Legal Issues In High School Athletics

Hackney Publications

In This Issue

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NIL and the Impact on High School Sports

By Hannah Dewey

While the NCAA has stated that high school students may engage in the same types of NIL opportunities available to current student-athletes under its interim policy without impacting their NCAA eligibility, the same might not be true for high school competition.

In fact, engaging in NIL activities as a high school student may render that student ineligible for high school sports, thereby creating more incentives for high school athletes to play club sports or transfer to private schools, instead of playing for their public high school. This possible shift could impact college sports competition, and many have strong views about the importance of participation in high school sports.

In that light, LEAD1 Association ("LEAD1") hosted its latest webinar on NIL and the impact of high school sports competition. The virtual forum was moderated by Karissa Niehoff, CEO of the National Federation of State High School Associations (NFHS), which is the national leader and advocate for high school athletics. The panel also featured Anson Dorrance, Head Women's Soccer Coach at the University of North Carolina at Chapel Hill, and James Parker, Director of Athletics and Student-Activities, at Alexandria City Public Schools, in Virginia. ***Here are the important takeaways from the panel:***

1. ***NFHS has made it clear that NCAA NIL rule changes do not affect current high school student-athletes.*** In fact, Niehoff kicked off the webinar stating that while NFHS recognizes the talents of high school student-athletes, its member state associations have rules in place that prohibit student-athletes from receiving money that is connected to wearing their school uniform.
2. ***Given that NFHS's member state associations, which include 51 states and the District of Columbia, prohibit student-athletes from earning NIL compensation connected to high school athletics, it could create a shift in high school athletes transferring to private high schools or participating in more club sports, instead of playing for their high school teams.*** Indeed, according to Parker, overly restrictive high school NIL rules could create a trend in more high school student-athletes transferring to private schools that don't restrict NIL opportunities. Dorrance believes that high school student-athletes should be allowed to "monetize their passions," and that high school associations should find "compromise" so that high school athletes can pursue more entrepreneurial opportunities, aligned with the recent changes at the college level.
3. ***NIL could create opportunities for state high school systems to help student-athletes learn more about entrepreneurship and business at a much earlier age.*** According to Dorrance, NIL could create more opportunities for entrepreneurs in

local communities to help teach high school student-athletes about business. In fact, he believes high school systems should develop more specific curriculum based upon helping students grow their brand. Attending public high school already provides significant social and communal benefits, according to Dorrance, so pairing those values with NIL catered education would be very beneficial for student-athletes. Parker explained that high schools might even be able to help some student-athletes broker NIL deals in their local communities and ensure that the deals are bona fide and compliant with applicable regulations. Of course, this is subject to NFHS member policies, and each state might act differently in terms of their future NIL policies.

4. ***NIL at the high school level could help student-athletes learn to better manage conflict earlier on.*** A student-athlete's teammate making more NIL money or getting more media opportunities could create inherent conflict in terms of camaraderie on a high school sports team. But sports are supposed to be a place for students to learn how to better navigate life issues, beyond the playing field, Dorrance said.
5. ***According to Dorrance and Parker, youth athletes should have the same NIL opportunities that college athletes have, particularly for female athletes.*** It is no secret that those athletes who know how to best brand themselves will have the most NIL success. Starting NIL at the high school level would allow student-athletes, particularly female athletes, to start the learning process in terms of maximizing their future earning potential off the field, while they continue to fight for equal pay (at least professionally) on the field, in professional soccer, for example.

So, while NFHS has made it known that NCAA NIL rule changes do not apply to high school athletes for now, more conversations like these from college sports stakeholders could help shape the future of youth sports, as we continue to move into a new era of sports competition.

Return to Table of Contents

Legal Issues in HIGH SCHOOL ATHLETICS

HOLT HACKNEY
Editor and Publisher

JEFF BIRREN, ESQ.
Contributing Writer

GARY CHESTER, ESC.
Contributing Writer

THE ROBERTS GROUP
Design Editor

Please direct editorial or subscription inquiries to Hackney Publications at:

P.O. Box 684611
Austin, TX 78768
(512) 716-7977
info@hackneypublications.com

Hackney Publications

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A Solution in Search of a Problem: Transgender Restriction Violates Constitution and Title IX

By Professor Paul Anderson, Director, Sports Law Program and National Sports Law Institute, Marquette University Law School

Since Idaho passed its Fairness in Women's Sports Act in 2020, 33 states have introduced over 100 bills restricting transgender participation in sport. In general, these bills force athletes to participate in sports that coincide with their birth gender or biological sex, and as a result, individuals who are transgender (i.e., born female, but medically transitioning to male) cannot compete in the sport according to their current sex. These bills are based on fears that transgender athletes will dominate sports, even though there is little evidence that this has or will happen.

West Virginia Transgender Bill

On Wednesday, April 28, 2021, West Virginia governor Jim Justice signed House Bill 3293 into law. Effective in July, the "Save Women's Sports Bill" begins by celebrating the differences between biological males and females, and then states that "[b]iological males would displace females to a substantial extent if permitted to compete on teams designated for biological females" and so "[c]lassification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex."[1] The statute mandates that any high school or college athletic team must be "expressly designated as one of the following based on biological sex: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed."[2] Once a team is so designated "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[3]

1 W. Va. Code, § 18-2-25d, **clarifying participation for sports events to be based on biological sex of the athlete at birth (2021)**

2 *Id.* § 18-2-25d(c(1)).

3 *Id.* § 18-2-25d(c(2)). Although not the focus of this litigation this "competitive skill and contact sport" language seems to come from Title IX's contact sport exception found in 34 C.F.R. 106.41. That language was implemented as part of the Code's language allowing for separate teams by gender and based on the assumption that if teams were not allowed to be separated based on gender boys would dominate as they have more competitive skill than girls. Whether that is the case in all sports in 2021 is debatable.

Barring Participation

Because of this new law, 11-year-old girl B.P.J.'s school told her that she would not be able to join the girls' cross country or track teams, because B.P.J. was born as a boy. B.P.J. knew from a young age that she was a girl. By third grade she was living at home as a girl, and soon joined her elementary school's all-girl cheerleading team without incident. In fact, as we come to know more about gender and sex, children typically know at a very young age that their identity is not their biological sex and begin to transition. Typically, their classmates accept them, and their schools are accommodating as happened with B.P.J. until the law was passed.

In 2019 B.P.J. was diagnosed with gender dysphoria, and she began taking puberty-delaying treatment in June of 2020. The treatment prevents endogenous puberty and any physiological changes caused by increased testosterone circulation, preventing her from developing any physiological advantage over other girl athletes.

The Lawsuit

After being told by her school that she could not participate, B.P.J. sued claiming that the law deprived her of her 14th Amendment rights and violated Title IX.[4]

Equal Protection Claim

The court begins its review with the Equal Protection Claim. The state argued that it was treating B.P.J. equal to other biological males, but the court disagreed finding that she was most similarly situated with other girls as she has lived as a girl for years, changed her name, participated in girls cheerleading, and out of all of the girls at her school, she would be the only one prevented from participating in sports. As the court noted the "inescapable conclusion" is that the law "discriminates on the basis of" her transgender status.[5] The court then follows the Fourth Circuit in *Grimm v. Gloucester County School Board*,[6] a case wherein a transgender boy challenged a school policy banning him from using the bathroom associated with his gender identity. Following *Grimm*, the court found that "discrimination against transgender people is inherently based on sex" and the state then had the burden to show that there was a reasonable fit between the statute and a substantial government objective.

The state argued that the statute's purpose was to provide equal opportunities for female athletes and to protect them from harm. Pursuant to the state's safety justification, the

4 B.P.J. v West Virginia State Board of Education, 2021 WL 3081883 (S.D. W.V. 2021)

5 *B.P.J.*, 2021 WL 3081883, *4.

6 972 F.3d 586 (4th Cir. 2020)

court noted that B.P.J. had already been on puberty delaying drugs and will not develop the physical advantages expected of young boys, and more important, the sports she wanted to participate in were not contact sports so her participation would not put other participants in danger. Moreover, as to the second justification, the court noted that permitting her to participate would not take any opportunities away from other girls. The court noted that transgender individuals make up 0.7% of teenagers, and the number who wish to participate in sports is even lower, therefore there was no evidence that allowing B.P.J. to play would take any opportunities away. In the end, the court found that B.P.J. was likely to succeed in showing that the law violated her equal protection rights.

Title IX Claim

Moving to the B.P.J.'s Title IX claim, and again following *Grimm*, the court initially concluded that it was clear she was being excluded from participation on the teams on the basis of her sex. Under the state law all other students, including transgender boys (biological females who transitioned to the male gender), are permitted to play on sports teams that identify with their gender. Only a transgender girl like B.P.J. is barred from doing this, and as the court notes, "the law both stigmatizes and isolates B.P.J."[7] According to the court, this exclusion is discrimination under Title IX, and she would face irreparable harm as "she would be excluded because of who she is: a transgender girl."[8] Balancing the harms, the court ruled in favor of B.P.J. supporting her right to be treated the same as her female peers "because any harm to B.P.J.'s personal rights is a harm to the share of American rights that we hold collectively."[9]

Impact Moving Forward

As more states pass bans on transgender participation in sport, similar lawsuits will likely come forward by those rare transgender individuals who are both interested in participating in sport, and willing to put themselves through the struggle of a legal battle. The West Virginia law purports to support female participation in sport, when in actuality it only bans transgender girls from participating in the sport that matches their gender identity, transgender boys could participate with no restrictions. There is little evidence of any large group of transgender individuals trying to participate in sport, either male or female, and the assumption that these individuals will take opportunities from others is suspect. This sort of law passed to solve a problem that does not seem to exist seems particularly misguided as this court noted that there was "scant evidence that this law addresses any problem at all, let alone an important problem."[10]

Courts have already found repeatedly that transgender individuals are protected under Title IX in cases dealing with their access to educational facilities and their locker and bathrooms. As participation in sport necessarily involves the use of locker and bathrooms, perhaps finding no way to ban access to these facilities, these new laws are attempts to make these individuals ineligible to participate regardless. Courts have also begun to follow the Supreme Court's *Bostock v. Clayton County*[11] decision holding that discrimination against transgender individuals violates Title VII and applying this reasoning to Title IX decisions. This is also something courts have done since for years, beginning with the 1979 Supreme Court decision finding that private individuals have an implied cause of action to sue for violations of Title IX,[12] based on similar precedent under Title VII.

Unfortunately, the only victim here is B.P.J., and other children like her. Like so many plaintiffs like her, no one had complained about her participation up until this law was passed, she was not a problem that needed to be dealt with. Hopefully state legislatures will focus on the real problems facing their citizens in the future.

Return to Table of Contents

Quadriplegia and Fatality Risk from Inadequate Basketball Court Buffer Zones: The Time to Act is Now

By Joseph J. Wadland

On March 14, 1970, Richard Atkinson, a sophomore at Bates College in Lewiston ME, lost his footing during an intramural basketball game and slammed into an unpadded brick wall. He died the next day from head injuries.[13] Bryant Gumbel, the then sports editor of the student newspaper wrote: "[y]et to sit back and say that he smashed into an exposed brick wall less than fifteen feet away, and accept it simply for

7 *B.P.J.*, 2021 WL 3081883, *7.

8 *Id.*

9 *Id.*

10 *Id.* at *1.

11 140 S.Ct. 1731 (2020).

12 Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

13 Bates College, "The Bates Student- volume 96 number 20- March 21, 1970," at p. 1. (1970). *The Bates Student.* 1593.

that, is senseless. As anyone who has been in the Bates gym realizes, the west wall in the gym is brick; it is bare; and it is only about fifteen feet away from the edge of the court. As anyone who has been in any other gym realizes, any walls that close to the court are in almost all cases covered with relatively inexpensive wrestling mats."

Bryant Gumbel urged that "steps be taken in the immediate future… to rid the gym of the danger of an exposed brick wall… [so] that the next time any accident involving that wall occurs, the writer, whoever he may be, will also be able to say that the athletic department cannot rightfully bear the blame. There are some who will say that Rich was probably the only person to hit that wall in the last fifty years. Maybe so. Whether he was the only one in the last fifty years; or whether he'll be the only one until that gym crumbles to the ground is unimportant. What is there to lose by gambling some money [on safety improvements] on the chance that one day the money spent may save a life?"[14]

Bryant Gumbel had it right more than fifty (50) years ago. Just ask Matt Wetherbee and Joel Gonzalez. In the span of a mere seven (7) months in 2016-17, at two gyms less than ten (10) miles apart in greater Boston, routine drives to the basket for these two young men in adult recreational basketball leagues turned into life altering plays. Today, Matt and Joel are quadriplegics. Both collided with a padded wall under the basket. In Matt's case, as he drove to the basket, a defender stepped in, their legs tangled, and he fell headfirst into the wall under the basket. Joel was laying the ball up following a drive from the top of the key. He was fouled as he went up and landed off-balance, and he too struck the wall under the basket headfirst. Both men were young (28 and 31 respectively), fit, athletic and seasoned, skilled basketball players. Neither player had sufficient time or distance to avoid or brace for their collision with the wall.

Imagine an NBA game where there is a padded concrete wall, at the point where spectators and media sit in the out-of-bounds area of arenas throughout the country, often no more than 3 or 4 feet from the out-of-bounds line. No owner would permit play to happen, and no player would play and risk his career under such circumstances.[15] Yet this is what happens in thousands of gyms, rec centers and basketball courts throughout the country daily. When a facility has an inadequate buffer zone it creates an unreasonable risk of harm.

Regardless of whether anyone is familiar with the term "buffer zone," the underlying concept is clear. Basketball actions, plays and player deceleration frequently occur in the out-of-bounds area of the court, whether it is a player attempting to save a loose ball from going out-of-bounds, a player running full speed for a lay-up where his momentum carries him out-of-bounds, or a player who is tripped or fouled near the out-of-bounds line and who loses his balance, forcing him out-of-bounds. In each of these instances, a player requires a safe distance between the out-of-bounds line and the nearest wall or obstruction to prevent against injury. It is important to remember that unlike boards in hockey and outfield walls in baseball, walls in the buffer zone of basketball courts are not part of the sport or in the field of play. They constitute a risk which is not inherent to the game itself.

Matt Wetherbee's and Joel Gonzalez's spinal cord injuries were predictable and avoidable. There was no buffer zone under the basket in Matt's case; the wall was the out-of-bounds marker. In Joel's case, the wall he struck was approximately 4 feet from the baseline.

Several basketball and sport governing bodies have promulgated standards, guidelines, recommendations and best practices respecting buffer zones. The American Alliance for Health, Physical Education, Recreation and Dance ("AAHPERD") and the National Intramural-Recreational Sports Association ("NIRSA") both specify a preferred buffer zone of ten (10) feet and a minimum of six (6) feet. The National Collegiate Athletic Association (NCAA) specifies a preferred buffer zone of ten (10) feet and a minimum of six (6) feet under the baskets and three (3) feet on the sides. The Amateur Athletic Union (AAU) specifies a preferred buffer zone of ten (10) feet and a minimum of three (3) feet. The AAU rule book specifies that the National Federation of State High School (NFHS) rules apply to AAU events (Amateur Athletic Union, 2016). The NFHS also specifies a preferred buffer zone of ten (10) feet and a minimum of three (3) feet.

What is clear from these governing bodies is that the *preferred* buffer zone distance is ten (10) feet. Even insurers have taken this position publicly.[16] However, many facility owners and operators take the legal position that as long as there is a three (3) foot minimum, they have complied with the standard of care. Alternatively, or in addition, facility owners and operators customarily assert that the risk of

14 Id., p. 10.

15 YouTube is replete with videos of NBA players going out-of-bounds and colliding with fans, chairs and other obstructions. For example, LeBron James chased a loose ball out-of-bounds and collided with golfer Jason Day's seated wife in 2015, injuring her. The YouTube video as well as Sports Illustrated still shots, show Lebron going headfirst when he struck her. Compare this with the video footage of Joel Gonzalez's injury, *infra* – showing his head-first position immediately before striking the wall. The two are very similar. Now imagine a concrete wall rather than Mrs. Day at the point of impact for Lebron.

16 See "Basketball Court Tech Sheet," *Employers Mutual Casualty Company* (2011), stating that "basketball courts should have a minimum clearance of 3 feet around the perimeter of the playing court, but 10 feet is highly recommended."

danger is open and obvious, players assume the risk of injury and/or are contributorily negligent. They also often will rely on written waivers as a risk management tool, arguing that a player who has signed one has waived his right to bring claim for his injury.[17]

There is no indication by any of the above-referenced organizations or in any of their publications as to how each arrived at its buffer zone requirement/recommendation. A review of the literature turned up no professional article advocating for a three (3) foot buffer zone. According to experts in the field, the three (3) foot minimum incorporated into some of the above-referenced literature is outdated guidance that has been rejected as inadequate by virtually all professionals in the field "for at least the last 50 years." [18]

The only publication to this author's knowledge which takes into consideration human biomechanics in establishing buffer zone distance requirements under a basket is an architectural design reference source book entitled "Human Dimension & Interior Space: A Source Book of Design Reference Standards" (1979). It recommends 7.5 to 9.6 feet of buffer zone from the end line under a basket to any obstruction, and as it notes *"[i]n sports where the action is more intense, such as basketball, the lack of adequate safety zone clearances may cause injuries to the players and may even prove fatal (p. 257).* Another architectural design reference, Architectural Graphic Standards (12th Ed.), also known as the architect's bible, recommends a ten-foot minimum buffer zone.

A study conducted by Gil Fried and other researchers at the University of New Haven using player measurements, surveys and physics attempted to identify what is an appropriate basketball court buffer zone. Based on the results of physics modeling in the study, the average distance necessary for players to stop their movement safely was reported to be 7.74 feet. The researchers then conducted a simulated game, and the players left the court under the baskets 19 times, traveling on average 5.18 feet. According to the researchers, the physics model theoretically provides the minimum safe buffer zone distance and provides a conservative measurement to provide safer basketball courts. The study concluded that the outdated three-foot minimum buffer zone is not only an arbitrary number but is also unsupported by any scientific research. The researchers concluded that by adopting preferably an 8-foot buffer zone (physics modeling) and at least a 5.2-foot buffer zone (simulated game), facilities can provide a safer distance for players. The study did not try to establish a minimum or uniform standard of care nor purport to be statistically valid.[19]

Joel Gonzalez's injury was captured on surveillance camera video footage. The link to it is: [link to be inserted here by editor/publisher]. A frame-by-frame analysis performed by Wilson C. Hayes, Ph.D. and Erik D. Power, P.E. of Hayes & Associates of Corvallis, OR is included below. While it may be disturbing to watch the video, sport facilities owners/operators, risk managers, athletic directors and others who have responsibility for the safety of sports facilities need to see it, as do insurers and officers of the above-referenced sport governing bodies.

All new facilities should be designed with at least a ten-foot buffer zone. Many existing gyms and courts with less than the preferred ten-foot distance can almost always adjust their baskets and move them in, i.e., shorten the court a few feet on each end with a new baseline, and have a significantly larger and safer buffer zone at least under the baskets.[20] While shortening an already small court may be less than ideal, is not changing it worth avoiding a spinal cord injury or fatality? Further, going forward, juries are unlikely to buy either the ostrich defense ("a freak accident"), accept the 3-foot minimum as an acceptable standard of care or be willing to find a player assumed the risk. Players and consumers generally are unaware of standards or about the potential for such devastating injuries. Juries are more likely today than ever to hold owners/operators accountable for unsafe buffer zones.

\It is important to recognize that for there to be real and effective change across the country in the thousands of gyms with unsafe buffer zones, it must come from the liability insurers and sport governing bodies. So long as a sport governing body such as the NCAA or the NFHS allows games to be played on courts with 3-foot buffer zones and insurers are willing to insure the risk, there will continue to be unnecessary fatalities and spinal cord injuries.

Putting aside the law and insurance, as a sports facility owner/operator, do you want to be the one with a spinal cord

17 Sports facilities owners/ operators and risk managers often use waivers or releases as a means of limiting their liability and exposure. But a waiver/release should not be the first line of risk management for an unsafe facility. In Massachusetts for example, its version of the model Health Club Services Contract Act (Mass. Gen. Laws Chapter 93, Section 78, et. seq.) outlaws use of waivers or releases by a health club or fitness facility and constitutes a violation of the Massachusetts Consumer Protection Act. Insurers of health clubs in Massachusetts who require their insureds to use waiver language in their contracts with consumers expose themselves and their insureds to treble damages and an award of attorney's fees. Several other states have their own iterations of the model Health Club Services Contract Act.

18 See, e.g., "Injuries in the Buffer Zone: A Serious Risk Management Problem." *Journal of Physical Education, Recreation & Dance*, Vol. 78 No.2 (Neil Dougherty and Todd Seidler).

19 Buffer Zone: Policies, Procedures, and Reality." *Journal of Legal Aspects of Sport,* 2019, 29, 86-101(Ceyda Mumcu, Gil Fried and Dan Liu)

20 According to Hayes & Associates, another approximately 18 inches of buffer zone space likely would have avoided Joel Gonzalez's spinal cord injury.

injury or fatality on your watch? Stated otherwise, would you prefer to have a reasonably safe facility or rely on the legal doctrines of assumption of risk, comparative fault and/or waiver to try to insulate yourself from liability for an unsafe facility? Which is the responsible approach?

Matt Wetherbee and Joel Gonzalez want you to know that as life-long basketball players, it never occurred to them that they could suffer such a devastating injury playing basketball. They want to prevent what happened to them from occurring in the future. They are the motivation for this article. They refuse to let their quadriplegia define their lives. They both are active in raising awareness about spinal cord injuries, research and promising, yet still unsuccessful, treatments. Matt Wetherbee has started the MW Fund, a non-profit which awards scholarships to spinal cord injured patients to assist in their rehabilitation. To read more about Matt and his story, go to **www.mwfund.org**.

Matt's and Joel's accidents were the subject of litigation which is beyond the scope of this article. The Massachusetts Trial Court maintains a website for electronic case access, deemed to be public information: **www.masscourts.org/eservices/home.page.2**. The civil action caption and docket number for each case is: *Gonzalez, Joel vs. Morton, James O'S., et al,* Suffolk Superior Court Civil Action No. 1884CV00690 and *Wetherbee, Matthew H., vs. Cambridge Racquetball, Inc., et al.,* Middlesex Superior Court Civil Action No. 1681CV02072. The author of this article represented both Mr. Gonzalez and Mr. Wetherbee.

Joseph J. Wadland of the Massachusetts firm, Wadland & Ackerman, is a trial attorney with over 35 years' experience. He represents both plaintiffs and defendants as well as insurance carriers. For more information, see www.wadlandackerman.com.

Return to Table of Contents

Magistrate Judge Dismisses Claim Brought by Parents of Concussed Football Player

A magistrate judge from the Eastern District of Texas has dismissed the claim of a Galveston, Texas couple has sued the Santa Fe Independent School District and several school officials in the Southern District of Texas, alleging that they violated the civil rights of their son, leading to the debilitating concussion he suffered on the playing field.

Donna and Troy Yarbrough, who filed suit on behalf of their minor son, were seeking in excess of $5 million in damages.

"This is a critically important civil rights case concerning traumatic physical and mental injuries sustained by a male high school student," according to the complaint. "Each year numerous children are injured across the country participating in sporting events. A number of injuries result due to a systemic culture of winning at all costs."

The Yarbroughs, through Houston attorney Alfred Sutherland, suggest that "children" like their son are ushered into arenas where they "battle for championships to the amusement of spectators" and to win championships.

The flaw, they allege, is that "in order to win championships, child athletes are subjected to training regimens that disregard their health, safety, and well-being. Drills are conducted in practice that are dangerous and are known to cause long term serious injuries while under the supervision of the coaches."

The incident leading to the concussion occurred on Sept. 21, 2016, when the minor was at football practice. Participating in a scrimmage, he collided, helmet-to-helmet, with a much larger player.

"The coaches were yelling at (the students) to line up again, and again, and again, and to hit harder, harder, harder," according to the lawsuit. "Indeed, the coaches encouraged, if not demanded, an aggressive and repetitive full-on head-to-head and upper body contact.

"The coaches ran the same drill over and over resulting in continued, repetitive head-to-head and upper body contact. The coaches never stopped or intervened in the constant helmet to helmet contact."

Shortly thereafter, the minor began experiencing severe headaches, and two days later was diagnosed with a concussion.

In their complaint, the plaintiffs took the novel approach of alleging that the "defendants failed to enact … proper and adequate policies … relating to the prevention of head injuries resulting from athletic activities. This deliberate indifference to the health, safety and welfare of student athletes in failing to educate said student athletes on the causes, symptoms, and dangers of traumatic head injuries was the common policy and custom of the defendants."

The Court's Ruling

It was significant that the couple did not claim the coaches knowingly forced their son into danger involving a known victim, according to Magistrate Judge Andrew M. Edison. Instead, their suit focused on "the overall danger of the sport and the coaches continuously urging players to meet aggression with aggression.

"Notably, Yarbrough does not complain that the coaches knowingly forced him to continue contact drills after he suffered a concussion," the magistrate wrote.

"The present lawsuit is, in essence, a condemnation of the football culture which pervades much of society in this part of the country," Edison wrote. "Boiled down, Yarbrough contends that the game of football, with its constant physical contact, aggression and violence, is an inherently dangerous sport. Allowing high school football players to repeatedly hit each other, Yarbrough maintains, puts these youngsters in harm's way."

Return to Table of Contents

Two, Four, Six, Eight, SCOTUS Sets the Record Straight…in Cheerleader Speech Case

By Robert Freeman, Jonathan Mollod, and Andrew K. Johnson, of Proskauer

Whether foreseeable or ironic, the impassioned words (or F-bombs) of a dejected junior varsity cheerleader recently brought a rather important First Amendment question before the Supreme Court. That is, whether a public school can lawfully remove a student from an extracurricular activity for profanity-laden social media posts transmitted to fellow students off school grounds on a Saturday. By a vote of 8 – 1, the Court **upheld** a Third Circuit majority **ruling** that the defendant Mahanoy Area High School›s decision to suspend a then 14-year-old, plaintiff Brandi Levy («Levy»), for an expletive-loaded rant on social media expressing her irritation with the school›s cheerleading team violated her right to free expression. (***Mahoney Area School Dist. v. B.L.***, No. 20-255, 594 U.S. ___ (June 23, 2021)).

In 2017, Levy came up short in try-outs for her Pennsylvania high school's varsity cheerleading team, landing on the JV team. Clearly unhappy with the decision, that weekend she turned to social media to gripe while in a local convenience store located off school grounds. However, as the Court noted, she didn't voice her frustration "with good grace"; instead, she logged into social media to make several posts, including one rather un-cheery image of her and a friend flipping the bird, with a caption that read: "F— school, F— softball, F— cheer, F— everything." Levy's posts on an ephemeral messaging app were designed to be viewed by her social media "friend" group and disappear after a short time. However, Levy's cathartic posts didn't quite disappear from memory, as one recipient took a screenshot of Levy's rants and surreptitiously shared it with coaches and school administration. The result was that Levy was suspended from the cheerleading squad for a year.

Not to be defeated, Levy and her parents filed suit against the school in Pennsylvania district court. With the First Amendment issues up in the air, Levy stuck the dismount. The District Court **found** that Levy›s statements were constitutionally protected by the First Amendment and **granted** Levy›s request for an injunction ordering the school to reinstate Levy to the cheerleading squad because her posts did not cause *substantial disruption* at the school, citing the landmark *Tinker* precedent that held that students do not «shed their constitutional rights to freedom of speech or expression,» even «at the school house gate,» and that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of «pure speech» on school property during the school day. Yet, in *Tinker*, the Supreme Court had stated that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

On appeal, a Third Circuit panel **affirmed** the district court›s decision but found *Tinker* not applicable to this case because Levy's speech took place off campus and thus the school could not discipline her for engaging in a form of free speech. The school district then filed a petition for certiorari, asking the Supreme Court to decide whether the *Tinker* standard "applies to student speech that occurs off campus."

Refusing to draw a bright line, the majority stated that it did not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus, as the school's regulatory interests "remain significant in some off-campus circumstances." While the Court declined to outline a precise list of school-related off-campus activities that could be properly regulated by a school to prevent substantial disruption or protection of the school community, Justice Breyer did note that, generally speaking, the leeway the First Amendment grants to schools in light of their special characteristics is "diminished" when it comes to off-campus protected speech.

Ultimately, the Court ruled that Levy's statements, albeit vulgar, were protected speech. The Court found that because the posts were made outside of school hours and off school grounds, sent to a targeted audience, and did not specifically mention the school's name or target a member of the school community, and since the school's interest in teaching

good manners and its evidence of disruption or loss of team morale was unconvincing, the posts at issue did not create a substantial interference that would overcome Levy's right to free expression under *Tinker*.

As this case showed, beyond the (potential) disturbance a JV cheerleader may have caused with a less-than-spirited post about her school lies the constitutional right to free speech. In closing, Breyer puts aside the crude speech and becomes a cheerleader for team SCOTUS on the importance of First Amendment rights: "[W]e cannot lose sight of the fact that, on what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."

Return to Table of Contents

AG Slatery Sues Biden Administration to Stop Enforcement of Guidance that Threatens Women's Sports and Student, Employee Privacy

Tennessee Attorney General Herbert H. Slatery III, leading a 20-state coalition, filed a lawsuit last month in the Eastern District of Tennessee. The complaint seeks to stop the Biden Administration from enforcing new, expansive, and unlawful interpretations of federal antidiscrimination laws.

In the complaint, the multi-state coalition challenges federal guidance issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Education (the Department) concerning issues of enormous importance. The guidance purports to resolve highly controversial and localized issues such as whether schools must allow biological males to compete on girls' sports teams, whether employers and schools may maintain sex-separated showers and locker rooms, and whether individuals may be compelled to use another person's preferred pronouns. The federal agencies claim that the guidance simply implements the Supreme Court's decision in *Bostock v. Clayton County*, but that decision did not address any of the issues covered by the guidance. The agencies have no authority to unilaterally resolve these sensitive questions, let alone to do so without providing the public with notice and an opportunity to comment.

"This case is about two federal agencies changing law, which is Congress' exclusive prerogative," said Tennessee Attorney General Herbert H. Slatery III. "The agencies simply do not have that authority. But that has not stopped them from trying. Even their attempts, as unlawful as they are, did not follow the Administrative Procedures Act. States over and over again have challenged federal agencies on this issue and been successful. These agencies also have misconstrued the Supreme Court's *Bostock* decision by claiming its prohibition of discrimination applies to locker rooms, showers, and bathrooms under Title IX and Title VII and biological men who identify as women competing in women's sports, when the Supreme Court specifically said it was not deciding those issues in *Bostock*. All of this, together with the threat of withholding educational funding in the midst of a pandemic, warrants this lawsuit."

The multi-state coalition asks the Court to declare the EEOC and Department guidance invalid and unlawful and to prohibit their enforcement.

Joining Tennessee on the lawsuit are the attorneys general from the following states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia.

To read the complaint, click here: **https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2021/pr21-31-complaint.pdf**

Return to Table of Contents

The Impact of Governmental Immunity on Injuries Sustained on School Grounds

By John E. Tyrrell and Vikas Bowry, of Ricci Tyrrell Johnson & Grey

On June 10, 2021, the Court of Appeals of Michigan, in a *per curiam* decision, affirmed summary disposition in favor of Lamphere Schools and middle-school track and field coach, Stephen Murray. *Nagy v. Murphy*, 2021 Mich. App. LEXIS 3600. The basis for the trial court's decision was rooted in the governmental immunity provision of Michigan Court Rule 2.116(C)(7).

By way of a brief background, on April 11, 2019, Defendant-Appellee, Stephen Murphy, was conducting an outdoor track and field practice at the Page Middle School, which is part of the Lamphere School District. A sudden change in weather conditions prompted Murphy to move the practice into one of the school's hallways. Murphy obtained approval from

both the school's principal as well as the athletic director prior to doing so. While participating in a relay sprint exercise facilitated by Murphy, Plaintiff-Appellant Jayse Nagy struck and broke a wire-mesh window with his hand. The Page Middle School was constructed in 1957 and contained wire-mesh interior windows, the glass of which remained original at the time of the subject incident. Nagy alleged that while participating in the relay, he tripped over a bag and attempted to stop himself with his left hand. As a result, his left hand went through the doorway window. Murphy stated that he ensured that the pathways of the hallway were clear in-between every relay race. His precautions included walking up and down the hallways on numerous occasions, ensuring that bags and students were against the wall, and positioning students at intersections to monitor for others.

Following the incident, Murphy used his sweatshirt to fashion a tourniquet and proceeded to take Nagy to the lobby of the school to await the arrival of an ambulance. Murphy acknowledged that a first aid kit consisting of bandages, gauze, athletic tape, scissors, petroleum jelly, extra mouth guards, and a small toolkit was available, but was on the other side of the hallway at the time that the incident occurred.

Approximately two months after the incident, Nagy filed suit alleging that Murphy committed gross negligence. Additionally, Nagy filed suit against Lamphere Schools based on a cause of action sounding in premises liability. Specifically, Nagy alleged that the school's failure to replace the wire-mesh glass from 1957 constituted to a failure to repair and maintain a public building. In response, defendants moved for summary disposition on the basis that Murphy's actions did not rise to the level of gross negligence. With respect to the school's failure to replace the wire-mesh glass, defendants argued that Nagy had set forth a design defect claim and that the claim was meritless. Although defendants did not frame their summary disposition arguments under a specific subrule, the trial interpreted their arguments as falling within the ambit of governmental immunity. As a result, summary disposition was granted in favor of defendants and Nagy subsequently appealed.

On appeal, the Court first analyzed Nagy's argument regarding Murphy's gross negligence. The Michigan Governmental Immunity Act affords governmental employees protection from tort liability. However, the shield is lowered in situations in which the employees conduct "amount[s] to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). Gross negligence is further defined as "conduct so reckless as to demonstrate a substantial concern for whether an injury results." MCL 691.1407(8)(a). The Court elaborated on this further and characterized gross negligence as being "as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety and welfare of those in his charge."

The Court distilled Nagy's allegations regarding Murphy's gross negligence into the following: Murphy failing to ensure that the running lanes were clear, failing to ensure sufficient maneuvering space for the students, failing to station an additional adult at the other end of the relay, and failing to keep a first-aid kit reasonably accessible. The Court acknowledged that by resolving all factual disputes in plaintiff's favor there could be a genuine question of fact as to whether Murphy was negligent. However, the Court unequivocally stated that "ordinary negligence does not establish a question of fact regarding gross negligence." Following an analysis of the aforementioned allegations set forth by plaintiff, the Court concluded that Murphy's actions simply did not rise to the level needed to constitute gross negligence. In the eyes of the Court, Murphy took steps to ensure that the track and field practice was safe and did not demonstrate a "substantial lack of concern" for the safety of the students.

As mentioned above, Nagy also filed suit against Lamphere Schools based on a cause of action sounding in premises liability. Plaintiff's claim was based on the "public building" exception to the absolute immunity from suit that governmental entities are afforded. MCL 691.1406 provides the following, in relevant part:

> Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take an action reasonably necessary to protect the public against the condition.

Nagy argued that the subject window was a dangerous or defective condition of the public building as it should not have shattered when he made contact with it. Additionally, Nagy asserted that defendant had actual or constructive notice of the defect and that it did not remedy the defect after a reasonable period of time. In response, defendant argued that Nagy had in essence set forth a design defect claim and that such a claim would be barred by governmental immunity. Defendant also asserted that the public building exception would not be applicable to such a claim.

In analyzing Nagy's claim, the Court began by acknowledg-

ing that defendant had established that the subject window was part of the original construction of the school. Moreover, the Court stated that there was no record evidence that the wire-mesh windows were unsafe in schools. The Court then turned to the Supreme Court's interpretation of the "public building" exception. In doing so, the Court highlighted the fact that liability is imposed under the exception where the dangerous or defective condition of a building was the result of a failure by the governmental agency to repair and maintain that building. The Court also noted that the Supreme Court has defined "repair" as restoration to a prior condition following damage and "maintain" as preserving a prior condition.

Based on the attendant facts and circumstances of the matter, the Court concluded that that the public building exception does not generally apply where the alleged defect existed as part of the original building. Here, the subject window was original and had not been improperly repaired or maintained. Plaintiff's claim was therefore considered to be a design defect claim as opposed to a claim based on a failure to repair or maintain. The Court thus held that plaintiff's claim did not fall under the umbrella of the public building exception to governmental immunity. As a result, summary judgment was affirmed in favor of defendants.

Nagy underscores the impact under Michigan law of governmental immunity with respect to injuries that are sustained on school grounds. It is apparent from the Court's fact-intensive analysis that plaintiffs must clear substantial hurdles before piercing the immunity that governmental entities are afforded.

John E. Tyrrell is a Member at Ricci Tyrrell Johnson & Grey who has specialized for over 25 years in the defense of sports liability litigation.

Vikas Bowry is an Associate at Ricci Tyrrell.

Return to Table of Contents

Young Athletes with History of Concussions May Have More Changes to Their Brains

A new study suggests athletes with a history of concussion may show more brain injury from a later concussion, particularly in middle regions of the brain that are more susceptible to damage, when compared to athletes with no history of concussion, according to a study from the **American Academy of Neurology**. The athletes participated in sports like football, volleyball and soccer.

"We know concussions may have long-term effects on the brain that last beyond getting a doctor's clearance to return to play," said study author Tom A. Schweizer, PhD, of St. Michael's Hospital in Toronto, Canada. "It is unclear, however, to what extent the effects of repeated concussion can be detected among young, otherwise healthy adults. We found even though there was no difference in symptoms or the amount of recovery time, athletes with a history of concussion showed subtle and chronic changes in their brains."

This study focused on changes within two areas in the middle of the brain that are especially vulnerable to concussion. Researchers focused on blood flow in the cingulate cortex and white matter microstructure in the corpus callosum. Changes in blood flow and microstructure that show up on brain scans can indicate underlying brain injury. The cingulate cortex is a layer of gray matter that coordinates sensory and motor skills. Below it is the corpus callosum, a broad band of nerve fibers linking the two hemispheres of the brain.

The study looked at 228 athletes with an average age of 20. This included 61 with a recent concussion and 167 without. Within the first group, 36 had a history of concussion. Within the second group, 73 had a history of concussion.

Researchers took up to five brain scans of each recently concussed athlete, from time of injury to one year after returning to play.

Researchers found that one year after a recent concussion, athletes with a history of concussion had sharper declines in blood flow within one area of the cingulate compared to those without a history of concussions. Those with a history of concussion had an average cerebral blood flow of 40 milliliters (mL) per minute, per 100 grams (g) of brain tissue. Those without a history of concussion had an average cerebral blood flow of 53 mL per minute, per 100g of brain tissue.

In athletes with a history of concussion, in the weeks after a new concussion, researchers also found microstructural changes in a region of the brain called the splenium, which is part of the corpus callosum.

"Our findings suggest that an athlete with a history of concussion should be watched closely, as these subtle brain changes may be worsened by repeated injury," said Schweizer. "Additionally, our results should raise concern about the cumulative effects of repeated head injuries later in life."

A limitation of the study is that athletes reported their own histories of concussion and could be inaccurate. Further research is needed that would follow athletes over time.

Return to Table of Contents

New Study Analyzes Rates of Concussions and Closed Head Injuries in High School-Aged Female Athletes Over the Past 20 Years

The epidemiology of sports-related concussions (SRCs) and closed head injuries (CHIs) in high school females remains largely undefined at the national level, especially for unorganized sports and recreational activities such as equestrian and snow-related sports.

A new study presented at the 2021 Annual Meeting of the American Academy of Orthopaedic Surgeons (AAOS) took a closer look at sports-related head injuries in female patients over a 20-year period to identify national estimates, demographic characteristics, and trends. The findings show a dramatic increase — more than 200 percent — in sports-related head injuries among female athletes ages 14-18 and demonstrates that this increase is not always directly correlated to increased participation.

According to studies investigating sex differences in SRC epidemiology, female athletes face concussion rates nearly twice as high as their male counterparts when participating in sex-comparable sports. Female athletes may also be more likely to sustain recurrent concussions, experience atypical symptoms, and require longer recovery times before returning to sport.

"In addition to concussions, we made sure to include closed head injuries as part of our analysis because, in both cases, we wouldn't want athletes to return to play without an evaluation," said lead researcher Kevin Pirruccio, MD, orthopaedic surgery resident at Yale New Haven Hospital. "CHI is the most common type of traumatic brain injury; it is a blunt, non-penetrating head trauma that doesn't create a break in the skull. While there is a lot of overlap between SRCs and CHIs, concussion refers to the symptoms (dizziness, nausea, blurry vision, etc.) and CHI is the mechanism of the injury."

The study, "Sports-Related Concussions in High School Females: An Epidemiologic Analysis of 20-Year National Trends," retrospectively identified a study population of female patients, ages 14 to 18, who sustained SRCs and CHIs across 56 sports or recreational activities from 2000 to 2019. Dr. Pirruccio and his team used the Consumer Product Safety Commission's National Electronic Injury Surveillance System (NEISS), which documents activity-associated injuries presenting to emergency departments (EDs) in the United States.

"We used the NEISS database because it captured injuries occurring in sports and activities outside of a school setting, such as horseback riding, snowboarding, and rugby, providing a more accurate look at data outside of what is typically studied among high school athletes," said Dr. Pirruccio.

The national weighted estimate of female patients ages 14 to 18 presenting to U.S. EDs with SRCs or CHIs increased significantly between 2000 (9,835 cases) and 2019 (31,751 cases). On average, 39.1% of annual SRCs and CHIs presenting to U.S. EDs occurred in this patient cohort. Over one quarter (26.2%) of these injuries occurred in patients 15 years of age.

Among this group, the five sports and recreational activities most commonly associated with SRCs and CHIs were soccer (20.6%), basketball (18.5%), cheerleading (10.4%), softball (10.1%), and volleyball (6.5%).

As the number of girls participating in sports continues to rise, the research team also studied the direct correlation of increased participation to concussion rates over the 20-year period in high school-aged female athletes. They determined that concussion rates cannot be attributed to increases in participation rates alone. While the primary influence behind increasing concussion trends in these patients may well be increased participation rate for certain sports, such as soccer and volleyball, variations in annual SRCs and CHIs presenting to U.S. EDs associated with softball, cheerleading, and basketball were not strongly correlated with participation.

Dr. Pirruccio and his team hope to further investigate the potential causes of these annual SRC and CHI variations, which could include factors such as concomitant changes in practice rules or training regimens, cultures within a sport, or reporting differences between individual athletes. They also hope this study will encourage other research teams to further investigate the topic.

"While concussions can be classified as an epidemic, it's important to consider that 96.7% of patients who were admitted to the emergency department with an SRC or CHI were treated and went home," said Dr. Pirruccio. "Sustaining a concussion shouldn't necessarily preclude our youth from participating in the sports and physical activities they love. Instead, we hope this study encourages mindfulness among athletes, coaches, and parents and stimulates the adoption of comprehensive return to play protocols to prevent further harm. This is especially important with non-school sanctioned sports and activities, which may lack a dictated return-to-play guideline."

Return to Table of Contents