



ATHLETICS AND PHYSICAL EDUCATION: NEW FRONTIERS IN LEGAL LIABILITY FOR SECONDARY SCHOOLS?

Constance H. Baker, Esq. and
Thomas H. Strong, Esq.

A recent lawsuit filed against a private school in Baltimore and a recent decision in another lawsuit by Maryland's highest court, the Court of Appeals, demonstrate that schools must be conscious of the ever-changing legal environment and take steps to protect themselves from new legal threats. The lawsuit filed against the private school in Baltimore is based upon allegedly unclear policies governing student conduct and reporting of student medical restrictions. A decision involving a public high school in Calvert County concerned allegedly improper instructions given to students who were volunteering during an adult athletic competition held by the school. As discussed below, based upon these developments, schools should reevaluate and modify, as appropriate, their policies on student conduct, reporting of medical restrictions, and the hosting of athletic events.

Does Your Student Code Of Conduct Create A Legal Liability Issue?

A prominent and successful personal injury firm in Maryland recently filed suit against a Maryland private school on behalf of a student who was allegedly injured during a physical education class. In addition to naming the school as a defendant, the head of the school, the principal of the high school, two school nurses, the director of the physical education program, and a physical education teacher were also named as defendants. In the lawsuit, the student alleges that in 2003 she suffered in excess of \$750,000 in damages due to an injury to her knee sustained during a physical education class. The parents also sued the school seeking over \$100,000 for medical and other expenses supposedly incurred as a result of the negligence of the school and its employees. In essence, the lawsuit contends that the student was forced to participate in a physical education activity despite a doctor's written instruction to the contrary. The student asserts in the lawsuit that she received a note from her physician directing that she not participate in physical education class in any way. While the lawsuit is unclear, the physical education instructor may not have been made aware of the existence of the physician's instructions.

The student, who is no longer at the school, claims that she was asked by the physical education instructor to assist another student in the performance of an unspecified physical activity during the course of a physical education class despite the existence of the note from her physician and the fact that she was dressed in school attire rather than gym attire. The student allegedly did so because she believed that questioning or refusing to comply with the physical education instructor's directives would be a violation of the school's student code of conduct. Specifically, the student asserts that she "dutifully complied with [the] directive and assisted the student in the physical activity." The complaint quotes the Student Handbook which stated that "disrespect (insubordination) towards a member of the ...community, which includes but is not limited to ...faculty and staff, may result in suspension." While assisting her classmate, the student purportedly suffered an injury to her knee which at the time was "asymptomatic."

While the probability of the lawsuit succeeding is unknown, there are two steps which schools can take to better protect themselves from this type of litigation. First, a school should have a clear policy for communication of medical information. The school should require the student or student's parent to give the medical information to a specific individual such as the school nurse. In addition, the policy should provide for alternative means of providing the information to the school in the event that the school nurse or other individual is unavailable. Further, the policy should direct the school nurse or other individual receiving the medical information to report the information to the necessary parties, including the physical education teacher.

Requiring the student or parent to provide medical information in a specific manner serves two important functions. Initially, it prevents a student or a parent from claiming that he or she did not understand to whom the information should be reported. It also requires the student to report the information to a specific individual or individuals who understand how the information needs to be disseminated and otherwise handled. This decreases the likelihood that the information will be reported to a staff or faculty member who does not fully understand the manner in which the information needs to be disseminated. The policy should also require any staff or faculty member who receives the information to bring it to the attention of the school nurse or other designated individual.

An additional straightforward step a school can take to better protect itself from this type of litigation is to examine the student code of conduct or other policies impacting students. The code of conduct or other policy should clearly specify that a student must inform any faculty or staff member who asks a student to engage in an activity which may injure the student or which is prohibited by instructions from a healthcare provider to inform the faculty member of the danger to the student's health or the instructions of the healthcare provider. While one would hope that common sense would prevail in this type of situation, obviously it didn't in at least one instance.

Does your hosting of athletic events increase your liability exposure?

Schools which host athletic events have previously enjoyed significant insulation from liability arising from injuries occurring during athletic competitions. This protection from liability was based upon the sound principle that a person who willingly participates in an athletic competition assumes all risks incidental to participation in the sport or contest which are the usual and foreseeable dangers of participation in the sport or contest. For example, a football player who suffers a broken leg during the course of a typical tackle cannot bring suit against the player who made the tackle or the school hosting the event.

A recent decision from Maryland's second highest court, *Cotillo v. Duncan* (<http://www.courts.state.md.us/opinions/cosa/2006/2859s05.pdf>), makes clear that schools hosting athletic and other events must exercise caution in the manner in which the events are organized and may wish to reconsider the hosting of non-student events. In *Cotillo*, a public high school hosted a weightlifting competition open to the public. Weightlifting competitions use "spotters" to assist participants in the competition who are unable to safely complete a lift. The spotters used by the organizers of the competition were high school students involved in the school's weightlifting club. A participant in the competition lifting 530 pounds lost control of the lift bar and was injured when the bar struck him in the jaw. The participant sued the school, the organizers of the competition, and the two high school students who were acting as spotters.

The participant alleged that the spotters were positioned in a negligent manner and that the spotters had been instructed in their duties in a negligent manner. Specifically, the participant claimed that the spotters were positioned too far away from the bar and that the spotters had been instructed to assist the participant in too narrow a range of circumstances. The lower court dismissed the claims holding that such risks were inherent in a weightlifting competition. The Court of Appeals disagreed, finding that negligently instructing spotters and negligently positioning the spotters could constitute grounds for holding the school and other parties liable for

the participant's injuries. However, the Court held that because the participant had observed the positioning of the spotters prior to the lift which injured the participant, he had assumed the risk of any injury resulting from the alleged negligent position of the spotters. Conversely, the Court allowed the claims against the school and others to proceed based upon the allegedly improper instructions to the spotters because the participant was not aware of the allegedly negligent instructions.

Initially, schools should reevaluate the hosting of any event which involves a risk of injury to participants which does not primarily involve student participants. For example, a school may wish to reconsider the hosting of a basketball tournament. An injured participant could use the decision in Cotillo to claim that the referee was instructed in a negligent manner or the student in charge of ensuring that the court was kept dry was instructed in a negligent manner. While a wet court or a referee who allowed a game to get too rough should be seen as inherent risks of a basketball game, the decision in Cotillo calls this into some doubt.

Obviously, schools cannot simply discontinue the hosting of athletic events, as such events are an integral part of student life. However, the decision in Cotillo makes clear that when students are involved in the running of such events, caution must be used. While many claims were made in Cotillo, the primary focus was improper instructions given to the spotters, who were high school students, by the adults running the competition. In particular, the Court of Appeals seemed focused on the brief informal nature of the instructions. Accordingly, schools should evaluate the circumstances in which students assist in athletic events. To the extent a student has any role in the health or safety of the participants, schools should ensure that the student has received the appropriate instructions. The instructions should be in writing and should be given to the student as well as verbally reviewed with the student. This will help to avoid later questions regarding whether the student was instructed in an appropriate fashion. During this process a school should also evaluate whether it is appropriate to have a student serving in a particular role.

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