Introduction

School-based gun violence is a tragic reality in our schools. For too long, school communities have been willing to ignore the deadly, but very real possibility of a shooting event in a school, sending teachers and administrators into service terribly ill-equipped to deal with an active shooter incident. Adoption and proper implementation of the ALiCE system can provide teachers and administrators with the skills, training, and response options necessary to save lives.

Detractors of the ALiCE system claim that adopting the system unnecessarily exposes a school district to legal liability. This criticism is often poorly articulated, and based on flimsy or non-existent legal reasoning. Realistically, if a shooting occurs, the school district should expect to be sued. Dodging lawsuits or avoiding legal liability is NOT the goal of the ALiCE system. The goals are to save lives, protect students and staff, and in doing so, minimize a school district's legal liability in potential law suits.

It is important to note that this analysis is not, and does not purport to be exhaustive. Due to constraints of time and space, we made the decision to focus on the most salient points of the law. This analysis is intended to provide readers with a basic understanding of the legal underpinnings of litigation resulting from an active shooter incidents in a school. It is also important to note that this analysis is accurate at the time of printing, but that due to the rapidly changing nature of this area of the law, this analysis may be outdated by the time you are reading it. Nothing here should be construed as legal advice, as you should consult your district's attorney regarding these issues before any policy chance.

Immunity

A discussion of a defendant-school's potential legal liability must first examine whether the school can be sued at all. Sovereign immunity is the legal concept that the government (and the arms of the government, including public schools) is immune from lawsuits, and therefore cannot be sued unless it consents.[1]

Through a long string of cases[2], the Supreme Court has found that states enjoy sovereign immunity as a "fundamental aspect of the sovereignty which [they]… enjoyed before the ratification of the constitution, and which they retain today."[3] However, because states enjoy immunity due to their sovereignty (not the eleventh

[1] The federal government has waived immunity and consented to suit in certain instances by way of the Federal Tort Claims Act.
[2] Hans v. Louisiana, Blatchford v. Native Village of Noatak, Northern Ins. Co. of N. Y. v. Chatham County, Jinks v. Richland County, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency.
[3] Alden v. Maine, 527 U.S. 706

amendment) immunity extends ONLY to States and *arms of the states* not to cities, municipalities, or counties. Later, the Supreme Court found that "An entity that does not qualify as an "arm of the State" …cannot assert sovereign immunity as a defense"[4] because sovereign immunity bars suit against states, but not lesser entities finding that "the immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[5]

The Supreme Court decisions provide guidance, but not a definitive answer. Some states have completely waived sovereign immunity. In some states, schools or school boards do not enjoy immunity, and in some states a school may not be sued. At least 33 states have 'capped' the amount which may be recovered from judgments against the state.

To definitively determine if a school is immune from suit, one must look to the law of the state in which the school operates. In a landmark case concerning Ohio law, Mt. Healthy City Bd. of Ed. v. Doyle the Court determined that a local school board was not immune from suit because under Ohio law the "State" does not include "political subdivisions"[6] and that a local school board is a political subdivision because it "is more like a county or city than it is like an arm of the State."[7]

It is important to note that even if a defendant-school is ultimately adjudicated to be immune from suit, that school must still defend the suit until that point. An immune defendant-school must still expend the time and money, and deal with unwanted media attention brought about by litigation.

Generalized questions for assessing legal liability for an institution:

Did the school comply with all applicable Federal and State laws? If a court determines that an institution failed to comply with all applicable Federal and State laws, that institution may be subject to whatever sanctions are contemplated by that statute. Additionally, failure to comply with applicable legislation may serve as evidence that the institution did not apply or had breached the reasonable standard of care.

Generalized elements of liability for a negligence-based claim.

[4] Northern Insurance Company of New York v. Chatham County, 547 U.S. 189
[5] Alden v. Maine, 527 U.S. 706, citing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U. S., at 280; Lincoln County v.Luning, 133 U. S. 529
[6] Ohio Rev.Code Ann. § 2743.01
[7] Mt. Healthy City Bd. of Ed. v. Doyle, 429 U. S. 274

In a negligence-based case, assuming there is actual, substantiated injury, the court will look to the following questions to determine liability:

1. Did the school have a duty to protect the student?
2. What was the reasonable standard of care to apply under the circumstances, and did the school apply that reasonable standard of care?
3. If there was a breach of that reasonable standard, was it a significant factor in causing a student's injury?
4. Did the victim contribute to the injury through his or her own negligence?

Did the school have a duty to protect the student? It is well settled that school officials have a duty to anticipate dangers and take reasonable precautions to protect students in their charge from those dangers. However, most common law, and the Fourteenth Amendment does not impose a constitutional duty upon a state to protect individuals from private violence.[8] Most (if not all) states do NOT require lay citizens to predict the future violent behavior of others. However, it is most likely that school officials would be expected to use common sense and ordinary judgment in assessing the knowledge they possessed about a shooter's activities.[9]

In the 10th circuit at least, there are two exceptions to the general rule that a state is not constitutionally obligated to protect individuals against private violence: 1) the special-relationship doctrine, and 2) the state-created or enhanced danger doctrine[10]. It is unlikely that a plaintiff could successfully argue that the state (here, the school district) created or enhanced the danger posed by the possibility of gun violence in a school. It is more likely that a plaintiff would argue that the state is obligated to protect school children against private violence because of the special relationship between a school district and the schoolchildren in its care. A court is likely to find that a special relationship exists if the school was acting *in loco parentis* and state law finds that *in loco parentis* constitutes a 'special relationship'[11] To determine if special relationship, and therefore, a duty to protect exists, Colorado courts for example, consider the following factors:

a) Foreseeability of harm;

b) social utility of the actor's conduct;

[8] DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189
[9] Taco Bell, Inc. v. Lannon, 744 P. 2d 43
[10] Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir.1995).
[11] Castaldo v. Stone

c) the magnitude of the burden of guarding against injury or harm; and

d) the practical consequences of imposing a duty[12]

a)**Forseeability**- Foreseeability includes factoring in "the setting of modern life" and "common sense perceptions of the risks" a "reasonably thoughtful person would take account of in guiding practical conduct." [13] In the litigation following Columbine, the judge found that Harris and Klebold's videos depicting the shooting of guns, and the discussion of their bomb-making abilities, Harris' website laced with profane tirades and death threats, and Klebold's disturbing short story indicated Foreseeability of their attacks and "weighs in favor of imposing a duty on" Columbine officials.

b) **Social utility**-this part of the test looks to the the social utility of the School District as a whole, which would not be called into question.

c) **The magnitude of the burden of guarding against injury or harm**. Here the court would examine the relative difficulty of protecting students from injury. It is likely that a court would not determine that protecting students is an unreasonable burden, given the extent to which schools strive to protect students from other harms. The court would also examine the burden relative to the cost of allowing students to go on unprotected. Because the costs of allowing students to go unprotected are so real and so grave, the court would probably find that the burden of protecting students is not too great for a school district to undertake.

d) **Practical consequences of imposing a duty**. Here the court would examine the practical ramifications of imposing a duty upon schools. Surely courts would consider the fact the schools, to varying degrees of preparedness, are already protecting students. Therefore, 'imposing' a duty that is already being undertaken by school district does not post that many additional practical consequences.

Under such an analysis, it is likely that most courts would determine that there exists a special relationship between a school and its students, and that, as such, the school owes a duty to protect its students, even from the violent acts of private citizens. It is important to note that it would be unreasonable for a court to impose an absolute duty to protect students: i.e. prevent any violent act from ever happening. Rather, the courts might be likely to impose a duty upon schools to do the best they can to protect students, using the lessons learned from previous incidents, and the best practices that have developed as a result.

[12] Solano v. Goff, 985 P.2d 53 (Colo.App. 1999).
[13] Taco Bell, Inc. v. Lannon, 744 P. 2d 43

What was the reasonable standard of care to apply under the circumstances, and did the school apply that reasonable standard of care? If a court determined that the school did in fact have a duty to protect its students from harm, the court would next look to determine what was the reasonable standard of care under the circumstances and if the school applied that reasonable standard of care. A court's examination of this element of a negligence-based claim might be the most concerning for a school district that employs lockdown as its only active shooter response.

Because there is no clearly established 'standard of care' for how a school district should train for and respond to an active shooter incident, the court would look to numerous factors to determine how a hypothetical reasonable school would have acted to protect students, and then look if the defendant school's conduct met the same standard of care.

Schools that employ a lockdown-only approach and critics of the ALiCE system would argue that lockdown is a traditional approach that is still employed by a large number of schools, and therefore should be considered the standard of care. However, tradition and widespread implementation do not determine was constitutes a "reasonable standard of care." The court would look to lessons learned from previous similar incidents, recommendations from experts, guidance from applicable agencies, and determine what is reasonable conduct to expect from a school.

There is no controlling precedent, and although it isn't possible to predict with absolute certainty, it is reasonable and likely that a court would find that something beyond or in addition to a 'lockdown-only' approach (like the ALiCE system) is the reasonable standard of care to which schools should be held.

If there was a breach of that reasonable standard, was it a significant factor in causing a student's injury? If the court found that employing a lockdown-only approach for active shooter response was inadequate and breached the school district's duty to its plaintiff-student, the court would then examine if that breach caused the student's injury. We will forgo an exhaustive discussion of legal causation for the oversimplified explanation that a court will find that a defendant-school's breach caused a student's injury if the injury would not have happened "but-for" the defendant's breach. This means that if the plaintiff-student would have been injured no matter what the school did, the student cannot recover from the school district. However, if the court finds that the school district's failure to meet the reasonable standard of care was a significant factor in the student's injury, then the court will most likely find that the school district's breach was enough of a causation to continue along the negligence analysis.

Did the victim contribute to the injury through his or her own negligence? Finally, a court will look to determine if the defendant contributed to their own injury in a way that would bar their recovery from the plaintiff. Some jurisdictions have preserved the doctrine of contributory negligence whereby a plaintiff who contributed to their own injury is completely prevented from recovering from a defendant. Alabama, the District of Columbia, Maryland, North Carolina, and Virginia still have 'pure' contributory negligence, meaning that a plaintiff cannot recover if he or she was even one per cent (1%) at fault for their injury. In most jurisdictions, a plaintiff must be less than 50% or 49% at fault for their own injury in order to recover from a defendant. Depending on the jurisdiction in which the litigation takes place, the court would apply the standard and determine if the plaintiff was partially at fault for their injury, and if they are therefore able to recover.

Therefore, the concern for a lockdown-only school district in negligence-based litigation stemming from a school shooting is that a court would find that:

-the plaintiff sustained actual, substantiated injury

-the school district owed the student a duty to protect him or her from harm

-the reasonable standard of care under the circumstances was something beyond or in addition to a "lockdown only" response and that the school district breached that duty by employing lockdown as the ONLY response

-the breach of that duty caused the student to be injured and,

-the student did not contribute to the injury in a way that would preclude them from recovering from the defendant school district.

Such findings would be incredibly damaging to a school district and would most likely result in a substantial award for the plaintiff.

Liability based on inadequate policies, practices, and training

The Supreme Court has held that "a local government may not be sued …for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom…or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity

is responsible under § 1983."[14] Therefore, liability does not attach unless a Plaintiff can show: 1) that a municipal employee committed a constitutional violation; and 2) a municipal policy or custom was the moving force behind the constitutional deprivation.[15]

The Supreme Court has found that failure to train is not enough to prove a constitutional violation.[16] However, plaintiffs seeking § 1983 relief can use school district's failure to train as one way to make the required showing that a municipal policy or custom was the "moving force" behind an already established constitutional deprivation.[17]

Individual liability for administrators

Qualified immunity is the legal doctrine by which government actors sometimes enjoy immunity from suits alleging the actor violated a plaintiff's rights. The Supreme Court opined that "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[18] Qualified immunity thus allows officials the freedom to exercise fair judgment[19], protecting "all but the plainly incompetent or those who knowingly violate the law."[20] The linchpin of qualified immunity is objective reasonableness.[21] So long as a public official's actions, viewed from the perspective of the official at the time, can be seen within the range of reasonableness, then no liability will attach.[22]

Qualified immunity can be waived if a plaintiff can show that the school officials violated a clearly established law based on Supreme Court or local circuit court authority, with facts analogous to the case at hand.[23] The question is whether the constitutional rights alleged to have been violated were clearly established so that reasonable school teachers and officials in the School Defendants' positions would have understood that their

[14] Monell v. New York City Dept. of Social Servs., 436 U.S. 658,
[15] Myers v. Oklahoma County Bd. of County Comm'rs, 151 F.3d 1313
[16] City of Canton, 489 U.S. at 389-90

[17] Myers v. Oklahoma County Bd. of County Com'rs, 151 F. 3d 1313

[18] Pearson v. Callahan, 555 U.S. 223
[19] Castaldo v. Stone, 192 F. Supp. 2d 1124
[20] Malley v. Briggs, 475 U.S. 335
[21] Anderson, 483 U.S. at 639
[22] Castaldo v. Stone, 192 F. Supp. 2d 1124
[23] Castaldo v. Stone, 192 F. Supp. 2d 1124

actions were in violation of these rights.[24] Without getting into too deep of discussion, it can be argued that the constitutional guarantee of "life and liberty" is clearly established.

A government agent's liability in a federal civil rights lawsuit now no longer turns upon whether the defendant acted with "malice," but on whether a hypothetical reasonable person in the defendant's position would have known that his/her actions violated clearly established law.[25]

Potential liability for institutions employing 'traditional' lockdown.

A concern often echoed by administrators is that they already have a "Lockdown" policy and they fear that changing the policy would unnecessarily open them to legal liability. Although there is no controlling legal precedent, it is a fair contention to argue that employing a traditional lockdown as the ONLY option for active shooter response is a much more tenuous legal position.

A court of law will not be moved by the argument "we had a lockdown policy and executed it." As discussed in the earlier section on negligence precedent, a defendant school is expected to uphold a reasonable 'standard of care' of the students in its charge. To determine the appropriate standard of care, a court would look to many sources for guidance. A court would look to any federal or state guidance of what is considered to be best practices for active shooter response. The court would also look to the lessons learned from previous school-based active shooter incidents to guide what a reasonable standard of care would be for a school's active shooter response.

Based on existing guidance, lessons learned, and what is widely considered to be best practice, it is very difficult to imagine a situation where a court would conclude that traditional lockdown alone is a reasonable standard of care for active shooter response. The recommendations from the Department of Homeland Security, the New York Police Department active shooter report, and other recommendations from the International Association of Police Chiefs and other associations and authorities strongly indicate that a lockdown-only approach is no longer considered best practice. Additionally, looking to the results of school-based shootings, and the fates of students in lockdown compared to the fates of students where other approaches were utilized weighs heavily in favor of a lockdown-only approach being an inadequate standard of care.

[24] Siegert, 500 US. at 232, 111 S.Ct. 1789; Tonkovich, 159 F.3d at 516.
[25] Bivens v. Six Unknown Named Agents, 403 U.S. 388

Potential liability for institutions that *properly* adopt and implement the ALiCE system.

Proper implementation of the ALiCE system is not a silver bullet. ALiCE will not prevent a shooting from happening, and it will not prevent a school district from being sued. However, implementing the ALiCE system as described and trained puts a school district in a significantly better position than a lockdown-only district. Aside from the safety benefits discussed elsewhere, properly implementing ALiCE decreases a district's potential legal liability by providing the school (and its teachers, administrators, and staff) with the options to make the best possible decision in the circumstances they face. If a court, as part of negligence-based litigation, looks to determine what the reasonable standard of care is, the court will determine how a hypothetical reasonable school would respond to a factually similar incident.

ALiCE, at its most basic, takes all the lessons learned from previous incidents, recommendations from experts and agencies, and finds the most reasonable way to respond to active shooter incidents in order to save lives. Knowing what we know about school shootings, it simply is NOT REASONABLE to hide in the corner and hope to live. The type of utilitarian calculus as reasonable conduct proscribed by the ALiCE system, equipping school officials with the absolute best response for the situation is exactly the reasonable conduct contemplated by the "reasonable standard of care."

It is important to note that implementing the ALiCE system is not a fool-proof cure-all. Improper ALiCE implementation is just as unreasonable as a 'lockdown-only' approach.

Conclusion

Because there is no truly controlling precedent, one can't state with certainty how a court would rule in a suit stemming from a school-based shooting incident. However, when comparing a lockdown-only response with an ALiCE-style range of response options it becomes clear that an ALiCE school is in a much stronger legal position. Having a policy and following it is not a defense to liability. Properly implementing ALiCE is not a complete defense to liability. Providing teachers, administrators and staff with training and a range of response options like those in the ALiCE system is arguably the best way to save lives and minimize exposure to liability.