



## **School Marshals and Other School District Personnel Carrying Firearms**

*Published online in [TASB School Law eSource](#)*

Safety is a top priority for every school district. Given the enormous variation in geography, resources, and demographics around the State of Texas, it is fitting that each school district makes its own assessment of security needs and options. For many school districts, security planning will include a determination regarding whether the district should employ school resource officers, school marshals, or other employees who are authorized to carry firearms. Factors relevant to those determinations are discussed in this memorandum.

Decisions about employees' access to firearms should be considered in light of the district's overall security plan. Given the range of potential risks at a school campus—including risks from weather, fire, gas leaks, accidents, as well as criminal activity—security planning should include readiness to respond to a variety of possible events.

### **Multi-Hazard Emergency Operations Plan**

All school districts are required to adopt and implement a multi-hazard emergency operations plan (EOP) for use in the district's facilities. The plan must address prevention, mitigation, preparedness, response, and recovery. The plan must provide for various factors of an emergency, such as: district employee training in responding to an emergency; school drills and exercises for responding to an emergency; measures to ensure coordination with local law enforcement, health departments, and others; and much more. Tex. Educ. Code § 37.108(a). The Texas School Safety Center (TxSSC) provides [resources](#) for districts creating EOPs on its website. See also TASB Legal Services' [Adopting and Implementing a Multi-hazard Emergency Operations Plan](#).

As a related matter, Texas Education Code 37.108(g) states that an EOP must include a policy for responding to an active shooter emergency. In its [District Audit Report](#) for 2017-2020, the TxSSC reports that of the 1,022 district EOPs reviewed, only 200 had a viable active shooter policy.

### **Options for Employing Security Personnel**

School districts have several [options](#) for obtaining security services at school facilities. School districts weigh these options based on factors such as district need, size, location, and cost.

For statistical information about Texas districts' choices, see the TxSSC's [District Audit Report](#) for 2017-2022.

**School Resource Officer (SRO):** A district may enter into a memorandum of understanding (MOU) with another governmental entity to have a peace officer, commissioned and employed by the other governmental entity, placed at the school district on a full- or part-time basis. Depending on the number of officers and the amount of time they will be stationed at the district, the MOU typically requires the school district to cover the proportional cost of their salary, benefits, and equipment.

**School district commissioned peace officers:** A school district can also create its own police department by commissioning school district peace officers. Any peace officer commissioned under Texas Education Code section 37.081 must meet all minimum standards for peace officers established by the Texas Commission on Law Enforcement (TCOLE). The school board may determine the jurisdiction of its commissioned officers, which may include all property under the control of the school district. To the extent school district commissioned peace officers have jurisdiction that overlaps with another law enforcement agency (e.g., the city or county), the school district and the other entity must have a memorandum of understanding (MOU) for communication and coordination. Tex. Educ. Code § 37.081(a).

SROs and school district commissioned peace officers must undergo model training for school police officers created by TCOLE in association with the TxSSC. School-based law enforcement officers must also take a TCOLE-approved course on active shooter incidents. Tex. Educ. Code § 37.0812.

**Security personnel:** If a school district employs an individual as security personnel, the individual must be a commissioned peace officer in order for the school district to authorize the individual to carry a weapon. Tex. Educ. Code § 37.081(a).

**Security company:** If a school district employs a private company, rather than its own employees, to provide security, state law does not directly address whether the company's employees may be authorized to carry firearms on school premises. A school district exploring the option of employing an outside security firm should do so in consultation with its school attorney.

**School marshals:** Since 2013, Texas law has permitted school districts to appoint one or more specially trained and licensed employees as school marshals, as described below. Tex. Educ. Code § 37.0811.

**Local authorization:** School marshals are one option—but not the only option—for school districts that wish to authorize designated employees to carry firearms on school premises. A second option is for a school board to adopt a local policy that authorizes the designation of specific employees who are authorized to carry firearms on school premises. (This is sometimes referred to as a “Guardian Plan.”) A school district has the option to appoint one or more school marshals, authorize through local policy the designation of one or more individual employees who may carry firearms on school premises, or both. Tex. Att’y Gen. Op. No. GA-1051 (2014).

### **Appointment of School Marshals**

The Protection of Texas Children Act, as the school marshal law is called, allows the board of trustees of a school district or the governing body of an open-enrollment charter school to appoint one or more school marshals for each campus. Tex. Educ. Code § 37.0811. The marshal must have the appropriate licensing and certification by TCOLE. Tex. Code Crim. Proc. art. 2.127(d). The specialized marshal training program must require a psychological exam and include 80 hours of instruction designed to:

- Emphasize strategies for preventing school shootings and for securing safety of potential victims of school shootings;
- Educate a trainee about legal issues relating to the duties of peace officers and the use of deadly force;
- Introduce the trainee to effective law enforcement strategies and techniques;
- Improve the trainee's proficiency with a handgun; and
- Enable the trainee to respond to an emergency situation requiring deadly force, such as an active shooter situation. Tex. Occ. Code § 1701.260.

A school marshal appointed by a school board may carry or possess a handgun on the physical premises of a school, but only as provided by written regulations adopted by the board and only at the school specified by the board. The board must require that a designated school marshal may carry a concealed handgun on the marshal's person or in a locked and secured location on the physical premises of a school. A school marshal may access a handgun only under circumstances that would justify the use of deadly force for the safety or protection of others as provided by law, and the marshal may use only frangible duty ammunition approved for the purpose by TCOLE. Tex. Educ. Code § 37.0811.

### **Designation of School Employees Authorized to Carry Firearms ("Guardian Plan")**

Under the authority of the federal Gun-Free School Zones Act and the Texas Penal Code, school districts can grant written permission for anyone, including designated employees, to carry firearms on campus. 18 U.S.C. § 922(q)(2)(B)(v); Tex. Penal Code § 46.03(a)(1)(A). An individual authorized by the district in writing to carry a firearm on school premises is not carrying the firearm pursuant to the individual's handgun license, but rather pursuant to the written authority granted under Texas Penal Code section 46.03. Tex. Att'y Gen. Op. No. GA-1051 (2014). If the firearm has moved in or otherwise affects interstate or foreign commerce, the permission must be in the form of a contract between the school and the individual or be part of a school district-approved program. 18 U.S.C. § 922(q)(2)(B).

In most cases, school districts limit employee authorization to commissioned peace officers. In some districts, however, authorization has been granted to other school officials or even classroom teachers. While state and federal law gives school districts broad discretion to authorize the possession of firearms and other weapons on school premises, granting such authority brings a host of practical concerns, including safety and liability.

### **Considerations Prior to Expanding Employee Access to Firearms**

**Local environmental factors:** School boards considering authorizing greater access to firearms on campuses should consider the unique environmental factors particular to their school district. A primary consideration for the school districts that have already granted authority for specific individuals to carry handguns on school premises has been an unusually long response time for emergency services. Rural districts located outside of municipalities have reported predicted response times of up to 30 minutes for emergency calls. Districts with campuses in such isolated settings may understandably have a heightened need to consider providing for their own security.

Relevant environmental factors include:

- Response time for first responders on a call involving an active shooter
- Proximity to high-crime areas
- Proximity to major railroads or roadways
- History of violent incidents
- Other factors indicating a heightened need for security to be provided by the school district as opposed to law enforcement

A school district that deems it necessary or appropriate to provide increased security through the school district, rather than local law enforcement, may want to consider all available options—including contracting for an SRO, contracting with a security firm, or commissioning its own law enforcement officers or school marshals—before permitting additional firearms to be carried on school premises by individuals who lack these credentials.

**Coordination with law enforcement:** Involvement of local law enforcement is essential in considering an expansion of access to firearms on school premises. State law requires school districts to ensure coordination with local law enforcement in the event of an emergency when preparing districts' emergency operations plans. Tex. Educ. Code § 37.108(a)(5).

With respect to school marshals, TCOLE is required to collect personal identifying information from each person that participates in the training program, such as name, date of birth, handgun license number, and address of the person's employment. Such information is confidential under law except that TCOLE is required to disclose this information to the following entities:

- Director of the Department of Public Safety;
- School district employing the individual;
- Chief law enforcement officer of the local municipality where the school district is located;
- Sheriff of the county if the person is employed by a school district and the campus is not located within a municipality; and
- Chief administrator of any peace officer commissioned under the Texas Education Code.

Tex. Occ. Code § 1701.260(j).

If a school district chooses to authorize designated employees to carry firearms through a local action other than the school marshal program, the district may wish to follow similar procedures to inform local law enforcement authorities about the presence of firearms on campus.

Moreover, school officials should seek to understand the legal requirements and obligations that law enforcement officials assume in responding to an emergency on a school campus. These requirements and obligations take on an entirely new meaning for a school district if a district employee is visibly carrying or discharging a loaded weapon on campus when law enforcement arrives. Districts must be prepared to recognize and address this safety concern with designated employees through training and possibly a written protocol.

Discussions with law enforcement may involve necessary school district officials, including potentially the superintendent, a board member, the school police chief or head of security, if any, and the school district's attorney. The discussions should be as candid as possible to acquire accurate information from law enforcement about their likely response to an emergency—especially an active shooter—on a campus that has authorized specific employees to carry firearms.

Discussions with law enforcement may include:

- Whether to adopt or amend a memorandum of understanding (MOU)
- Law enforcement's protocol for responding to an active shooter on campus
- Response time for an emergency call on campus involving a firearm
- Identification required for a school employee carrying a firearm
- Mutual agreement of procedures to follow when law enforcement arrives (e.g., stand-down, put weapon on the floor, show identification, etc.)

**Stakeholder input:** All school districts share a commitment to creating safe learning environments, but there can be no one-size-fits-all response to securing school campuses. Texas school districts vary enormously in size, location, demography, resources, and perspectives. While some Texas communities might embrace an action of the local school board to expand the presence of firearms on school premises, others would erupt in controversy over the suggestion.

A school board considering granting authorization for firearms on campus may want to create opportunities for community feedback. Obtaining input from the community, parents, and other stakeholders will provide insight for the board into community support for a policy change, including support for the financial impact of a change.

School boards typically obtain community input through the public comment portion of school board meetings, posted in accordance with the Texas Open Meetings Act (OMA). See TASB Policies BED(LEGAL) and (LOCAL). A school board could receive public comment on the topic at a board meeting, or the district could consider calling a special “town hall” style meeting to focus on the single topic. If a quorum of the school board is gathered to hear community input, the event should be posted as a board meeting under the OMA. Tex. Gov’t Code § 551.043(a).

**Risk management:** As described in greater detail below under *Liability and Risk Management Concerns Related to Firearms*, permitting firearms on campus exposes a school district to additional risks, including theft, accidents, or injuries to school personnel or students. School districts considering expanding the authority of employees to bring weapons on campus should discuss the decision with their school attorney and insurance provider.

**Coordination with EOP:** If a district decides to expand the presence of firearms on school premises, it will likely need to make policy revisions. The general information included in board policy may be incorporated into the EOP. However, merely having an EOP on file may not be sufficient to serve as the *written authorization* needed under federal and state law to grant written permission to certain individuals to carry firearms on school premises. Changes to both local policy and the EOP should be considered in districts expanding authorization for firearms.

Note that a district’s EOP is generally not considered public information, unless the disclosure enables a person to verify certain issues related to a district’s safety plan. An interested person may request access to a document that verifies that the district has established an EOP, that the district has reviewed its EOP within the last twelve months, that district employees have been trained to respond to an emergency, and that each campus has conducted mandatory emergency drills and exercises in accordance with the plan, among other things. Tex. Educ. Code § 37.108(c-2).

### **Process for Local Policy Adoption**

For a district preparing to authorize school employees other than commissioned peace officers (including school marshals or other designated employees) to carry firearms, the first step is to change local school district policy. Then, based on the recommendation of the superintendent, the school board could grant specific named individuals written authorization to carry handguns on school premises. In order to keep the identities of the authorized individuals confidential, the district should proceed as described below at *Confidentiality Before, During, and After Safety Policy Changes*.

Relevant local policies include:

- TASB Policy CKE on SAFETY PROGRAM/RISK MANAGEMENT - SECURITY PERSONNEL for provisions on school marshals
- TASB Policy CKC on SAFETY PROGRAM/RISK MANAGEMENT - EMERGENCY PLANS for provisions authorizing designated employees (other than commissioned peace officers or school marshals) to carry firearms
- TASB Policy DH on EMPLOYEE STANDARDS OF CONDUCT for provisions authorizing designated employees to carry firearms

TASB Policy Service does not offer recommended model policy language authorizing designated employees to carry firearms. However, TASB Policy Service can provide examples from other districts' policies as a starting place. TASB Policy and Legal Services provide no assurance that these examples are appropriate for any specific district; therefore, it is recommended that each district consult with its school attorney. Likewise, it is recommended that a district work with its school attorney on developing policy and regulations for an approved school marshal plan.

School districts considering the development of a local policy to expand access to firearms on school premises may want to work through a committee to develop a policy recommendation for the board. Each school district is already required to establish a school safety and security committee. The committee is tasked with developing and implementing emergency plans consistent with the district's EOP and providing support services in connection with safety audits and reports. Tex. Educ. Code § 37.109. The school safety and security committee may be a good place to start discussions about firearm policies. A district may want to consider including additional members to work with the committee, including additional representatives of local law enforcement, the district's local attorney, campus administrators, and a school nurse or counselor.

**Implementation issues:** For a district introducing a new policy to expand access to firearms on school premises, an implementation plan may be needed to cover complex issues that are not reflected in board policy. The plan would address a host of issues, including but not limited to,

storage of an approved or district purchased firearm, training requirements for employees specifically authorized to carry firearms, retrieval of a firearm during an emergency situation, and other issues as detailed below.

The level of detail to include in a written protocol depends on a number of factors, including concerns about the availability of the plan to the public or concerned parents through a public information request, safety concerns if details of the plan are disclosed, and concerns about theft or other criminal actions involving firearms on school premises. Discussion of how much detail to put in such an administrative document should be addressed with the school board, school district attorney, the committee creating the policy and protocol, and other individuals as appropriate. A written protocol may be maintained as a separate document or, in consultation with the district's school attorney, may be attached as an appendix to the district's EOP. While exploring the details of the protocol, a district may consider any available information gathered during the research process, including guidance from the school district's attorney, discussions with law enforcement, and state statutes and programs for licensing individuals to carry weapons. Some issues to consider and address include:

- **Ownership of the weapon:** Should the district purchase and own the weapon or allow personal weapons owned and properly registered by the employee to be used? Answering this question requires consideration of the procedures required to purchase the firearm.
- **Gift of public funds concerns:** Does the purchase of firearms by the district, the purchase of related equipment such as storage lockers, or the payment of required handgun safety training or other expenses incurred in the implementation of the policy, constitute a gift of public funds? It will not if the school board determines the purchases are necessary to the operation of the school district. Tex. Educ. Code § 45.105(c). The school board should be involved in decision making and budget for expenditures ahead of time, to allow for a determination that the expenditures would serve a valid school district purpose. The district should not reimburse expenses requested after the fact. Tex. Att'y Gen. Op. No. JC-0432 (2001).
- **Storage of the weapon:** The district should discuss the various options available for storing authorized firearms. Options may include keeping the gun under lock and key in a gun safe or locker in the employee's desk or office area; allowing the employee to wear the gun secured in a locked shoulder, hip or leg holster; or maintaining all district firearms in a central location under lock and key to be accessed by the authorized employees during an emergency. A school marshal may carry a concealed handgun on the marshal's person or possess the handgun on the physical premises of a school in a locked and secured safe or other locked and secured location. Tex. Educ. Code § 37.0811(d).



The district should also determine whether the firearms stay at school or go home each day with authorized individuals, who are also responsible for the care and maintenance of the firearms. Discussions with law enforcement may be a great asset to a district in deciding the best method for storing firearms.

- **Storage in locked cars:** Texas Education Code section 37.0815 provides that a school district may not prohibit an employee who is licensed to carry a handgun from transporting or storing a handgun, other firearm, or ammunition in a locked, privately owned vehicle in a school district parking lot, provided that the firearm or ammunition is not in plain view. See TASB Policy DH(LOCAL). In light of the fact that school employees may have access to firearms in their personal vehicles, a district may wish to clarify that any action an employee takes with regard to the employee's firearm is not taken at the district's direction and is outside the course and scope of employment. If, on the other hand, the school district would permit an employee to take action with a personal handgun in the event of a school emergency, the school board should consult its school attorney about the proper way to address this permission in the district's EOP and local policy.
- **Type of firearm and ammunition:** Districts that have authorized employees to carry firearms on school premises have been very specific about the types of firearms and ammunition that will be permitted, with a goal of minimizing the risk of accidental harm through ricocheting ammunition or misfires. For example, if a district uses a school marshal, the ammunition of a handgun used by the school marshal must contain only frangible duty ammunition approved for this purpose by TCOLE. Tex. Educ. Code § 37.0811(d).
- **Training designated employees:** A district should consider what type of training employees must obtain before and during the time they are authorized to carry a firearm on campus. School marshals are required to attend specialized training prior to being certified by TCOLE. Tex. Occ. Code § 1701.260. At a minimum, the district should require any employee designated to carry a firearm to obtain and maintain a handgun license through the Texas Department of Public Safety. Handgun license holders are required to renew their licenses every five years by completing continuing education courses in handgun proficiency. Tex. Gov't Code §§ 411.183, .185. Handgun license training must be provided by a licensed instructor, with: (1) classroom or online instruction to include at least four hours and not more than six hours of instruction on the laws that relate to weapons and the use of deadly force; handgun use and safety, including open carry; nonviolent dispute resolution; and proper storage practices for handguns with an emphasis on storage that eliminates the possibility of injury to a child; and (2) range instruction of one to two hours to demonstrate physical proficiency with a handgun. Tex. Gov't Code § 411.188.

Districts that have considered expanding authorization for employees to carry firearms have typically required training beyond that required for a handgun license. Additional training might include instruction on the use of a firearm in high stress situations such as active shooter scenarios, use in crowded settings, or use near children.

Specialized training may be available from instructors certified by the Department of Public Safety (DPS) to become proficient in providing training to school districts in school safety. DPS, which is the agency that governs handgun licenses, must establish a process for qualified handgun instructors to obtain a school safety certification training course including 15-20 hours of specialized training on: the protection of students; interaction of license holders with first responders; tactics for denying an intruder entry into a school facility or classroom; and methods for increasing a license holder's accuracy with a handgun while under duress. Upon completing the school safety certification, a qualified handgun instructor may provide school safety training to employees of a school district who have obtained a handgun license. Tex. Gov't Code § 411.1901.

- **Emergency response:** A district should work with local law enforcement and training specialists to articulate how an authorized employee is expected to respond in an emergency. Is an employee with supervisory responsibility for students supposed to stay with the children or leave them to provide assistance elsewhere in the school building? Is the employee supposed to maintain a defensive position or engage an assailant?

**Employment issues:** If a district decides to authorize employees other than commissioned peace officers to carry handguns on school premises, the district will face a host of personnel-related issues.

**Determining which employees are authorized to carry handguns:** After making the decision to change board policy to permit individual employees to carry firearms, the district will then need to determine which individuals will be authorized pursuant to the policy. A district may decide to grant authority to a subset of employees based on their position at the district (e.g., all assistant principals) or the district may choose employees on an individualized basis. Either method has practical and legal pitfalls. Some of the issues a district must consider include the following:

- Can a district require an employee to carry a handgun or terminate the employee who is unwilling to carry?
- How will a district ensure an armed employee will be present at each desired location (e.g., campus)? Will campus reassignments be made on this basis?
- If the district needs to replace an individual who has been serving as one of the authorized employees, will willingness and capacity to carry a firearm affect later hiring decisions?
- If physical attributes such as athleticism and marksmanship are a consideration, is the district setting itself up for discrimination claims, including age, race, gender, and disability discrimination? See 42 U.S.C. § 1981; 42 U.S.C. § 2000e et seq. (Title VII); 20 U.S.C. § 1681 et seq. (Title IX); 42 U.S.C. § 12111 et seq. (Americans with Disabilities

Act); 29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act); 29 U.S.C. §§ 793-794 (Rehabilitation Act); U.S. Const. amend. I; Tex. Hum. Res. Code § 121.003(f); Tex. Lab. Code ch. 21 (Texas Commission on Human Rights Act).

- The district may be confronted with strong personal objections to the use of firearms, which could lead to claims of discrimination based on religious belief. See 42 U.S.C. § 2000e(j) (defining “religion”); 29 C.F.R § 1605.2 (clarifying “reasonable accommodation” requirements); Tex. Lab. Code § 21.108 (identifying what constitutes discrimination based on religion).

#### **Requiring mental and physical evaluations of armed personnel:**

- Can a district require pre-employment testing to determine an employee’s mental and physical fitness if carrying a handgun is a job requirement? To avoid discrimination on the basis of actual or perceived disabilities, a school district must demonstrate mental and physical evaluations are related to the job in order to require such tests.
- A psychological exam is specifically required before an individual may be certified as a school marshal. TCOLE, in consultation with psychologists must devise and administer a psychological examination to determine whether a trainee is psychologically fit to carry out the duties of a school marshal in an emergency. An individual may be licensed to serve as a school marshal only if the results of the psychological examination indicate that the individual is fit to serve. Tex. Occ. Code § 1701.260(d).
- Random drug testing of employees is permitted for positions designated as “safety sensitive.” *Aubrey v. Sch. Bd. of Lafayette Parish*, 92 F.3d 316 (5th Cir. 1996). An employee who is not a commissioned peace officer but who is authorized to carry a firearm in the course of employment seems to be in an inherently safety sensitive position. If your district determines the position should be subject to random drug testing, work with your school attorney to establish the appropriate policy and protocols.

#### **Use of criminal background check results:**

- A district may wish to set a higher standard for acceptable criminal history for employees authorized to carry a firearm.

#### **District’s training of employees authorized to carry firearms:**

- As discussed above at *Implementation Issues*, the district will want to define its expectations related to an employee’s skills and commitment to continued training.

### **Compensating employees who carry a gun as a job duty:**

- Could a district supplement current compensation with an extra duty stipend? If the district is considering this option, it should ensure that the agreement for extra pay sets forth clear expectations.
- The district will need to determine who is responsible for purchasing the firearm, meeting the licensing requirement, and obtaining appropriate training. Any requirement of extra time commitment could lead to questions of overtime pay and the Fair Labor Standards Act if authorized employees are non-exempt.

### **Workplace concerns if employees are armed:**

- In general, such a policy change will likely affect the working relationship among employees, creating a change in the work environment and perhaps even employee morale. If students know or suspect an educator is carrying a firearm, the nature of the teacher-student relationship may be affected as well.
- Employees who are not authorized to carry firearms may not want to work next to an employee who is granted such authority. A district should be prepared to listen to grievances and offer solutions if such complaints arise.
- Districts must also consider issues related to the management of employees authorized to carry guns. Supervisors must be prepared to discipline employees for improper use or abuse of the imbalance of power in interactions with students and other employees.

### **Liability and Risk Management Concerns Related to Firearms**

**No legal duty to protect students from actions by third parties:** All agree that schools have a moral obligation to provide a safe learning environment for students. Generally speaking, however, school districts have no legal duty to protect students from harm by third parties, unless:

- **Special relationship:** The government can create a special relationship giving rise to a duty to protect when it takes a citizen into physical custody. Compulsory attendance laws requiring students to attend school do not create a legal duty to protect students from harm by third parties. *Doe ex rel. Magee v. Covington Cnty., Sch. Dist.*, 675 F.3d 849 (5th Cir. 2012) (en banc).
- **State-created danger:** A governmental entity may be liable for a state-created danger if the government creates an environment that is dangerous, the government has actual knowledge of the danger, and the government uses its authority to create an opportunity for harm that did not otherwise exist. So far, the Fifth Circuit Court of Appeals has not recognized liability for school districts under this theory.

In short, although a school district has no legal liability for failing to protect students against the violent acts of a third-party school shooter, a school district that adopts a policy or practice that introduces risk into the school environment may increase its exposure to federal liability.

**Risk of injury or death to an armed employee:** Except in instances of gross negligence or intentional harm, an employee who is injured or killed in the course of employment would be eligible for workers compensation. Tex. Lab. Code § 504.011.

An employee who is physically assaulted during the performance of regular duties is entitled to the number of days of leave necessary, up to two years, to recuperate from physical injuries sustained as a result of the assault. Tex. Educ. Code § 22.003(b).

A school district may also purchase insurance for family members of law enforcement officers commissioned by the school district who are killed in the line of duty. Tex. Gov't Code §§ 615.003, .071-.080.

**Risk of injury or death caused by an armed employee:** Increasing the presence of firearms on school premises and at school events, especially in the possession of individuals other than commissioned law enforcement officers, raises the possibility of accidental shootings, injury to bystanders, theft, or other criminal actions involving the firearms. Even fully trained law enforcement officers have made tragic errors by misidentifying unarmed children as potential threats; similar errors might occur if educators with little training beyond that required for a handgun license are armed on campus. Permitting non-uniformed staff members to carry guns also raises a concern that law enforcement officers responding to an emergency call will incorrectly identify a staff person as an assailant.

School district insurance, such as workers compensation or errors and omissions coverage, would likely protect a school district or school district employee in the event of most legal claims. If a legal claim arises out of actions taken in the course and scope of an employee's employment, the school district's insurer would likely provide a legal defense and assert immunities.

#### **Challenges under Texas law:**

- **Claims against school district:** School districts have governmental immunity from claims based on personal injury (tort) law. Tex. Civ. Prac. & Rem. Code § 101.051.
- **Claims against employee:** School employees have immunity from liability in their individual capacities for actions taken within the scope of employment involving the exercise of judgment or discretion. Tex. Educ. Code § 22.0511(a). Courts have concluded, however, that immunity may be waived when an employee's action was *ministerial* rather than *discretionary*. For example, if a school employee were negligent in storing a firearm, despite a written protocol regarding storage, and the negligence resulted in injury to a

student, the employee's duty to follow the protocol could be deemed ministerial and immunity lost. *See, e.g., Myers v. Doe ex rel. Doe*, 52 S.W.3d 391 (Tex. App.—Fort Worth 2001, pet. denied) (holding that employees have no statutory immunity for failure to perform ministerial acts).

**Additional statutory immunity:** Both *security personnel* and the school districts that employ them have additional state-law immunity from liability under Texas Education Code section 37.087. The statutory immunity provided by this section is in addition to and does not preempt the common law doctrine of official and governmental immunity. To the extent that another statute provides greater immunity to a school district, open-enrollment charter school, or private school than this section, that statute prevails.

*Security personnel* includes a school district peace officer, a school marshal, a school resource officer, and a retired peace officer who has been hired by or volunteers at a school district, open-enrollment charter school, or private school to provide security services.

**Immunity for the district:** A school district, open-enrollment charter school, or private school is immune from liability for any damages resulting from any reasonable action taken by security personnel to maintain the safety of the school campus, including action relating to possession or use of a firearm. In addition, a school district, open-enrollment charter school, or private school is immune from liability for any damages resulting from any reasonable action taken by a school district, open-enrollment charter school, or private school employee who has written permission from the board of trustees of the school district or the governing body of the open-enrollment charter school or the private school to carry a firearm on campus. Tex. Educ. Code § 37.087(b), (c).

**Immunity for the employee:** Security personnel employed by a school district, open-enrollment charter school, or private school is immune from liability for any damages resulting from any reasonable action taken by the security personnel to maintain the safety of the school campus, including action relating to possession or use of a firearm. Tex. Educ. Code § 37.087(d).

### Challenges under federal law:

- **Federal law claims against school district:** Claims alleging that a person acting under color of state law has deprived a citizen of a right protected by federal law can be brought under Section 1983. 42 U.S.C. § 1983. For the school district itself to be liable, the deprivation must have been caused by an official policy, custom, or practice. *Monell v. Dep't. of Social Serv. of N.Y.*, 436 U.S. 658 (1978). Parents of a child injured by a firearm present at school pursuant to an official policy authorizing individuals other than commissioned peace officers to carry firearms could claim that the policy carried with it inherent risks that caused the child's injury. An injured individual might also claim that the injury violated the individual's federal rights and was a direct result of the district's

failure to train the employee adequately. *City of Canton v. Harris*, 489 U.S. 378 (1989); *Moreno v. Northside Indep. Sch. Dist.*, No. SA-11-CV-746-XR, 2013 WL 3716531 (W.D. Tex. July 12, 2013). The outcome of such a claim is difficult to predict.

- **Federal law claims against employee:** Claims may be brought against an individual school employee under Section 1983 when the employee knowingly causes the deprivation of a student's right to life, liberty, or bodily integrity, or when a school employee with supervisory authority has actual knowledge of the violation of a student's rights and responds with deliberate indifference. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc). Qualified immunity shields government officials from liability for performing discretionary functions as long as their conduct does not violate clearly established rights which a reasonable person would have known. Again, the outcome of such a claim is difficult to predict and may depend on a federal court's assessment of the risks inherent in a school district's policies and practices.

**Risk of harm to or by an armed volunteer:** A school district would have essentially the same immunity and liability if a claim arose out of the actions of a volunteer, as opposed to an employee, acting on the school's behalf. The volunteer would have personal immunity from legal actions similar to that of a school employee, except in cases of intentional misconduct or gross negligence. Tex. Educ. Code § 22.053.

Insurance coverage varies among school districts, but most school districts' error and omissions and workers compensation coverage excludes the actions of school volunteers. Because volunteers can be personally liable for gross negligence, and because school districts generally do not carry insurance for the acts of volunteers, TASB Legal Services does not recommend authorizing non-employee volunteers to carry firearms on school premises.

### **Confidentiality Before, During, and After Safety Policy Changes**

In the instances in which school boards have authorized employees other than commissioned peace officers to carry handguns on school premises, confidentiality has been considered important to protect against theft or other criminal action involving the firearms, and also to protect the personal safety of the authorized individuals. To the extent a school marshal is permitted to carry a handgun on the marshal's person, the handgun must be concealed. Even though theoretically a school board could approve the open carry of handguns on school premises by other employees, school boards that have authorized individual employees to carry handguns have specified that the firearms will be concealed.

**Open Meetings Act:** When considering board policy changes, including written authorization to expand the presence of firearms on school campuses, school boards may wish to conduct board meeting deliberations in closed session. Closed session deliberation may be permitted under closed meeting exceptions to the OMA.

- **Security personnel or devices:** To ensure the effectiveness of security personnel and devices, governmental bodies are permitted to deliberate the deployment, or specific occasions for implementation, of security personnel or devices in closed session. Tex. Gov't Code § 551.076.
- **Security infrastructure:** Similarly, governmental bodies may meet in closed session to deliberate security assessments or deployments relating to information resources technology; network security information; or the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices. Tex. Gov't Code § 551.089.
- **Personnel:** Governmental bodies may also meet in closed session to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee. Tex. Gov't Code § 551.074(a)(1). This provision does not apply to independent contractors. Tex. Att'y Gen. Op. No. MW-0129 (1980). Consequently, it would not apply to the employment of an SRO or security officer hired as an independent contractor.
- **Consultation with attorney:** A school board may also seek legal counsel from the district's school attorney in closed session to the extent the discussion is covered by the attorney-client privilege. Tex. Gov't Code § 551.071.

Under these exceptions, a school board may deliberate potential initiatives to enhance school security through new measures, devices, or personnel in closed session. Arguably, this confidentiality would extend to discussions about potential policy changes to increase access to firearms or written authorizations to permit specific employees to carry firearms on school premises. Nevertheless, all final board action must take place in open session with a public vote. Tex. Gov't Code § 551.102. Changes to local board policy may be initially discussed in closed session to the extent these exceptions apply, but before final adoption, local policy matters should be discussed, and public input received, in open session.

The Texas school districts that have revised local school board policies to state generally that the board may authorize specific employees to carry firearms have worked with school attorneys to adopt the relevant policies. The policies were adopted in open session and are public records. The specific authorization to individual employees, however, has been kept confidential. Working with counsel, individual names can be discussed in closed session, then in open session through a board vote, the superintendent can be authorized to proceed as discussed in closed session.

**Public Information Act:** While the OMA has a specific exception related to security, as stated above, the Texas Public Information Act (PIA) does not have a comprehensive exception of that nature. Protecting the identity of the individuals authorized to carry firearms requires



maintaining confidentiality of any documents, including contractual or compensation agreements, safety protocols, or other records that reveal the identity of the authorized employees. Districts may also seek to maintain confidentiality regarding other details such as the number, location, and storage protocols for the firearms.

The identities of employees designated as school marshals are confidential and may not be disclosed except as provided by law. Tex. Educ. Code § 37.0811(g). However, the identities of employees authorized to carry firearms through an alternative local action are not clearly protected by a single statute. Potential provisions that might protect the identity of these individuals may include:

- Attorney-client privilege. Tex. Gov't Code §§ 552.022, .101, .107.
- Confidentiality of handgun license information. Tex. Gov't Code §§ 411.192, 552.101.
- Common-law privacy exception to protect physical safety. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112 (Tex. 2011).
- Information in a personnel file, disclosure of which would be an unwarranted invasion of privacy. Tex. Gov't Code § 552.102.
- Information held by a law enforcement agency, including a school district police department, the disclosure of which would hinder law enforcement. Tex. Gov't Code § 552.108; *Tex. Appleseed v. Spring Branch Indep. Sch. Dist.*, 388 S.W.3d 775 (Tex. App.—Houston [1st Dist.] no pet.).
- Information related to homeland security and domestic terrorism. Tex. Gov't Code §§ 418.182, .176, .177. *See Tex. Dep't of Pub. Safety v. Abbott*, 310 S.W.3d 670 (Tex. App.—Austin 2010, no pet.) (protecting videos recorded by security cameras in a Texas Capitol hallway under Texas Government Code section 418.182).
- Internal memoranda regarding policy recommendations and deliberations. Tex. Gov't Code § 552.111.
- Information related to an employee or officer if, under the specific circumstances pertaining to the employee or officer, disclosure would subject the employee or officer to a substantial threat of physical harm. Tex. Gov't Code § 552.152.

In addition, a school district may assert that the district's EOP is confidential by law under Texas Government Code section 552.101 and not subject to disclosure. Texas Education Code section 37.108(c-1) provides that any document or information collected, developed, or produced during a safety and security audit conducted under the provision requiring regular safety and security audits of a district's facilities is confidential. At least one school district attorney has

successfully argued that a district's EOP was collected, developed, or produced during a safety and security audit of the district's facilities and therefore need not be produced in response to a PIA request. Tex. Att'y Gen. OR2011-16616 (2011) (cautioning that the ruling is limited to the particular circumstances and may not be relied upon as a previous determination).

### **Parental Rights**

**Involvement in decision making:** As discussed above at *Importance of Input from Stakeholders*, a district's decisions with respect to student safety should reflect the desires of the community, including parental input. Districts may want to conduct public hearings to elicit thoughts of parents. These hearings could also be information sessions useful in conveying information to parents about the competing interests that districts must balance in making decisions related to safety issues. School districts facing opposition from even a minority of parents should consider the costs, in terms of legal fees, employee time, and public good will, of defending a policy to expand employee access to firearms over parental objection.

**Right to know about school marshals:** Texas Education Code section 37.0811(h) states that if an enrolled student's parent inquires in writing, the school shall provide the parent written notice indicating whether any employee of the school is currently appointed as a school marshal. The notice may not disclose confidential information identifying the individual.

**Right to know about other security matters:** As discussed at *Confidentiality Before, During, and After Safety Policy Changes*, decisions about campus security may be discussed in closed session under the OMA. In addition, implementation plans and protocols are arguably confidential under the PIA. Because such a disclosure could compromise emergency operations planning, districts may refuse to disclose specific information about security measures to parents.

The Texas Education Code provides that a parent is entitled to full information regarding the school activities of the parent's child. Tex. Educ. Code § 26.008(a). Similarly, the Texas Education Code provides that parents are entitled to all written records of a school district concerning their children. Tex. Educ. Code § 26.004(b). However, a Houston court of appeals held that these provisions did not entitle parents of a district student to access a copy of the district's police force handbook protected from disclosure under the Texas Government Code section 552.108. *Tex. Appleseed v. Spring Branch Indep. Sch. Dist.*, 388 S.W.3d 775 (Tex. App.—Houston [1st Dist.] no pet.).

Other than Section 37.0811(h) regarding school marshals, a parent's right of access does not entitle a parent to greater information than the general public about school security measures. Consequently, a parent may be denied information regarding the presence of firearms in the classroom to which the parent's child is assigned.

**Requests to change campus or class assignments:** Under federal law, a student who attends a *persistently dangerous* public school, as defined by TEA, or who becomes a victim of a violent criminal offense, as determined by state law, while at the school the student attends may seek a transfer to another public school. 20 U.S.C. § 7912. See TASB Policy FDE(LEGAL).

By law, parents are entitled to reasonable access to the campus principal, or an administrator with authority to reassign a student, to request a change in the class or teacher to which the parent's child has been assigned, if the reassignment or change would not affect the assignment or reassignment of another student. The decision of the school board regarding such a request is final and may not be appealed. Tex. Educ. Code § 26.003(a)(2), (b). Decisions relating to the classroom assignments are purely local and addressed in TASB Policy FDB(LOCAL). Most districts authorize the campus principal to investigate and approve the transfer of a student from one classroom to another.

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*Published January 2022*