44] Different software allows the alerts to be triggered when students use certain language online if a student is bullying another or if a student is being bullied.[45] Once again, school districts can tailor the software to a school district's specific needs.[46]

Impero Education Pro incorporates monitoring software into its classroom management software.[47] As do the other software providers, Impero identifies keywords and phrases that presage cyberbullying or threats of violence.[48] The software then sends an alert to the proper staff when it detects a student typing those words or phrases, or even if the student accesses websites often used for cyberbullying or violence.[49] The classroom management software allows school officials to identify students involved in the situation.[50] The screen shots generated by the SMPs can also

(Feb. 27, 2018), https://www.ibm.com/blogs/client-voices/ai-technology-protect-teens-cyberbullying/.

41. Deborah Lessne & Christina Yanez, *Student Reports of Bullying: Results from the 2015 School Crime Supplement to the National Crime Victimization Survery. Web Tables. NCES 2017-015*, NATIONAL CENTER FOR EDUCATION STATISTICS (Dec. 20, 2016), https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2017015.

42. Ari E. Waldman, *Tormented: Anti-Gay Bullying in Schools*, 84 TEMP. L. REV. 385, 399 (2012).

43. Gilbert, *supra* note 3.

44. *Id.*

45. *Id.*

46. *See id.*

47. Walker, *supra* note 13.

48. *Id.*

49. *Id.*

50. *Id.*

be shared with the proper administrators, parents, and even authorities.[51]

Social Sentinel is another one of the many technology companies that offer some form of social media scanning or monitoring.[52] The software scans social media posts across dozens of social media platforms every day. Social Sentinel also works with mental health and public safety experts to build a "library" of possible harmful words and phrases for school districts to choose from.[53] School districts principally deploy Social Sentinel to pick up threats of violence, but the software also scans social media posts for indications that a student might hurt him or herself.[54]

Some software not only monitors for bullying and violence, but also prompts students to prevent such behavior. For example, Gaggle includes a feature called the SpeakUp Timeline, which allows students to report bullying, fights, threats of violence, and more.[55] The email address for SpeakUp will automatically populate in the address box any time a student starts composing an email on G Suite or Office 365.[56] Trained officials then evaluate the reports to filter out false positives. School officials and law enforcement are contacted in emergency situations.[57] Securly also features a Tipline, where students can send in anonymous tips that are later analyzed by professionals.[58]

In short, SMPs utilize AI to identify students at risk of suicide, bullying and other violence. SMPs alert school administrators to the need to intervene to prevent the harm.

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51. *Id.*

52. Mullins, *supra* note 18.

53. *Id.*

54. *Id.*

55. *SpeakUp*, GAGGLE, https://www.gaggle.net/product/safetytipline/.

56. *Id.*

57. *Id.*

58. *TipLine*, SECURLY, https://www.securly.com/products/tipline.

II. SCHOOL DISTRICT DUTY TO PROTECT

A. *Custody Theory*

Courts have long imposed on schools a duty to protect students in their charge: "The duty owed derive[d] from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians."[59] Given that schools have custody of students for at least part of the day, courts reasoned that schools must take care that no harm befell students for that period of custody. Just as schools had to ensure that students were not harmed by slippery floors or debris on stairs,[60] they had a duty to protect the students from harm from others or their own employees on the premises.[61]

At the same time, courts placed significant limitations on the school's duty. As the New York court summarized in

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59. Mirand v. City of New York, 84 N.Y.2d 44, 49 (1994).

60. Perkins v. Norwood City Schs., 707 N.E.2d 868, 870 (Ohio 1998); Cooper v. Smithtown Cent. Sch. Dists., 441 N.Y.S.2d 552, 553 (1981).

61. With respect to federal law, the custody question loomed large in a variety of civil rights lawsuits alleging that school districts' failure to protect students violated the Due Process Clause. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 198 (1989), the United States Supreme Court rejected a Section 1983 claim based on the social service department's failure to intervene to protect plaintiff's son from serious abuse by the custodial father. The Court recognized the gravity of the harm but held that the government's failure to protect against private violence does not constitute a denial of due process unless the state exercised custody over the individual or somehow had created or amplified the risk. *Id.* at 202. Liability, however, can arise if state actors have near total custody of individuals, as in a prison or orphanage, or when the state actors themselves caused the peril. *Id.* at 200. To the Court, custody was the lynchpin, not a special relationship *per se. Id.* at 201. Following *DeShaney,* the Seventh Circuit in *J.O. Alton Community Unit School District,* 909 F.2d 267, 272 (7th Cir. 1990), held that the limited custody exercised by the school did not create an affirmative duty to protect, and the Third Circuit held similarly in *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1371 (3d Cir. 1992). According to the Third Circuit, "parents remain the primary caretakers, despite [students'] presence in school." *D.R.*, 972 F.2d at 1371. State attendance laws were insufficient to impose such a duty upon the schools. Parents could remove the children from school or talk to their students about taking steps at school to avert the harm. *Id.*

Carabello v. New York City Dept. of Educ.,[62] "the imposition of this duty d[id] not make schools insurers of the safety of their students, 'for they [could not] be reasonably expected to continuously supervise and control all movements and activities of students.'"[63] Because schools cannot ensure the safety of students in the hallways, locker room, and in the school yard, courts generally administered a heightened foreseeability standard before they imposed liability in the school context for harm at the hands of others—whether students, teachers, or staff. This heightened standard required the school to possess "sufficiently specific knowledge or [actual or constructive] notice of the dangerous conduct which caused the injury; that is, that the third-party acts could reasonably have been anticipated."[64] And, the custodial origin of a school's historical duty—the duty's *foundation*, for lack of a better term—led courts to limit school liability to foreseeable injuries that occurred on school premises. Unless the school released the student into "a potentially hazardous situation, particularly when the hazard [was] partly of the school district's own making," the school's duty ended when the school relinquished custody of the student.[65]

To illustrate these limitations, consider the New York Court of Appeals' decision in *Stephenson v. City of New York*.[66] There, two eighth-grade students were suspended

62. 928 F. Supp. 2d 627 (E.D.N.Y. 2013).

63. *Id.* at 646.

64. *Mirand*, 84 N.Y.2d at 49. Under a different formulation of the same concept, Wisconsin courts hold that no immunity exists where "public officers or employees" breach "ministerial duties" that arise from "known and compelling dangers." Voss ex rel. Harrison v. Elkhorn Area Sch. Dist., 724 N.W.2d 420, 423 (Wisc. 2006) (internal quotations omitted).

65. Ernest v. Red Creek Cent. Sch. Dist., 93 N.Y.2d 664, 671 (1999); *see also* Pratt v. Robinson, 39 N.Y.2d 554, 560 (1976) ("When [the school's] custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases.").

66. 19 N.Y.3d 1031, 1032 (2012).

from school for their involvement in an altercation at school on October 22.[67] Two days later, on October 24th, one of the students assaulted the other student two blocks from the school prior to school hours.[68] The assaulted student's mother sued school officials, alleging that school officials failed to ensure the student's safety during the October 24th assault.[69] The defendant school officials then moved to dismiss the claim, arguing that school officials owed no duty related to the second altercation because the altercation took place before school hours and off school property.[70] After the lower court originally denied the school officials' motion, New York's highest court affirmed the Appellate Division's decision to dismiss the case.[71] The court found that "the school addressed the [first] altercation that occurred on school property . . . by punishing the students" and that the second altercation "was out of the orbit of the school's authority, as the incident occurred away from the school and before school hours where there was no teacher supervision."[72]

Similarly, in *Matallana v. School Board of Miami-Dade County*,[73] the Florida court held that a school could not be responsible for violence outside school premises. The decedent informed the school guard that someone wanted to fight him, and soon after the student left school, he was attacked and tragically died. Even though the security guard breached protocol by failing to report the information, the court reiterated that "a school's obligation of reasonable

67. *Id.* at 1033.

68. *Id.* at 1032.

69. *Id.* at 1033. *See also* Searcy v. Hemet Unified Sch. Dist., 223 Cal. Rptr. 206, 213 (1986) (finding that school responsibility ends "when a student had departed homeward after school hours").

70. *Stephenson*, 19 N.Y.3d at 1033.

71. *Id.* at 1033.

72. *Id.* at 1034.

73. 838 So.2d 1191, 1192 (Fla. Dist. Ct. App. 2003).

supervision must come to an end and the parent or guardian's duty of supervision must resume . . . when the student leaves the school's premises during non-school hours and is no longer involved in school-related activities."[74] The custody theory of liability prevailed.[75]

Even when an injury occurs on school premises, state law immunity poses a high hurdle for those challenging supervision and other discretionary acts by public schools. Some of the immunity is statutory, and some is based on common law.[76] Although immunity doctrines vary, the doctrine typically immunizes school districts from liability for *discretionary* actions—actions "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment."[77] However, schools can still be held accountable for injuries stemming from *ministerial* acts—actions "requiring only obedience to the orders of others, or when the officer's duty is absolute, certain and imperative, involving merely execution of a specific act arising from fixed and designated facts."[78] And schools may be held liable even for *discretionary* actions if those actions reflect willful and wanton conduct. But, for judgment calls, the public immunity doctrine blocks liability. As the court summarized in *Coe v. Board of Educ. of Town of Watertown*,[79] "[t]he

74. *Id.* (citation omitted).

75. *See also* Colette v. Tolleson Unified Sch. Dist. No. 21, 54 P.3d 828, 832 (Ariz. Ct. App. 2002) (holding school not liable for crash involving students during school hours even though school officials were negligent in allowing students to leave the school).

76. *See* Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive & Well?*, 19 KAN. J.L. & PUB. POL'Y, 234, 242–43 (2010) (assessing immunity state by state and concluding that some form of immunity exists in all states); *see also* KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 531–35 (Chris Thillen ed., 3d ed. 1992).

77. James v. Wilson, 95 S.W.3d 875, 905 (Ky. Ct. App. 2002) (quotations removed); *see also* Coe v. Bd. of Educ., 19 A.3d 640, 643 (Conn. 2011).

78. *James*, 95 S.W.3d at 905 (quotations removed).

79. 19 A.3d at 643.

hallmark of a discretionary act is that it requires the exercise of judgment . . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion."[80] In short, the judgment of school administrators as to when students should be protected from themselves or others is highly discretionary—teachers and school administrators are not experts in preventing violence to others or selves, and their determinations as to whether and how to intervene if threatening behavior comes to their attention has been considered discretionary.

As an example, consider *Brandy B. v. Eden Central School District*.[81] There, the mother of a five-year-old girl sued the girl's school district after an eleven-year-old boy sexually assaulted the girl on a school bus.[82] The plaintiff mother alleged inadequate supervision against the defendant school district.[83] In support of the claim, the plaintiff produced evidence of the boy's "troubling history" of "'verbal aggression, aggression towards himself and others, threats with weapons, fire setting, hyperactivity, impulsivity, auditory hallucinations, history of stealing, temper tantrums, poor peer relations, academic problems, and history of suicidal injurious ideations.'"[84] The plaintiff had even complained to the school bus driver about the boy after receiving "some notice . . . of inappropriate interactions between the two children."[85] Faced with this evidence, the court nonetheless held that "the alleged sexual assault . . . was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably

80. *Id.*

81. 934 N.E.2d 304, 305 (N.Y. 2010).

82. *Id.*

83. *Id.* at 306.

84. *Id.* at 305.

85. *Id.* at 306.

anticipated by the school district."[86] Thus, despite the boy's behavioral history and the mother's previous complaints, the court determined that the decision whether to take protective measures remained in the school's discretion.[87]

B. *Special Relationship*

Although the custody framework does not trigger a general duty to protect, courts more recently have focused on whether the school's special relationship to students itself triggered a broader duty to protect. Indeed, in a separate common law context, the California Supreme Court in *Tarasoff v. Regents of the University of California*[88] famously held that a therapist with knowledge that a patient was likely to injure someone had a "duty to warn" the victim and could be sued in negligence for such failure. The duty flowed from the special relationship between therapist and patient. The therapist need not be omniscient, but must exercise a reasonable degree of skill in forecasting violence and determining when to warn specific victims.

Some jurisdictions have applied *Tarasoff* explicitly to schools. For example, in *Phyllis P. v. Superior Court*,[89] the court applied *Tarasoff* to the school setting, holding that the school had a duty to inform a student's mother that the student had been molested at school. The student subsequently was raped, and the mother sued for the school's failure to warn of that danger. Custody was not the lynchpin, but rather the unique relationship between school and student.

Typically, courts have held that the schools' "special

86. *Id.*

87. *Id.* at 307; *see also* Pichler v. United States Fire Ins. Co., No. 98-1337, 1999 Wisc. App. LEXIS 754 at *6 (holding that only if "the danger is so clear and the solution so evident that the officer's obligation admits but one immediate course" would immunity be defeated).

88. 551 P.2d 334, 343–44 (Cal. 1976).

89. 228 Cal. Rptr. 776, 777 (Ct. App. 1986).

relationship" to students requires a duty to protect without citing *Tarasoff*. For instance, the Supreme Court of Kentucky in *Williams v. Kentucky Department of Education*[90] reflected that "the 'special relationship' thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students."[91] Similarly, the Maryland Court of Appeals in *Eisel v. Board of Education*[92] held that a school with specific knowledge of a student's suicidal impulses could be liable despite the fact that the suicide took place in the student's home. Even when the harm arises off site, the school can still be liable because of the special relationship.[93]

Although some courts have not been explicit as to whether liability is based on the custody or the special relationship theory, the difference can be palpable. The custody theory focuses on liability for acts at school, whether in the classroom, at the gym, or in a bathroom. In contrast, liability under the special relationship theory is potentially far broader, for it is not limited by geography, as the court in *Eisel* determined.

C. *Affirmative Act*

Courts have held that, even when no duty to protect arises through the custody or special relationship theories, liability can exist if the plaintiff relied on the defendant's affirmative act, or if the defendant's conduct makes the risk

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90. 113 S.W.3d 145 (Ky. 2003).

91. *Id.* at 148. *See, e.g.*, Beshears v. Unified Sch. Dist. 305, 930 P.2d 1376, 1383 (Kan. 1997); Munn v. Hotchkiss Sch., 165 A.3d 1167, 1173 (Conn. 2017); Murray v. Hudson, 34 N.E.3d 728, 733 (Mass. 2015); Hendrickson v. Moses Lake Sch. Dist., 398 P.3d 1199, 1200 (Wash. Ct. App. 2017).

92. 597 A.2d 447, 450 (Md. 1991).

93. "[A] school district may owe a duty to its students, despite the fact that injury occurred off of school grounds and outside of school hours." Stoddart v. Pocatello Sch. Dist., 239 P.3d 784, 789 (Idaho 2010) (citing Brooks v. Logan, 903 P.2d 73 (Idaho 1995)).

of harm worse.[94] With respect to reliance, the *Restatement (Second) of Torts* explains that one who provides for the protection of another is subject to liability for physical harm resulting from a failure to exercise reasonable care if "the harm is suffered because of the other's reliance upon the undertaking."[95] In *Florence v. Goldberg*,[96] for example, a police department voluntarily assigned an individual to help students cross at a dangerous intersection. Plaintiff walked her child to the intersection and was reassured that the police were continuously helping. When the police guard was ill, the police department failed to notify the school, and an accident occurred at the intersection injuring the child.[97] The student's mother sued, and the court concluded that a suit could proceed because she had relied on the officer's help and therefore had not herself accompanied her child through the intersection.[98]

Similarly, in *Jefferson County School District v. Justus*,[99] the court refused to dismiss a challenge predicated on the school's allegedly negligent efforts to ensure the safety of first graders. The school had prohibited first graders from riding bicycles to school, disseminated such information to parents, and evidently posted faculty at the front of the school to enforce the rule.[100] A car collided with plaintiff's son while he was riding a bicycle home from school.[101] The court held that, through the communications with parents and the

94. Chisolm v. Stephens, 365 N.E.2d 80, 89 (Ill. App. Ct. 2007); *see also* Sculles v. Am. Envtl. Prods., Inc., 592 N.E.2d 271, 274 (Ill. App. Ct. 1992).

95. RESTATEMENT (SECOND) OF TORTS § 323 (Am. Law Inst. 1965).

96. 375 N.E.2d 763, 765 (N.Y. 1978).

97. *Id.*

98. *Id. See also* Cornelius v. Town of Highland Lake, 880 F.2d 348, 359 (11th Cir. 1989) (holding that prison officials had a special duty to defendant injured by member of inmate work squad); Wood v. Ostrander, 879 F.2d 583, 596 (9th Cir. 1989).

99. 725 P.2d 767, 773 (Colo. 1986).

100. *Id.* at 768.

101. *Id.*

posting of teachers, the school may have induced the parents of the first grader to rely on those protections.[102] Thus, the school could be liable for negligence in allowing the son to bicycle home.[103]

With respect to the risk of increased harm, a school may be liable if it carelessly gives a warning that increases the level of existing risk. Consider the Section 1983 action in *Armijo v. Wagon Mound Public Schools*.[104] Plaintiff argued that the school authorities increased the risk of harm to a suicidal student.[105] School officials suspended and sent the student home without complying with the school's policy of notifying his parents.[106] School administrators evidently also knew that the student had access to guns in the house.[107] The Tenth Circuit determined that, if the plaintiff could demonstrate that the school's handling of the disciplinary issue augmented the likelihood of harm, the Due Process suit could proceed.[108] Whether on or outside the school's premises, liability may arise if the school administrators' conduct heightens the risk, as in *Armijo*.[109]

To summarize, courts have imposed liability on schools for failing to protect their students under three rationales: custody, special relationship and affirmative acts undertaken to protect those students. Although liability historically was reserved for injuries occurring only on the premises, the special relationship and affirmative act

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102. *Id.* at 773.

103. *Id.*; *see also* Wright-Young v. Chicago State Univ., No. 1-18-1073, 2019 WL 4738855, at 13–14 (Ill. App. Ct. 2019) (affirming jury verdict against school board and finding that school board voluntarily assumed duty "to make future sporting events safer for students" after principal sent letter to parents assuring them that additional security precautions would be taken at future games).

104. 159 F.3d 1253, 1257 (10th Cir. 1998).

105. *Id.* at 1262.

106. *Id.* at 1257.

107. *Id.* at 1264.

108. *Id.*

109. *Id.*

theories expanded liability to include at least some injuries off premises.

III. IMPACT OF SMPS ON SCHOOL DISTRICT LIABILITY

Adoption of SMPs may alter the liability of school districts in several ways—at least in those school districts in which a special relationship/duty to protect theory is viable. Perhaps most dramatically, adoption of an SMP reflects a good faith effort by school districts to protect the interests of their students. Accordingly, school districts should escape liability for any harm that ensues when following the steps indicated by the SMP—whether those steps counsel for intervention or not.

At the same time, reliance on SMPs may increase school district liability in more narrow contexts. First, a failure to follow through on SMP alerts likely will be deemed ministerial and therefore open school districts to liability in most jurisdictions. Although the school administrators in the absence of the SMP perhaps would not have alerted parents to possible harm, it is far more difficult to defend a failure to warn when the SMP protocols indicate that further action was due. Related, the school districts' duty to warn likely will extend to the home and even to when school is not in session, as long as information flowing through the SMP signals that a warning is required. Second, because school districts arguably induce reliance on the safety measures undertaken through SMPs, plaintiffs may more readily argue that the school districts breached a duty of care when violence occurs even if an SMP has not issued an alert. By affirmatively adopting an SMP, a school district arguably lowers the vigilance of parents and their children who rely upon SMPs for protection. And, if the school heightens the risk of harm by mishandling the warning, liability for negligence can attach as well. Third, at some point in the future, school districts might be found liable for *not* adopting an SMP given the considerable benefits that can be gained. Unless the district can show it chose not to utilize an SMP for policy

reasons, its failure to act may reflect the kind of ministerial negligence that will defeat immunity.

A. *SMPs as a Defense*

In essence, school districts outsource digital monitoring to SMPs. That delegation reflects a proactive step that school districts have taken to help prevent their students from coming to harm. In light of the SMPs' credible assertions of efficacy, any claim of negligence for failing to warn arising from information within the domain of the SMP that did not result in an alert readily should be dismissed. School districts act reasonably in utilizing SMPs to prevent harm to those in their charge.

When professionals follow the standard of reasonable care in their profession or exceed that standard, courts generally accept such evidence as persuasive against claims of negligence. In the malpractice context, for instance, physicians escape liability if they follow standards in their profession, and when they adopt prevailing technology, they generally are protected as well.[110] When educational professionals adopt state of the art technology and follow the protocols indicated, they should escape liability. In *Brandy B*,[111] for example, if the SMP had not indicated that an alert was needed, the school should have prevailed at the summary judgment stage.

To be sure, some claims may still arise outside the SMP system. Schoolmates may come directly to administrators or teachers with concern for suicidal tendencies or planned

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110. *See, e.g.*, Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1212 (1992) (explaining that courts have shielded physicians from liability when conforming to standard practices); *see also* Michael D. Greenberg, *Medical Malpractice and New Devices: Defining an Elusive Standard*, 19 HEALTH MATRIX 423, 428–34 (2009) (noting that courts have precluded recovery for malpractice in most jurisdictions if physicians follow prevailing standards, including tech-enabled practices).

111. *Supra* note 81.

gang fights. In *Matallana,*[112] the danger was communicated to the security guard directly and not via emails or chat rooms. Similarly, in *Colette,*[113] there undoubtedly was negligence, but use of the SMP would not have detected any information calling for an alert. School districts may be found liable in those contexts for failing to respond adequately. But, if the information flows through the SMP and the SMP does not call for an alert, no liability should exist.

B. *Loss of Immunity for Failure to Communicate Alert*

On the other hand, introduction of SMPs may open schools to liability for converting what before was a discretionary duty to warn to a ministerial act if dictated by the SMP algorithm.[114] School administrators previously had to reach the complex decision of whether to warn and how to warn given the context-specific facts. Judgment ruled, and courts were loath to intrude upon that judgment, frequently ruling that immunity precluded suit. But, for matters covered by SMPs, school district responses become less discretionary—either the SMP analytics call for a warning or not. Once the SMP places the information in the school's hands, school administrators must respond. Thus, school districts must communicate alerts dictated by the SMP or face the loss of immunity.

Moreover, particularly in light of the breadth of the information channeled through the SMP, the duty to protect likely will not be confined to a school's premises, as it has largely been in the past. Information gleaned from emails or Facebook are not confined to the school setting. As in *Eisel*, schools increasingly will be required to intervene to prevent harm wherever it occurs, as long as the information concerns a student and addresses a relatively specific harm. The SMP extends the special relationship between school and student

112. *Supra* note 73.

113. *Supra* note 75.

114. The duty to warn is an aspect, of course, of the school's duty to protect.

because it places so much more information in the administrators' possession.

Return to the fact pattern in *Stephenson*.[115] If the SMP had detected the animosity between the two boys and concern for an assault became heightened, a school's failure to heed the alert may have opened the school district to liability for injuries even blocks away from the school. A school cannot turn a blind eye to credible information that harm is imminent.

Indeed, experience under the Federal Tort Claims Act (FTCA)[116] bolsters the view that failure to comply with an alert from an SMP will expose a school district to liability. In partially waiving the federal government's immunity from tort actions, Congress precluded recovery for challenges to governmental acts that were "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."[117] The Supreme Court's construction of the discretionary function exception has varied over the years, but it has fashioned a number of tests to distinguish planning level or policy decisions that are covered by the exception from operational or ministerial actions that are not.[118] The current doctrine, espoused in *United States v. Gaubert*,[119] establishes a two-part test to determine which federal governmental actions are exempt from suit. The Court provided that only those governmental actions that stem from acts grounded in "social, economic or political" policies fall within the exception, and only then if the governing rules and regulations left the government actor with a choice.[120]

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115. *Supra* note 66.

116. 28 U.S.C. §§ 2671-80 (2012).

117. *Id.* § 2680.

118. *See, e.g.*, Dalehite v. United States, 346 U.S. 15, 35–36 (1953); *see also* Indian Towing Co. v. United States, 350 U.S. 61, 67–68 (1955).

119. 499 U.S. 315, 321–23 (1991).

120. *Id.* at 323.

As applied to the failure to protect context, courts have held that, if the federal government actor's failure stems from oversight or inattention, the discretionary function exception does not apply. But if the failure stems from an economic or social decision, then liability will not attach. For instance, in *Rich v. United States*, the question raised was whether the federal government should have warned of a dangerous intersection instead of relying on a guardrail.[121] Given that the decision as to what kind of warning to give stemmed from social and economic policy, the court held the discretionary function exception was applicable.[122] But, if plaintiff had been able to show that the government knew of the danger and simply failed to act, liability could have followed. [123] Indeed, in *Cope v. Scott*, the D.C. Circuit went further and stated that, although the decision whether to warn itself was discretionary, the decision on how to implement the warning did not involve the type of discretion protected by the exception because the implementation decision was technical as opposed to being steeped in policy.[124]

Viewed with the lens borrowed from the FTCA, school districts' utilization of SMPs eliminates much of the discretion that the administrators otherwise would exercise when reviewing online writing or postings. The school's implementation of the SMP in effect has delegated that judgment or expertise to the AI program. As such, school districts would be hard-pressed to argue that they retained discretion to deviate from the recommended alerts and, accordingly, any such deviation could subject the school to liability. Indeed, the reasoning in *Cope* and similar cases leaves open the argument that the school's ineffective

121. 119 F.3d 447, 449 (6th Cir. 1997).

122. *Id.* at 451–52.

123. *See, e.g.*, Burns v. Gagnon, 727 S.E.2d 634, 643–44 (Va. 2012) (holding the jury could determine that administrator's silence after being given warning of imminent attack was actionable).

124. 45 F.3d 445, 451–52 (D.C. Cir. 1995).

conveyance of a warning might itself be actionable if the manner of the warning failed to communicate the risk successfully, and did not involve any policy considerations.

There undoubtedly is an anomaly that arises from imposing liability on a school district after it adopts an SMP. School districts that eschew the technology learn fewer of the dangers their students face and, yet, paradoxically are less likely to be held liable as long as they act whenever receiving specific evidence of a threat. In contrast, with the introduction of SMPs, schools will have far more intimate knowledge of students' lives and far more responsibility to warn of potential harm, whether on or outside school premises. With greater knowledge comes greater responsibility. But, the paradox seems less jarring given that school districts can also defend themselves by relying on the SMP as a shield to deflect liability whenever the protocols are followed.

To minimize the potential for liability, school districts should make a record each time they disagree with the alert suggested by the SMP, and briefly indicate the reasons for withholding the alert. In that way, school districts can lessen the potential for liability, despite the disregard for the SMP alert.[125] Moreover, communicating alerts to parents or guardians of any suicidal tendencies should absolve the school of any liability. The parents have primary responsibility for seeking treatment and care once the alert has been given. School districts, therefore, should err on the side of alerting parents in any close case. But, when the threat of harm comes from another student or a staff member, no such alerts are possible.

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125. Liability for failure to provide necessary information to the SMP raises another potential problem. If the failure to supply needed background to the SMP can be linked to the failure to alert, the school district can defend on the ground that no clear parameters for when to furnish the information were given. On the other hand, if the failure to communicate adequately with the SMP stems from a ministerial failure, liability may attach.

C. *Affirmative Act*

Finally, there is some risk that a school district's affirmative act in adopting an SMP may induce reliance and lead to a finding of a more pervasive duty to protect than now governs. As discussed,[126] any affirmative acts taken to protect students may trigger negligence liability if they induce reliance, as in the *Florence* and *Jefferson County* cases. Utilization of SMPs may enhance that risk.

Schools utilize SMPs to identify signs of bullying, self-harm, suicide, and school violence.[127] The technology providers themselves say they do so to protect students from these harms.[128] And schools then publicly advertise student protection as a reason for implementing the SMPs.[129] Indeed, the more that SMPs tout their efficacy, the more that they may dampen the watchfulness that parents otherwise would exert. Schools utilizing SMPs may not detect every potential risk; but those schools can still monitor exponentially more than previously.

Thus, considering the purpose of SMPs, the manner in which technology providers advertise them, and the reasons schools offer for implementing them, it becomes difficult to envision the implementation of an SMP as anything other than an affirmative action taken to protect.

Given that students and their parents know of the SMP utilization, they arguably become less likely to take steps to

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126. *See supra* Part II.C (discussing the *Florence* and *Jefferson County* cases).

127. *See* Benjamin Herold, *Schools Are Deploying Massive Digital Surveillance Systems. The Results Are Alarming*, EDUCATION WEEK (May 30, 2019), https://www.edweek.org/ew/articles/2019/05/30/schools-are-deploying-massive-digital-surveillance-systems.html.

128. *Id.* (quoting technology provider executives regarding a school's need to protect its students by implementing an SMP).

129. Charlotte Andrist, *Nearly 1,200 School Districts Renew Partnerships with Gaggle*, PRWEB (May 16, 2019), https://www.prweb.com/releases/nearly_1_200_school_districts_renew_partnerships_with_gaggle/prweb16315062.htm (quoting the Denver Public Schools' Director of Emergency Management as saying that the district relies on its use of an SMP to keep students safe).

ensure student safety. When students know they are subject to continuous surveillance at young ages, they may come to anticipate that someone is always watching. For example, some students may assume that, if they write a call for help on their laptop, a school official will intervene. Although SMPs may detect much of this behavior, the technology cannot be expected to detect everything; nor can schools respond effectively in every situation in which the technology does detect a warning sign. If harm to the student then occurs, the affirmative act doctrine provides a basis upon which a plaintiff might argue for school liability. As a result, schools should be mindful that some students may assume that someone is always ready and able to help.

In utilizing SMPs, therefore, school districts should take care not to tout the capacity of SMPs too expansively. The more that school districts reassure students and their parents that they can prevent harm before it happens, the more they may unintentionally encourage overreliance on the monitoring system. Harm can befall students that the SMPs cannot detect and prevent, and schools may not respond effectively in the eyes of a jury. The risk is that students and their parents will take fewer precautions in light of operation of the SMPs. Therefore, to avoid liability, school districts should stress that SMPs remain just a tool to oversee the safety of their charges, and that it is up to children and their parents to remain vigilant at all times.

D. *Failure to Adopt an SMP*

At first blush, it stretches credulity to argue that a school district's failure to adopt an SMP can itself open a school district to liability. After all, a district's decision whether to adopt an SMP stems from economic and social decision-making, taking into account factors such as expense, efficacy, and privacy.

Yet, if SMPs prove as successful as advertised, districts that furnish computers and use management software to monitor student writing will become increasingly hard-

pressed to justify not utilizing SMPs. Plaintiffs may argue that the failure to take such a step, in the face of the efficacy of an SMP, demonstrates deliberate indifference to the safety of pupils in their charge.[130]

Consider the example of smoke detectors or smoke alarms in homes. Over one hundred years ago, individuals faced a small chance of survival if their home caught fire.[131] With the invention of smoke detectors, the chance of survival grew. The first smoke detectors were extremely expensive.[132] And they still had to be improved to the point at which people could reasonably rely on them to alert to a fire.

Today, however, a failure to install a smoke alarm may be evidence of negligence. For example, in the Ohio case of *Starost v. Bradley*,[133] plaintiff filed suit alleging negligence for failure to install smoke detectors after being seriously injured in a fire.[134] The court noted that "installation of smoke detector alarms in buildings creates an inference that the alarms will diminish the risk of harm to persons . . . because the alarm is designed and intended to warn them of the fire in its early stages."[135] Based in part on that finding, the court concluded that the failure to install a smoke alarm was a permissible factor for a jury to consider in determining liability, even if the failure may not have been negligence *per*

130. Indeed, the Minnesota Appellate Court in *S.W. v. Spring Lake Park School District No. 16*, 580 N.W.2d 19, 23 (Minn. 1998), held that a school district's failure to adopt a security policy is not entitled to immunity unless the court is convinced that the lack of a policy was intended to enhance security—"were we to hold that the simple absence of a policy or a decision not to have a policy entitles government entities to immunity under the statute, we would be providing government decisionmakers an incentive to avoid making the difficult decisions which the statute was designed to protect." *Id.*

131. A BRIEF HISTORY OF SMOKE ALARMS, http://www.mysmokealarm.org/history-of-smoke-alarms/ (last visited Sept. 30, 2019).

132. *Id.*

133. No. 17319, 1999 WL 41897, at *1 (Ohio App. 2d 1999).

134. *Id.*

135. *Id.* at *5.

se.[136]

A more recent example involves the steps needed to protect the integrity of data stored online. In the early days of the internet, businesses could not be found negligent for failing to install anti-virus, anti-malware, or any protective software on their websites. Now, one can search for protective software on the internet, and pages of providers with costs and guarantees pop up. Within a decade, the Federal Trade Commission (FTC) moved to fine companies for failing to install protective software to protect against data hacking.[137] In *F.T.C. v. Wyndham Worldwide Corporation*, the agency brought an action against defendants for "failure to maintain reasonable and appropriate data security for consumers' sensitive personal information," which the agency contended was in violation of Section 5 of the Federal Trade Commission Act.[138] Specifically, defendant failed to monitor its computer network for malware.[139] Even though defendant argued that it had no notice of what the FTC deemed to be reasonable and appropriate data security, the court upheld the FTC's determination.[140] The Third Circuit affirmed the trial court's decision, adding that defendant "failed to use *any* firewall at critical network points, did not restrict specific IP addresses *at all*, [and] did not use *any* encryption for certain customer files."[141] Private suits have been filed on comparable

136. *Id.* at *5–6.

137. *See, e.g.*, Complaint at ¶ 7, 9–10, In re BJ's Wholesale Club, 2005 WL 1541551 (F.T.C. 2005) (No. 042-3160).

138. 10 F. Supp. 3d 602, 607 (D.N.J. 2014) (quoting First Amended Complaint for Injunctive and Other Equitable Relief at ¶¶ 1, 44–49, Wyndham Worldwide Corp., 10 F. Supp. 3d 602 (No. 13-1877(ES))).

139. *Id.* at 629.

140. *Id.* at 616, 636.

141. F.T.C. v. Wyndham Worldwide Corp., 79 F.3d 236, 256 (3d Cir. 2015). The FTC also issued a guidebook, which describes certain practices that form a sound data security plan, though no particular practice is necessarily required. FED. TRADE COMM'N, PROTECTING PERSONAL INFORMATION: A GUIDE FOR BUSINESS (2016), https://www.ftc.gov/system/files/documents/plain-language/pdf-0136_

theories, as in the massive Anthem data breach case.[142] Much more quickly than in the smoke alarm context, technology developed that became an essential part of the duty to protect.

The examples above illustrate how the invention of new technology can change safety requirements and the duty to protect in various contexts. They also show that the change in protective measures is typically not immediate due to factors such as cost, reliability, and development. Yet, as SMPs become the norm, plaintiffs may argue in the future that a school district's failure to adopt comparable protective measures itself manifests negligence.

IV. SCHOOL DISTRICT RESPONSIBILITY FOR A TECHNOLOGY COMPANY'S NEGLIGENCE

Separate from the issue of liability for a school district's own negligence is the issue of a school district's potential liability for a technology company's negligence. For instance, a private company deploying an SMP may fail to notify a school about flagged incidents or fail to detect warning signs

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proteting-personal-information.pdf. The recommended practices are encrypting sensitive information stored on the computer network, checking software vendors' websites for alerts about new vulnerabilities, using a firewall to protect a computer from hackers, setting access controls, requiring employees to use strong passwords, and implementing a breach response plan. *Id.* at 10, 13, 17, 22. Additionally, the Federal Communications Commission recommends use of web filtering, antivirus signature protection, proactive malware protection, firewalls, strong security policies, and employee training as a combination of techniques to lower the risk of security threats. FED. COMMC'N COMM'N, CYBER SECURITY PLANNING GUIDE, at SF-3 (2012), https://transition.fcc.gov/cyber/cyber planner.pdf.

142. In *In re Anthem, Inc. Data Breach Litigation*, a number of lawsuits were filed against Anthem and Blue Cross Blue Shield Association after cyberattackers breached the Anthem database. 162 F. Supp. 3d 953, 965 (N.D. Cal. 2016). The Anthem database held members' personal information, including individually identifiable health information. *Id.* at 966–67. In all, the Anthem database contained the personal identification information of approximately 80 million individuals. *Id.* at 967. Plaintiffs alleged in part that Anthem and Blue Cross failed to protect the data systems adequately. *Id.* at 967–68. The court determined that defendants failed to take appropriate measures to protect their members, especially in light of available data security technology.

of potential risks of harm because of inadequate algorithms. In general, a school district would not be liable for any negligent act or omission by an independent contractor such as a technology company.[143] There are, however, various exceptions to this general rule of non-liability. Although these exceptions can be numerous and vary significantly across jurisdictions, they broadly fall into three categories: the school district (1) was negligent in selecting, instructing, or supervising the technology company; (2) has a non-delegable duty; or (3) hired a contractor to perform work that is inherently dangerous.[144] Only the first two exceptions are relevant here.[145]

Yet even when considering these exceptions, it is generally unlikely that school districts would be liable under existing law for a technology company's negligence. First, courts would likely consider technology companies to be independent contractors. Second, it is unlikely that school districts would be liable for negligently selecting or supervising technology companies. Finally, it is also unlikely that courts would determine that a school's duty to protect students is non-delegable.

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143. *See, e.g.*, Jacks v. Tipton Cmty. Sch. Corp., 94 N.E.3d 712, 719 (Ind. Ct. App. 2018); *see also* McCurry v. Sch. Dist. of Valley, 496 N.W.2d 433, 439 (Neb. 1993); Saiz v. Belen Sch. Dist., 827 P.2d 102, 108 (N.M. 1992); Begley v. City of New York, 972 N.Y.S.2d 48, 66 (N.Y. App. Div. 2d Dep't 2013); Lofy v. Joint Sch. Dist. No. 2, 166 N.W.2d 809, 813 (Wis. 1969); RESTATEMENT (SECOND) OF TORTS § 409.

144. *See McCurry*, 496 N.W.2d at 439; *see also Saiz*, 827 P.2d at 108; *Begley*, 972 N.Y.S.2d at 66; *Lofy*, 166 N.W.2d at 813; RESTATEMENT (SECOND) OF TORTS § 409.

145. For the third exception to apply, generally the contracted work itself must be inherently dangerous. *See, e.g.*, *Saiz*, 827 P.2d at 110 ("[O]ne who employs an independent contractor to do work that the employer as a matter of law should recognize as likely *to create a peculiar risk* of physical harm to others unless reasonable precautions are taken is liable for physical harm to others caused by an absence of those precautions.") (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS § 409. Administering SMPs itself does not create a peculiar risk of harm similar to other activities such as operating certain machinery or performing maintenance on high voltage electrical equipment.

A. *Technology Companies as Independent Contractors*

A threshold inquiry is whether a technology company in this context is an independent contractor as opposed to a servant or an employee. The general rule of non-liability applies only if the contracting party is in fact an independent contractor instead of an employee.[146] The test courts use to classify independent contractors as opposed to employees varies considerably across jurisdictions and is often a very fact-intensive inquiry.[147] Courts typically balance numerous factors, none of which is determinative.[148] The most important factor courts consider is that the independent contractor has the ability to control the method and means of the work while the employer may control the results of the work.[149] There are also various other factors courts consider, such as the nature of the work, the degree of skill or expertise required, which party supplies the instrumentalities of the work, the length of time required to complete the work, the method of payment, and the parties' intent in forming the relationship.[150]

In the SMP context, courts likely would consider technology companies to be independent contractors. A school district's role in administering SMPs is typically triggered only after a technology company notifies the school of a potential risk. Although schools may suggest phrases to monitor after considering the local slang and any particular school issues, the technology companies implement those

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146. Smith v. Fall River Joint Union High Sch. Dist., 5 P.2d 930, 933 (Cal. Dist. Ct. App. 1931).

147. *E.g.*, *McCurry*, 496 N.W.2d at 439; RESTATEMENT (SECOND) OF TORTS § 409.

148. *E.g.*, *McCurry*, 496 N.W.2d at 439.

149. *Id.*; *see also Smith*, 5 P.2d at 933 (determining a school bus driver was not an independent contractor where the school could terminate the contract at will because "[b]y retaining the power of discharge the district was virtually in a position to control every act of the driver").

150. RESTATEMENT (SECOND) OF TORTS § 409; *see also* 41 AM. JUR. 2D *Independent Contractors* §§ 1, 5 (2015).

suggestions. And, while school districts may provide students the devices and accounts that technology companies monitor, technology companies design and implement the SMP programs and algorithms and may also own intellectual property rights related to the SMP. Moreover, technology companies typically contract with numerous school districts to provide the same or similar services. Thus, courts would likely consider technology companies administering SMPs to be independent contractors, which would generally insulate school districts from liability for a technology company's negligence.

However, schools should still recognize that the general rule of non-liability applies only for an independent contractor's negligence.[151] Schools may still be liable for their own negligence even if an independent contractor relationship exists. School districts may still make certain decisions in administering SMPs, such as deciding which phrases to monitor and flag, when and how to notify parents and interested parties of incidents, or how to handle investigations.[152] As previously discussed, a school district's liability for this type of conduct depends on the applicable law regarding immunity and the school's duty to protect.[153] Therefore, while courts are likely to characterize technology companies as independent contractors, school districts should still take special consideration as to how their own potential negligence may prompt liability.[154]

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151. *McCurry*, 496 N.W.2d at 439.

152. *See supra* Part I.

153. *See supra* Parts II–III. For example, in negligence cases involving school-provided transportation, jurisdictions differ on how immunity applies when school officials designate bus stops and design bus routes. Some jurisdictions categorize these decisions as operational decisions and others categorize them as discretionary or policy-implementing decisions. *Compare* Warrington v. Tempe Elementary Sch. Dist. No. 3, 928 P.2d 673, 677 (Ariz. Ct. App. 1st Div. 1996) (determining sovereign immunity does not apply), *with* McNees v. Scholley, 208 N.W.2d 643, 646 (Mich. App. Ct. 3d Div. 1973) (determining sovereign immunity applies).

154. *See supra* Part III.

B. *School District Liability for Negligently Selecting, Instructing, or Supervising Technology Companies*

Even where an independent contractor relationship exists, the employer may still be liable for negligently selecting, instructing, or supervising the contractor.[155] First, if a contractor turns out to be incompetent, an employer can be liable for failing to use reasonable care in selecting the contractor to perform a duty the employer owes to a third person.[156] The *Restatement (Second) of Torts* describes a competent contractor as one "who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others[.]"[157] The amount of care required in selecting a contractor depends on factors such as the risk of harm from negligently completing the work, the expertise required to complete the work, and the relationship of the parties that creates the employer's duty owed to the other party.[158] Second, an employer can be liable for negligently instructing, inspecting the work of, or supervising an independent contractor.[159] This is often applicable in the premises liability context where, for example, a school may be liable for failing to inspect the work of an independent contractor who designed and built an addition to the school.[160]

A school district's liability for negligently selecting, instructing, or supervising an independent contractor is particularly relevant when schools delegate supervision of

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155. *See* RESTATEMENT (SECOND) OF TORTS §§ 411–14.

156. Settles v. Inc. Vill. of Freeport, 503 N.Y.S.2d 945, 948 (N.Y. Sup. Ct. 1986); *see also* RESTATEMENT (SECOND) OF TORTS § 411.

157. RESTATEMENT (SECOND) OF TORTS § 411.

158. *Id.*

159. Williams v. Cent. Consol. Sch. Dist., 952 P.2d 978, 982 (N.M. Ct. App. 1997); *see also* RESTATEMENT (SECOND) OF TORTS §§ 412–14.

160. *See Williams*, 952 P.2d at 983.

students. Yet this exception to the general rule of non-liability is merely an extension of the school's own negligence, meaning the school's negligence must still be the proximate cause of the harm producing the plaintiff's injury.[161] For example, in *Greening by Greening v. School District of Millard*, a disabled student sued the school district after injuring his leg in a physical therapy program run through the school.[162] A licensed physical therapist designed the student's physical therapy program but later delegated supervision of the student's exercises to a school employee, who was not a licensed physical therapist.[163] The Nebraska Supreme Court held that the school was not liable for permitting the unqualified employee to oversee the student's exercise program because there was no evidence suggesting that the incompetent employee's conduct proximately caused the injury.[164] The court stated that, if an undue risk of harm "exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm."[165]

In the SMP context, a school district's liability for negligently selecting, instructing, or supervising a technology company can also be a fact-intensive inquiry and vary across jurisdictions based on the parties' relationship. A school may be liable if it fails to perform diligence in selecting an SMP provider. Due diligence may include checking the technology company's credentials and ability to perform what the company advertises. Schools should also diligently instruct and supervise technology companies. This can include instructing companies on the best phrases to flag

161. Greening v. Sch. Dist. of Millard, 393 N.W.2d 51, 57-58 (Neb. 1986).

162. *Id.* at 55–56.

163. *Id.* at 55.

164. *Id.* at 57–58.

165. *Id.* at 58 (quoting RESTATEMENT (SECOND) OF AGENCY § 213 (1958)).

depending on the schools' specific issues.[166] However, even if a school district negligently selected, instructed, or supervised a technology company, the school's negligence must still be the proximate cause of the plaintiff's injury. Because of this limitation, it is less likely that a school district would be liable under this exception.[167] Even so, school districts should still carefully consider a technology company's qualifications and should take adequate precautions when administering SMPs.

C. *Delegating a School's Duty to Protect Students*

Employers have also been liable for an independent contractor's negligence where the employer hired the contractor to perform a non-delegable duty.[168] A non-delegable duty can arise by common law or by statute, but is typically deemed "so vital or important to the community that the employer should not be permitted to transfer or delegate it to an independent contractor."[169] Courts often broadly apply exceptions to the general rule of non-liability, relying on numerous different exceptions and allowing considerable overlap in how to formulate each exception.[170] And, because school districts only recently began to use SMPs, there is little controlling case law on whether a school's duty to protect is delegable. Accordingly, this section describes how courts have applied the non-delegable duty exception to various school duties of care arising by common

166. For instance, a school should instruct a technology company to monitor for a phrase if the school is aware of an issue with a particular type of drug at the school that students may commonly refer to by a local slang term. This concept is discussed in greater detail *supra* Part III.

167. *See, e.g.*, *Greening*, 398 N.W.2d at 58.

168. *See, e.g.*, Carabba v. Anacortes Sch. Dist. No. 103, 435 P.2d 936, 948 (Wash. 1967).

169. Richard. J. Hunter, Jr., *An "Insider's" Guide to the Legal Liability of Sports Contest Officials*, 15 MARQ. SPORTS L. REV. 369, 409 (2005); *see also* Jacks v. Tipton Cmty. Sch. Corp., 94 N.E.3d 712, 719 (Ind. Ct. App. 2018).

170. Saiz v. Belen Sch. Dist., 827 P.2d 102, 109 (N.M. 1992); *see also* RESTATEMENT (SECOND) OF TORTS § 409.

law and then by statute, concluding that courts are unlikely to determine that a school's duty to protect is non-delegable.[171]

1. Delegating a School's Common Law Duty to Protect

Most relevant to this inquiry is how courts have applied the non-delegable duty exception to schools' common law duty to protect, and courts have adopted contrasting approaches.[172] At least one court has determined that a school's duty to protect is non-delegable. In *Carabba v. Anacortes School District Number 103*,[173] the student body associations of two schools jointly sponsored a wrestling meet and employed a referee from an independent high school wrestling association to monitor the matches. During one match, a student became paralyzed after being put in a full nelson (an illegal wrestling move) while the referee was distracted.[174] The Washington Supreme Court first determined that the schools were liable for the student body associations' conduct because the schools tightly controlled the associations and the wrestling meet was "under the

171. For an argument that schools should have a non-delegable duty to provide an equal educational opportunity based on a sexual harassment theory, see Ivan E. Bodensteiner, *Peer Harassment-Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 40–41 (2000).

172. *Compare* Kennel v. Carson City Sch. Dist., 738 F. Supp. 376, 379 (D. Nev. 1990) (holding a school's duty to protect is delegable), *with Carabba*, 435 P.2d at 948 (holding a school's duty to protect is non-delegable). It is also worth noting that this analysis is relevant only where technology companies contract directly with the school district and not with a separate entity, such as a state agency. *See Greening*, 393 N.W.2d at 57 (declining to determine whether a school's duty to protect was delegable where the state, not school district, employed an independent contractor to supervise student). A school district may be further insulated from a technology company's negligence where the technology company contracts with and operates under the direction of a state agency instead of directly with the school district. However, this type of engagement does not appear to be the current industry trend. *See supra* Section I.

173. 435 P.2d at 939.

174. *Id.*

auspices" of the school districts.[175] Further, the court ruled that the schools could be liable for negligent supervision even though they employed the referee, an independent contractor, to monitor the wrestling match.[176] In so holding, the court stated that a party's duty of care to protect a third party is non-delegable and "satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection."[177]

In the SMP context, however, it appears generally unlikely that *Carabba* would control how courts would apply the non-delegable duty exception. At least one court has declined to follow *Carabba* and has instead held that a school's duty to protect is delegable.[178] As discussed in detail above, an employer's liability for negligence of an independent contractor and employee alike is based on the concept of control, which *Carabba* does not consider at length.[179] Rules on classifying an independent contractor and the doctrine of *respondeat superior* are both based on the employer's right and ability to control the agent's work.[180] Yet, schools exert little control over how technology companies design and administer SMPs.[181] As a result, even if courts extend a school's common law duty to protect based on how SMPs change a school's custodial nature, it is still generally unlikely that courts would determine that a school's duty to protect is non-delegable.

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175. *Id.* at 947.

176. *Id.* at 948.

177. *Id.* at 947–48 (quoting RESTATEMENT (SECOND) OF AGENCY § 214).

178. Kennel v. Carson City Sch. Dist., 738 F. Supp. 376, 379 (D. Nev. 1990).

179. *Id.*; *see also* Smith v. Fall River Joint Union High Sch. Dist., 5 P.2d 930, 933 (Cal. Dist. Ct. App. 1931); McCurry v. Sch. Dist. Of Valley, 496 N.W.2d 433, 439 (Neb. 1993).

180. *Kennel*, 738 F. Supp. at 379.

181. *See supra* Part I.

2. Delegating a School's Statutory Duty of Care

Although schools' duty to protect has historically been a result of the common law, several statutes also impose specific duties of care schools owe students. These statutes can take a variety of forms. For example, many states have recently enacted legislation regulating how schools must prevent, mitigate, and respond to incidents of bullying (including cyberbullying).[182] Other laws may require schools to implement programs for certain classes of students, such as disabled students.[183] Moreover, several states extensively regulate safe transportation by schools (which, as with administering SMPs, schools commonly contract this duty out to independent bus companies).[184] Even though these statutory duties may vary in subject matter and construction, courts have commonly determined that these duties are delegable. While school districts should consult their jurisdiction's laws, it is unlikely in general that courts will hold schools liable for a technology company's negligence based on a non-delegable statutory duty to protect.

First, many, if not all, states have comprehensive regulations requiring schools to adopt anti-bullying policies.[185] Schools' anti-bullying policies often must include policies on preventing, mitigating, investigating, and notifying interested parties about bullying, including cyberbullying.[186] A school's statutory anti-bullying responsibilities are dependent on the statutory language

182. For a summary and comparison of each jurisdiction's laws and policies regarding bullying and cyberbullying, see *Laws, Policies & Regulations*, STOPBULLYING.GOV (Jan. 7, 2018), https://www.stopbullying.gov/laws/index.html#1.

183. *See, e.g.*, Begley v. City of New York, 972 N.Y.S.2d 48, 90 (N.Y. App. Div. 2d Dep't 2013) (discussing the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–09 (2010)).

184. *See, e.g.*, Lofy v. Joint Sch. Dist. No. 2, 106 N.W.2d 809, 811–12 (Wis. 1969) (describing Wisconsin's previous regulatory scheme for school transportation).

185. *See Laws, Policies & Regulations*, *supra* note 182.

186. *Id.*

and, thus, can vary considerably across jurisdictions.[187] Yet even where states have adopted statutory anti-bullying policies for schools, courts have often declined to hold schools liable for failing to follow these policies, let alone determine that any statutory anti-bullying duty is non-delegable.[188] This trend is likely due to how courts often narrowly interpret the statutory duties, particularly in light of the school's limited common law duty to address bullying (especially outside of school premises).[189]

In similar vein, courts have also determined that other specific statutory duties of care are delegable. For instance, a New York court has held that a public school could delegate supervision to a private school and a contracted school nurse where a statute required schools to provide programs and services for disabled students.[190] The court held that the public school was not liable where the private school had primary custody and, hence, supervision of the disabled student.[191] And, even after considering the "importance of ensuring that children who require nursing services to attend school receive such services from competent professionals," the court reasoned that providing nursing

187. *See, e.g.*, Gauthier v. Manchester Sch. Dist., 123 A.3d 1016, 1021 (N.H. 2015) (holding a school did not breach a statutory anti-bullying duty where the statute did not create a private cause of action and the school did not have a distinct common law duty to intervene).

188. *See, e.g.*, Castillo v. Bd. of Educ. of Chicago, 103 N.E.3d 596, 599–600 (Ill. App. Ct. 1st Dist. 2018) (holding Illinois's bullying-prevention statute only requires school districts to craft an anti-bullying policy, not to respond to bullying incidents in any precise manner); *see also* Mulvey v. Carl Sandburg High Sch., 66 N.E.3d 507, 514 (Ill. App. Ct. 1st Dist. 2016) (holding a school district's statutorily required anti-bullying policy did not create a cause of action against the school where the policy stated merely a general anti-bullying goal and did not promise any particular result or action in response to bullying incidents).

189. *See, e.g.*, Stephenson v. City of New York, 978 N.E. 1251, 1253–54 ("There is no statutory duty to inform parents about generalized threats made at school, and the circumstances here do not give rise to a common-law duty to notify parents about threatened harm posed by a third party.").

190. Begley v. City of New York, 972 N.Y.S.2d 48, 67 (N.Y. App. Div. 2d Dep't 2013).

191. *Id.* at 65.

services is not "so integral" to the school's "core responsibility of educating children that, as a matter of public policy, it can be deemed a nondelegable duty[.]"[192] Thus, even though the statute mandated detailed responsibilities to schools for specific students, the court determined that those responsibilities were delegable to both the private school and the contractor-nurse.[193]

Finally, courts have also construed a school's statutory responsibility to provide reasonably safe transportation as delegable. As one court has stated, a "plaintiff is under a burden to demonstrate something more than the fact" that a statute requires schools to safely transport students to and from school for a school to be liable for an independent contractor's negligence.[194] Courts often will not construe a school's transportation responsibilities as non-delegable unless an accompanying common law duty or specific statutory provision imposes strict liability on schools for providing school transportation.[195] But state laws regulating school transportation rarely impose strict liability on schools to ensure that students are safely transported to and from school, even if an independent contractor provides the transportation.[196] As a result, courts are often hesitant to frame these duties as non-delegable.

In sum, because courts have been reluctant to interpret schools' statutory duties of care as non-delegable, it is

192. *Id.* at 67.

193. *Id.*

194. Settles v. Inc. Vill. of Freeport, 503 N.Y.S.2d 945, 949 (N.Y. Sup. Ct. 1986).

195. *See id.* at 948–49.

196. *See, e.g.*, Chainani v. Bd. of Educ. of New York, 663 N.E.2d 283, 285 (N.Y. 1995) (holding a school district is not liable for a contracted bus driver's negligence where the school had no duty to ensure the driver complied with the school bus safety regulations); *see also* Lofy v. Joint Sch. Dist. No. 2, 166 N.W.2d 809, 814 (Wis. 1969) (holding a school's negligence liability for providing school transportation is delegable where the statute afforded schools discretion in whether to provide transportation and a provision permitted claims against the state without mentioning claims against an independent contractor).

unlikely that courts would do so within the SMP context. A school's duty to protect is likely delegable so long as there are no statutory provisions imposing either strict liability or a specific non-delegable duty to protect. Even if SMPs broaden schools' custodial nature, courts would likely still be reluctant to categorize this duty as non-delegable because schools exert little control over technology companies. And, although supervising students is an integral aspect to education, schools contracting with technology companies to administer SMPs augment rather than abdicate a duty to protect. SMPs enhance rather than merely delegate schools' supervisory capacities. A school's liability naturally depends on a jurisdiction's specific laws. But, overall, courts are generally unlikely to hold school districts liable for a technology company's negligence in administering SMPs.

CONCLUSION

Technology can enhance a school district's effort to protect its students from harm. Although it is too early to tell, SMPs hold great promise in preventing bullying and facilitating early intervention in cases of suicidal tendencies. Adoption of an SMP outsources a school's duty to protect in part to an outside technology company.

That contracting out likely will shift a school district's potential liability in several ways. First, school districts that follow through on alerts indicated by the SMP should be protected from liability for any harm that nonetheless ensues. Second, any school district that ignores an SMP alert may be liable if harm follows, even outside of school premises, because utilization of an SMP increases the geographic scope of a school's duty. Third, school districts must take steps to prevent adoption of the SMP as an affirmative act from dampening the vigilance of parents in protecting their own children, lest schools be liable for any negligence stemming from mistakes in setting up SMP filters or in carrying out SMP warnings. Fourth, if SMPs prove as reliable as advertised, school districts in the future may face

liability for *not* utilizing such technology to protect their students. And, finally, schools should take care not to ignore signs of their technology contractors' negligence. SMPs protect students and, to some extent, schools, but schools need take care lest their adoption of an SMP leads parents and courts to conclude that, in walking down that path, schools have become the insurer of student safety.