

## **Liability Risks for After-Hours Use of Public School Property to Reduce Obesity:** *A Fifty-State Survey*

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### **I. INTRODUCTION**

Physical activity addresses one-half of the “Energy In = Energy Burned” formula featured in the Robert Wood Johnson Foundation’s President’s message on obesity. For this reason, the public health response to childhood obesity must include research on how to increase children’s physical activity. One part of that research will focus on finding fun, physically active, and safe activities that children can build into their lives. Another part will focus on finding and creating good places for children to engage in those activities.

While there surely is more to learn about good places for children to be active, we already know the two things that animated this legal research project. First, neighborhood schools are good places for children to be active. Second, some school boards and school administrators are worried about opening up their facilities for recreational activities because of concerns about liability in the event of injuries. This survey addresses those concerns by describing the legal rules that apply to claims that may be brought against public schools during recreational use of public school grounds and facilities as part of a program designed to promote physical activity among children at risk for obesity.

As part of a long-term and very effective public relations effort, the American public has been told repeatedly that the United States has suffered through litigation explosions that prevent many organizations from serving their customers or constituents.<sup>1</sup> So it would not be at all surprising if many public school officials and the people who advise them fear that liability is out of control and that parents and children are poised to file lawsuits against public schools as a get-rich-quick scheme.<sup>2</sup>

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<sup>1</sup> See WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW* (2004) (reviewing the empirical research on tort law and claiming and documenting the tort reform public relations effort). Cf. TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2007) (reviewing the empirical research on medical malpractice and medical malpractice litigation and documenting the lack of evidentiary support for restrictive medical liability reform).

<sup>2</sup> See, e.g., American Tort Reform Association, *Fear of Tort Liability Limits Educational Opportunities for America’s Children* (1999), available at <http://www.atra.org/show/91> (news release reporting findings from unpublished survey conducted by ATRA of school principals).

No good social science research, however, supports this view of the world. Indeed, a large and growing body of research demonstrates that such fears are, at the very least, exaggerated.<sup>3</sup> This research is best developed in the medical malpractice arena. But across the board, the research shows that the amount of money paid to plaintiffs in tort lawsuits in the United States has roughly tracked the rate of medical and wage inflation.<sup>4</sup> Liability insurance premiums rise and fall over time as part of an insurance business cycle that sometimes makes it *seem* that the tort system is out of control. But the tort system is by no means out of control.<sup>5</sup>

Among other things, the social scientific research on tort claiming shows the following. First, with the exception of automobile accidents and injuries covered by workers' compensation, most people who are injured through the fault of someone else never file a lawsuit or bring a claim.<sup>6</sup> Second, poor people are no more likely than others to make a claim or file a lawsuit.<sup>7</sup> Third, the legal system does a reasonably good job of weeding out non-meritorious claims, particularly high-value claims.<sup>8</sup> Fourth, even when plaintiffs win at trial, they only rarely receive the full amount of the verdict.<sup>9</sup> Finally, and perhaps most importantly, media reporting on lawsuits is overwhelmingly weighted toward the unusual, very high-value claim or verdict, ignoring the vast majority of cases in which plaintiffs recover only small amounts of money or the defendants win, with the resulting bias in public understanding.<sup>10</sup> Taken together, these research findings demonstrate that tort liability risk is much less severe than commonly believed.

For those bodily injury claims against public schools that are made and do survive, state law governs their passage through the civil justice system. Laws differ substantially among the states, particularly with regard to the special defenses that public schools and other governmental entities have against liability claims. Significantly, however, our review of the liability rules in all fifty states and the District of Columbia identified no jurisdiction in which the legal standards

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<sup>3</sup> DONALD DEWES, DAVID DUFF & MICHAEL TREBILCOCK, *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996); BRIAN J. OSTROM & NEAL B. KAUDER, NATIONAL CENTER FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* (1995); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Deborah Hensler, *The Real World of Tort Litigation*, in *EVERYDAY PRACTICES IN TROUBLE CASES* 155-77 (Austin Sarat et al. eds., 1997).

<sup>4</sup> See, e.g., Seth A. Seabury, Nicholas M. Pace & Robert T. Reville, *Forty Years of Jury Verdicts*, 1 J. EMPIRICAL LEGAL STUD. 1 (2004).

<sup>5</sup> See, e.g., Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393 (2005).

<sup>6</sup> DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* (1991); Stephen Carroll & Allan Abrahamse, *The Frequency of Excess Auto Personal Injury Claims*, 3 AM. L. & ECON. REV. 228 (2001).

<sup>7</sup> Herbert M. Kritzer, W. A. Bogart & Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, table 5 (1991).

<sup>8</sup> See, e.g., Tom Baker, *Reconsidering the Harvard Medical Practice Study Conclusions about the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501 (2005).

<sup>9</sup> See, e.g., David A. Hyman et al., *Do Defendants Pay What Juries Award? Post-verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003*, 4 J. EMPIRICAL LEGAL STUD. 3 (2007).

<sup>10</sup> See HALTOM & MCCANN, *supra* note 1.

that would apply to recreational use of school facilities are more onerous than the *ordinary or reasonable care standard* that applies to most activities in the United States.

In addition, public schools receive the benefit of governmental immunity rules that shield them from liability in some circumstances. Moreover, many states have enacted recreational user statutes that would apply to recreational activity programs for children on school grounds and that provide additional protection from liability. Finally, the legal rules that would apply to tort claims arising out of the after-hours recreational use of school facilities are generally no more onerous than those that apply during the school day. Indeed, our survey identified many states in which the liability rules that apply to public schools would be more lenient for injuries that occur during recreational use of school facilities than for injuries that occur during the regular school day.

The remainder of this guide is organized as follows. Section II provides an overview of the basic elements of tort liability. Section III describes the special legal rules that may limit public schools' legal obligations in the context of public health-based recreational use of school facilities. This is the longest and most complicated section of the report.

Section IV briefly reviews the statutory limits on the damages that may be awarded against school districts in some states. Section V evaluates two potential tools for shifting the liability risk associated with recreational use of school facilities: liability waivers (which would require the children and their families to retain the risk of their own injuries) and providing access through third parties (which could shift the risk to these third parties).

## **II. OVERVIEW OF TORT LIABILITY**

In general, any tort law claim for compensation must satisfy four elements: duty, breach, causation, and damage. To prevail in a tort action, a plaintiff must prove (1) the defendant had a legal *duty*, (2) the defendant *breached* the duty, (3) the breach by the defendant *caused* an injury to the plaintiff, and (4) the plaintiff suffered *damage* as a result. Courts in some states use different verbal formulations to describe these elements, but the fundamental tort liability concepts are the same in all U.S. states.

The *duty* element refers to the requirement that the person or entity against whom the claim is brought must be among those that have a *legal duty* to take precautions to avoid such injuries. The duty element is the most technical and context-specific aspect of liability law, the aspect that differs the most from state to state, and the main focus of this fifty-state survey.

Public schools generally have at least some legal duty to take *reasonable* precautions to prevent injuries, although the extent of that duty differs significantly from state to state. In no state, however, is a public school held to a legal duty that is more demanding than the ordinary reasonable care standard that applies to automobile accidents and to accidents that happen at homes and shopping malls. What is reasonable is very context specific and depends on many things: most important, the nature of the harm, the difficulty of preventing it, and, for present purposes, generally accepted standards in the management of schools and recreational facilities. A school can be held liable for an injury under this standard only if the school did something that

a reasonable school would not have done, or failed to do something that a reasonable school would have done.

The *breach* element refers to the requirement that the claimant must prove that the defendant's conduct failed to meet the standard of conduct that applies in this situation. Whether a defendant breached a standard of care in a particular case is a fact-intensive question that lies outside the scope of a legal survey such as this one. What we address, instead, is the legal duty element just described: the verbal formulas that courts in different states use to describe the nature of the legal duty of care that a public school would have in connection with providing access to its facilities for after-hours use.

The *causation* element refers to the requirement that the claimant prove that the deficient conduct caused the injury in question. In other words, it is not enough that a school did something that it should not have done and that a child was injured. In addition, the school's misconduct must have caused the injury. This causation element has two parts: cause in fact and proximate cause. The *cause in fact* requirement is sometimes called the "but for" cause requirement. Here the question is, "Would the injury have occurred but for the defendant's misconduct?" Cause in fact involves an intensely factual inquiry. The *proximate cause* requirement is sometimes called the "legal cause" requirement. Here the question is, "Was the causal connection between the defendant's misconduct and the harm to the plaintiff so remote or so unexpected that it would not be proper to hold the defendant responsible?" Both aspects of the causation element can present complicated issues in individual cases, but our research identified nothing special about the public school context that makes causation any different or more complicated than most other liability contexts. For this reason, the survey does not address causation issues.

Finally, the *damage* element refers to the requirement that the claimant must prove a compensable injury. As with causation, there can be very complicated, case-specific questions regarding the extent of an injury and the costs of compensating someone for that injury. But our research identified nothing special or unusual about the public school context, other than the fact that children are involved. Permanently disabling injuries to children can be quite expensive because of the lifetime care issues involved. Nevertheless, public schools already face this risk during the ordinary school day. This survey does not address damage issues, except to identify those states in which there are special rules limiting the amount of damages that may be assessed against public schools or limiting certain categories of damages more generally.

### **III. PUBLIC SCHOOLS, THE DUTY ELEMENT, AND RECREATIONAL USE**

This section explains three kinds of legal rules that operate to exempt public schools, in whole or in part, from their legal obligation to take reasonable precautions to avoid injuring others. Public schools that receive the benefit of these rules do not have the same legal duty that some other organizations providing similar services would have. These three sets of special legal rules are

1. Sovereign or governmental immunity,
2. State recreational user statutes, and

3. The traditional common law treatment of “invitees” and “licensees” who use land owned or occupied by others.

We include the first set of rules—sovereign or governmental immunity—as part of the duty section because the effect of these immunities is to *free* the school district, in whole or in part, from the duty that a private organization would have in similar circumstances. We address the conceptually related “public duty rule” as part of the same discussion.

Closely related to sovereign or governmental immunity is the duty of school employees and the related rights and responsibilities of school districts regarding their employees. These issues are important because school employee liability may result in *de facto* school liability in some states in which the school district benefits from sovereign or governmental immunity.

The second set of special legal rules that may provide liability protection to public schools comes from statutes enacted to encourage landowners to open their property for recreational use. Many states have enacted these “recreational user statutes” to promote public access to land that might otherwise be closed because of liability concerns.

The third set of special legal rules that may provide liability protection to public schools comes from the common law treatment of entrants on land. In most states, these rules regarding entrants on land will not provide significant liability protection for a school running a recreational program, for three main reasons. First, some states have eliminated these traditional distinctions among categories of entrants on land. Second, governmental immunity or recreational user statutes provide more significant protection to school districts in many states. Third, in many, if not most, of the remaining states, the courts would be likely to classify children in recreational programs as owed the usual legal duty rather than a more lenient duty. Nevertheless, these rules may provide some liability protection in a few states and so are included.

At the conclusion of the duty section, we consider whether public school districts’ duties with regard to injuries arising out of the recreational use of school facilities differ in any meaningful way from the districts’ duties with regard to injuries arising out of the use of the facilities during regular school programs. We undertake this analysis because school districts already have experience dealing with the duties and corresponding liabilities that arise out of activities during the school day. In our view, liabilities arising out of recreational use of school facilities should present a serious impediment to providing access to the facilities only if the recreational liabilities are significantly different in kind from those that school districts already face for activities during the school day.

### **A. Sovereign and Governmental Immunity**

States differ in whether they classify school districts as part of a state agency, thus bringing the schools within the scope of the typically broader *sovereign immunity*, or as a local government organization, thus bringing them within only the more limited scope of *governmental immunity*.

Regardless of the classification they use, however, all states have waived sovereign and governmental immunity to at least some degree, with the result that state agencies can be sued in

at least some instances. States often have waived immunity by enacting a tort claims act that establishes a procedure for bringing a claim against a state entity, sometimes subject to special damages limits. But even when a state has broadly waived sovereign and governmental immunity, pockets of immunity remain. While there are significant individual variations, our research identified the following four general approaches to these immunities, ordered according to the degree to which schools are protected from liability:

1. Sovereign immunity for public school districts, with very limited exceptions
2. Governmental immunity for public school districts, subject to limited exceptions
3. Governmental immunity for public school districts, subject to more substantial exceptions
4. A general exposure to liability for school districts, subject to governmental immunity exceptions for specified categories of activities, most significantly for discretionary activities

We begin our discussion of how these immunities affect schools' liability risks with a general review of sovereign and governmental immunity law that focuses on how the various rules and exceptions are likely to be applied to the recreational use of public school facilities.

## **1. Sovereign Immunity for School Districts**

Sovereign immunity offers a very strong immunity that has no judicially created exceptions. Schools in sovereign immunity states are highly unlikely to be liable for any injuries that take place during a recreational program unless the school has purchased liability insurance that provides coverage for the claim. Significantly, sovereign immunity traditionally does not extend to state employees, who are shielded from liability only by a more limited form of immunity. If school districts regularly defend and indemnify their employees, or purchase liability insurance for them, school employee liability can amount to school liability, thereby reducing the practical impact of sovereign immunity.

## **2. Governmental Immunity for School Districts**

Governmental immunity is a common law doctrine that protects municipalities and other governmental entities that are not part of the state-level government in the United States and thus are not protected by sovereign immunity. Governmental immunity is more limited than sovereign immunity because it is subject to more significant exceptions. In this section we describe the traditional rule/exception framework of governmental immunity and the leading exceptions to the immunity rule.

Most states have codified their governmental immunity law, often in response to court decisions that eliminated or significantly narrowed the common law immunity.<sup>11</sup> Under the common law, immunity was the rule for governmental entities, but there were significant exceptions. The two most significant exceptions were for “proprietary” activities and “ministerial” activities. We describe these two exceptions next, and follow with some additional exceptions that apply in some states. We then discuss the governmental immunity situation in states that have made governmental immunity the exception rather than the rule. We close this section with a discussion of the public duty rule, which complements governmental immunity in some states.

*a. The exception for proprietary activities*

The core idea of the *proprietary activity* exception to governmental immunity is that the immunity should not apply to everything that a government organization might do, but rather only to activities that are truly governmental. Courts developed the concept of proprietary activities as those that government agencies engage in but that are not the traditional activities of government agencies. Among the factors that affect whether an activity is proprietary are

- Whether a fee is paid,<sup>12</sup>
- Whether the activity produces a profit,<sup>13</sup>
- Whether the activity is customarily engaged in by nongovernmental entities for the purpose of making a profit,<sup>14</sup> and
- Whether a state statute codifying governmental immunity specifically lists the activity as either “governmental” or “proprietary.”

Private organizations routinely run recreational programs for profit-making purposes. Thus, in the states in which the governmental/proprietary distinction remains important, some recreational programs could well be regarded as proprietary and thus not subject to governmental immunity. For example, if a municipality opened an amusement park or a golf club and charged an admission fee, there would be strong arguments in favor of classifying those recreational activities as proprietary.

A free, school-based recreational program designed to reduce obesity among children, however, is easily distinguished from these and other more obviously proprietary activities. The children would not be charged a fee to participate, the program would not produce a profit for the school district, and the purpose of the program would be to promote public health. This kind of recreational program is more like a school physical education program, which would be a core

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<sup>11</sup> As this suggests, the mid-twentieth-century wave of judicial decisions striking down governmental immunity did not lead to the elimination of governmental immunity. Instead, it was part of a shift of tort lawmaking power from courts to legislatures that has not received the attention that it should receive among tort law commentators.

<sup>12</sup> *Schulz v. City of Brentwood*, 725 S.W.2d 157 (Mo. Ct. App. 1987) (because city charged a fee for day-care services, the city day-care center would be regarded as proprietary); *Douglas v. York*, 445 P.2d 760 (Wyo. 1968) (because city charged a fee for garbage removal, operating a garbage dump was a proprietary activity).

<sup>13</sup> *See, e.g., Abrams v. City of Rockville*, 596 A.2d 116, 123 (Md. Ct. Spec. App. 1991); *Davis v. City of Detroit*, 711 N.W.2d 462 (Mich. Ct. App. 2005).

<sup>14</sup> *Yanero v. Davis*, 65 S.W.3d 510, 520 (Ky. 2001).

governmental activity of a public school. Although a recreational program could be distinguished from physical education classes on the grounds that the recreational program would be voluntary and would take place after the end of the regular school day, the same can be said of interscholastic athletic programs, which are commonly regarded as governmental activities of school districts.<sup>15</sup> With that said, it is important to be aware, as Professor Dan Dobbs has observed, that “the governmental-proprietary distinction can produce some surprising case outcomes.”<sup>16</sup>

***b. The exception for ministerial activities***

The *ministerial activity* exception to governmental immunity reflects the idea that the immunity protects the policymaking, political, and administrative judgment aspects of governing—typically labeled as “discretionary” activities—but not the operational delivery of services—known as “ministerial” activities. As one U.S. court of appeals described the difference, “‘Ministerial’ connotes the execution of policy as distinct from its formulation.”<sup>17</sup> Other courts draw a similar distinction, labeling the two types of activities as “planning” and “operational.”<sup>18</sup> For present purposes, planning and policymaking activities generally would include deciding when to open school premises to the public, whether to station security guards (and, if so, how many and on what schedule), what kinds of equipment to install, and what activities to permit or promote on the premises.

Courts that take a narrow approach to defining planning or policymaking activities grant immunity only if the decision in question represents a “conscious choice.”<sup>19</sup> Under that approach the omission of a safety feature on a playground would be protected by discretionary immunity only if the responsible official made a conscious decision not to install equipment with that feature.<sup>20</sup>

Operational or policy execution activities are activities that carry out a plan or policy, such as maintaining playground equipment, following through on security procedures, and—in some states—supervising activities on school grounds. These activities are not protected by governmental immunity in those states that recognize a ministerial exception to governmental immunity. The latter activity of supervising children raises an important issue on which courts disagree. This issue is whether an “on the spot” decision by an individual employee engaged directly in the delivery of governmental services qualifies as a discretionary activity protected by immunity. In general, courts in states that treat liability as the rule and immunity as the exception

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<sup>15</sup> See, e.g., *id.* at 527 (holding that a school board was engaged in a governmental function in authorizing interscholastic athletics at its schools).

<sup>16</sup> DAN B. DOBBS, *THE LAW OF TORTS* 719 (2000).

<sup>17</sup> *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964).

<sup>18</sup> See, e.g., *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989); *Greathouse v. Armstrong*, 616 N.E.2d 364, 366-67 (Ind. 1993); *Bowers by Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992).

<sup>19</sup> See Dobbs, *supra* note 16, at 722, citing cases from California, New Jersey, South Carolina, and Vermont.

<sup>20</sup> See, e.g., *Creech v. S.C. Wildlife & Marine Res. Dep’t*, 491 S.E.2d 571 (S.C. 1997) (public entity not immune from suit alleging negligent failure to install a second guardrail because there was no conscious choice to install only one).

take a narrower approach to defining discretionary activity, while courts in states that treat immunity as the rule and liability as the exception take a broader approach.<sup>21</sup>

*c. Other exceptions to governmental immunity*

By statute, many states have introduced additional exceptions to governmental immunity. The most significant of these additional exceptions are

- The public buildings exception,
- The negligent public employee exception, and
- The insured liability exception.

The *public buildings exception* waives governmental immunity for liability arising out of defective or dangerous conditions in public buildings.<sup>22</sup> In some states the public building exception also includes the grounds of public buildings, expanding the scope of the waiver.<sup>23</sup> Significantly, the waiver applies only to liability arising out of conditions in the buildings (or grounds), not to liability arising out of the negligence of people working in the buildings (or on the grounds).

In some states the public building immunity waiver is subject to an *exception for discretionary activities* that may reduce the significance of the waiver. In those states, decisions about the design of the building would arguably be protected by immunity, while negligence in the construction or maintenance would not.<sup>24</sup> If the state already recognizes a ministerial exception to governmental immunity, then the public building waiver would simply shift the burden of persuasion in cases in which the injury arose out of a dangerous condition in a public building. Instead of the plaintiff bearing the burden of persuading the court that the activity in question was ministerial, the school district would bear the burden of persuading the court that the activity in question was discretionary. We think that it is likely that shifting the burden would lead courts to take a narrower approach to governmental immunity, and thus even a public building waiver with a discretionary activity exception increases the liability risk as compared to the situation at common law.

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<sup>21</sup> Compare *Bauder v. Delavan-Darien Sch. Dist.*, 558 N.W.2d 881, 882 (Wis. Ct. App. 1996) (ruling a school district's provision of a physical education pursuant to state law was a ministerial duty, but the way the teacher conducted the class was a discretionary duty subject to immunity because the school district had not specified how to run the class by statute or policy), with *Norman v. Ogalla Public Sch. Dist.*, 609 N.W.2d 338, 346 (Neb. 2000) (holding that discretionary immunity did not apply where a student caught on fire during a welding class because a teacher's decisions regarding clothing to be worn during the class "are not basic policy decisions, but are discretionary acts at an operational level"), and *Hacking v. Town of Belmont*, 736 A.2d 1229 (N.H. 1999) (ruling that coaches' individual decisions did not concern municipal planning and public policy, nor did the decisions involve weighing competing social, economic, or political factors).

<sup>22</sup> See, e.g., ME. REV. STAT. ANN. tit. 14, § 8104-A (West 2008); MICH. COMP. LAWS ANN. § 691.1406 (West 2008).

<sup>23</sup> UTAH CODE ANN. § 63-30d-301(3) (West 2008).

<sup>24</sup> See, e.g., ME. REV. STAT. ANN. tit. 14, § 8104-A(2) (West 2008). Cf. *Lightfoot v. Sch. Admin. Dist. No. 35*, 816 A.2d 63, 65 (Me. 2003) (stating that the plaintiff could prevail only if she could demonstrate an actual defect in the playground equipment and that the decision to allow the child to play on the playground would not be sufficient to impose liability on the city).

The *negligent employee exception* waives governmental immunity for injuries resulting from the negligent acts of public employees.<sup>25</sup> On first thought, this exception might appear to eliminate governmental immunity entirely. After all, a government agency can act only through people, and a conclusion that an agency did not take reasonable care amounts to a conclusion that one or more employees in the agency was negligent. In fact, however, the negligent employee immunity waiver does not eliminate governmental immunity because that waiver is always subject to the discretionary activity exception just discussed.

Thus, in practice, the negligent employee immunity waiver simply reverses the rule/exception framework of governmental immunity. Instead of an immunity rule subject to a ministerial activity exception, there is a no-immunity rule subject to a discretionary activity exception, as long as a negligent public employee can be identified as the cause of the injury. This shift in the burden of persuasion could have a significant impact on the overall liability risk in either of two circumstances: (1) if the state in question did not already recognize the ministerial exception to governmental immunity, or (2) if the courts were to use that cue from the legislature to take a narrower approach to the definition of discretionary activities. As already noted, we think it is likely that shifting the burden of persuasion would lead to a narrower application of governmental immunity rules, but this is a hypothesis that we have not tested.

The *insured liability exception* waives governmental immunity for any insured liability, but only to the extent of that liability. In effect, this exception makes the governmental entity the partial master of the liability regime that it faces. As a practical matter we tend to doubt that schools approach the liability insurance purchasing decision in that way. Rather, schools most likely purchase insurance (or not) in the face of a confusing patchwork of immunity and liability rules, without intending to have any effect on the scope of liability that they face as a result. Any expansion in liability that results from the insured liability exception seems most likely to be the unintended consequence of a decision reached on other grounds.<sup>26</sup>

#### *d. Reversing the rule/exception framework*

Many states have adopted a state tort claims act or other legislation that explicitly reverses the traditional governmental immunity rule/exception framework, so that governmental immunity becomes the exception rather than the rule. In those states, the legislation identifies categories of activity that are subject to governmental immunity. The most important of these categories is that for discretionary activities. As a formal matter, the analysis of whether an activity qualifies for the discretionary exception to the no-immunity rule appears to be the same as the formal analysis of whether an activity is discretionary and thus not subject to the ministerial exception to the immunity rule. Nevertheless it is our sense that courts in states that have explicitly reversed the rule/exception framework are more likely to adopt a narrow definition of discretionary

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<sup>25</sup> See, e.g., CONN. GEN. STAT. ANN. § 52-557n(a)(1) (West 2008); UTAH CODE ANN. § 63G-7-301(4) (West 2008).

<sup>26</sup> In those states it would be interesting to consider whether insurance companies should offer, as an option, an endorsement that excludes coverage for liability under the insured liability exception to governmental immunity.

activities.<sup>27</sup> We recognize that the practical impact of this difference is an empirical question that we cannot answer.

*e. The public duty rule*

The public duty rule is a common law doctrine that was traditionally understood to protect public entities from liability in some situations in which governmental or sovereign immunity did not apply:

When a statute imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort. Under this view, as the saying goes, a duty to all is a duty to none.<sup>28</sup>

Although we found no authority directly on point, we conclude that this approach to the public duty rule would be unlikely to provide significant liability protection to schools that open their premises for recreational use because the children using the premises would be part of a particular class of individuals with whom the school has a special relationship such that the duty owed to the children would not be a “duty to all,” but rather a duty to these specific children. Nevertheless a lawyer preparing to defend a school in a case arising out of the recreational use of school facilities should consider the public duty rule as a potential defense.

### **3. Duties and Indemnification of Public School Employees**

Typically, organizational tort liability arises through the legal doctrine of *respondeat superior*, a legal rule that makes employers vicariously liable for torts that their employees commit in the course of employment. In everyday conversations, and even in this report, we talk and write in terms of school districts engaging in activities, but of course school districts “do” things only through people, most obviously through their employees.

Sovereign and governmental immunity are legal rules that limit the extent to which governmental organizations may be held vicariously liable for the torts of school employees. As noted above in our discussion of sovereign immunity, the immunity granted to governmental entities does not apply to school employees in many states. In these states public employees are protected under another form of immunity, sometimes called public official immunity. Significantly, the immunity that applies to public employees is narrower in many states than the immunity that applies to school districts. This means that it is possible for a school employee to be liable for an injury caused by careless conduct on the job without the school district also being vicariously liable.

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<sup>27</sup> See, e.g., *Div. of Corrections, Dep’t of Health & Soc. Servs. v. Neakok*, 721 P.2d 1121, 1133 (Alaska 1986) (formulation of parole plan and selection of special activities for a prisoner were not discretionary activities); *Norman v. Ogalla Public Sch. Dist.*, 609 N.W.2d 338, 346 (Neb. 2000) (taking a narrow approach to discretionary immunity that excludes discretionary decisions by teachers acting at the operational level).

<sup>28</sup> See *Dobbs*, *supra* note 16, at 723.

In those situations school districts may nevertheless have some responsibility toward the employee. Some states require school districts to defend their employees in lawsuits arising out of employment activity and to pay for any resulting judgments. Other states require school districts to buy liability insurance for their employees. Still other states permit school districts to defend and indemnify their employees or to buy liability insurance for them. In each of these cases, the *de facto*, practical liability of the school districts may be that of the school employees, or nearly so, with the result that the protection afforded by sovereign or governmental immunity will be less than would appear from close study of the cases and statutes delimiting those immunities.

From a dollars and cents perspective there is no real difference between a legal rule that makes a public school vicariously liable for the torts of its employees and a legal rule that obligates a public school to indemnify its employees for the amounts that they are liable in tort. Similarly, from a dollars and cents perspective there is not much difference between a legal rule that makes a public school vicariously liable for the torts of its employees and a well-established practice by which a public school routinely indemnifies its employees. If there is no legal rule obligating the school to indemnify its employees, the school could depart from its well-established practice, but there could be strong pressures not to do so, if only to maintain employee morale.

Accordingly, we paid close attention in the individual state guides to the legal rules governing the defense and indemnification of school employees, particularly in states in which public school employees are protected by a narrower immunity than public schools.

## **B. Limited Duty under Recreational User Statutes**

Legislatures in many states have enacted recreational user statutes that limit the duty that the possessors of property owe to recreational users when the property is open to the public without charge.<sup>29</sup> Traditionally, these statutes applied only to rural property and to rural activities such as hiking, camping, and snowmobiling. But courts in many states now apply these statutes to developed or urban land. The statutes limit the possessor's duty to that traditionally owed to trespassers under the common law: the duty to avoid willful and wanton injury and to warn of known hazards that are not in plain sight.<sup>30</sup> This is very different from the ordinary duty of reasonable care.

Recreational user statutes will provide significant liability protection to school districts only in states that (a) treat their statutes' list of recreational activities (typically rural in nature) as illustrative rather than exhaustive, or have statutes that do not specifically list activities; (b) apply the statutes to public land as well as private land; (c) apply the statutes to developed as well as

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<sup>29</sup> See, e.g., MASS. GEN. LAW ANN. ch. 21, § 17C (West 2008); WIS. STAT. ANN. § 895.52(1)(d) (West 2008).

<sup>30</sup> See, e.g., MASS. GEN. LAW ANN. ch. 21, § 17C(1) (West 2008); *Murphy v. Wachusett Regional Sch. Dist.*, 2007 WL 4633307, at \* 3 (Mass. Super. Ct. Dec. 4, 2007) (stating that wanton and reckless conduct is “act[ing] or intentionally fail[ing] to do an action which it is [one’s] duty to [another] to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent”).

undeveloped land; and (d) do not have a strong sovereign immunity rule that already protects school districts from suit.

### **C. Limits Relating to the Status of Entrants on Land**

The final potentially important limit on public school duties comes from the common law's preferential treatment of possessors of land. Traditionally, the common law established different duties for possessors of land that depended on whether the entrant on the land was an *invitee*, a *licensee*, or a *trespasser*. For present purposes, the distinction that matters is that between the classifications of invitee and licensee. Because people using school grounds as part of a program to combat obesity would have the school's permission to be there, they would not be trespassers.

*Invitees* are people who enter the property to provide a tangible benefit to the owner. The classic examples are a patron entering a store or a repair person coming to fix something in a home. Children attending school during regular school hours are also invitees because the school is paid to teach them, which represents the school's tangible benefit. Invitees are owed the ordinary tort law duty of reasonable care.

By contrast, *licensees* are people who enter the property, with permission, for their own purposes or for social purposes and who do not provide a *material* benefit to the landowner. A social guest is the classic licensee. While a social guest presumably provides emotional and other social benefits to his or her hosts, those benefits do not lead to invitee status in most states. In a school context, adults playing a pickup game of basketball on the weekend on an open school playground would be licensees. Licensees are owed a lesser duty of care than are invitees.

The examples of children attending school and weekend athletes playing basketball are relatively easy cases. A child participating in a free, after-hours recreational program presents a more difficult case. There is surprisingly little authority on this issue, most likely because it never arises in many jurisdictions. Courts in states that have eliminated the invitee/licensee distinction obviously no longer spend any effort on the distinction in this or any other context. Courts in states that retain strong sovereign immunity for public schools do not reach this question. Similarly, courts in states that apply recreational user statutes to school grounds do not reach this question because all recreational users are treated equally under the statutes.

In the states that use the invitee/licensee analysis, courts differ as to whether they are likely to classify children using school facilities for recreational purposes as invitees or licensees. The individual states guides discuss this in more depth.

### **D. Duty during the School Day and After: A Comparison**

When deciding whether to open up school facilities for recreational use after the end of the school day, it is useful to evaluate how the legal risk arising out of opening the school grounds for recreational use compares to the legal risk arising out of the use of school grounds for programs that the school already runs. Based on our legal research, a school district's tort duty of care with respect to injuries during recreational use of the facilities is almost always the same as, or less demanding than, its duty of care with regard to injuries during the school day.

Significantly, in no state is the duty of care more onerous than the ordinary, reasonable care standard that applies to most entities and individuals for most activities in the United States.<sup>31</sup> Moreover, all states apply some form of sovereign or governmental immunity to public schools, with the result that the schools are protected from liability to an extent that a private entity would not be.

#### **IV. LIMITS ON DAMAGES**

There are two kinds of statutory limits on tort damages that may reduce school districts' liability risk in many states: (1) damages limits that apply to claims brought against governmental entities under a state tort claims act, and (2) damages limits that apply to tort claims more generally. In addition, a few states have special statutory damage limits that apply to claims against public schools. Research shows that damages limits do reduce the liability risk, as common sense would suggest.<sup>32</sup> These limits are controversial as a public policy matter because they disproportionately affect people with the most serious injuries.<sup>33</sup>

#### **V. SELECTED RISK MANAGEMENT ISSUES**

In this section we consider two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a private organization providing the recreational programming on school facilities would have the same duty of care as a school district.

##### **A. Liability Waivers**

Liability waivers are contracts in which a person or an organization that provides a service or access to facilities agrees to provide that service or access only if the person who receives the service or access agrees to waive any right to bring a tort claim against the provider in the event of an injury. Liability waivers are most commonly viewed through a contract law lens: Do individuals have the power to agree in advance to contract away their right to bring a tort claim for an injury that they may suffer in the future?

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<sup>31</sup> Some states have statutes or case law that articulates a "duty to supervise" children in schools. This duty to supervise simply makes explicit a legal conclusion that almost certainly would result from the application of the ordinary reasonable care standard to the school context. All schools supervise their students and, to the extent that a school is subject to the ordinary reasonable care standard, a school would have the duty to exercise reasonable care in that supervision.

<sup>32</sup> See, e.g., Patricia Born, Kip Viscusi & Tom Baker, *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, J. RISK & INS. (forthcoming 2009).

<sup>33</sup> See, e.g., NICHOLAS M. PACE, DANIELA GOLINELLI & LAURA ZAKARAS, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS xxii (2004) (reporting that "plaintiffs with the most serious injuries . . . have their awards capped most frequently").

As this contract-centered approach to liability waivers makes clear, there is a very serious practical obstacle to using liability waivers for children. Children do not have the power to enter into enforceable contracts. Parents can act with binding authority on behalf of their children in many situations, but courts are reluctant to give parents authority to sign away the tort rights of their children, even in jurisdictions that are generally favorable to liability waivers.

We conclude that there is little or no benefit to schools' using liability waivers in most cases. But there would be a significant cost: the additional time and money involved in administering any liability waiver requirement, plus the reduced access to the facilities for children who forget or lose their waiver forms or who simply cannot get their parents to sign the forms.

### **B. Providing Access through Third Parties**

From a total liability risk perspective, providing recreational access to public school facilities through third parties makes sense in two situations only: either (1) the third party receives the benefit of a liability protection rule that does not apply to the school district, or (2) the third party will do a better job at managing the liability risk. The second situation is beyond the scope of a legal research project such as this.

Our research identified only one relevant situation in which a third party would receive the benefit of a liability protection rule that would not apply to public schools: when a state recreational user statute applies to *private parties* but not to public entities that provide free recreational access to developed urban land.

The optimal approach in most cases, then, would be for the school district to provide access directly, using its own employees, or for the school district to partner with another governmental entity, such as the parks and recreation department of the county or municipality in which the school is located. Of course, there may be budgetary or other reasons why a school may need to use a private partner. In that situation the better arrangement from a total liability risk minimization perspective would be for the school district to receive financial support from the private partner and to provide recreational access directly.

### **CONCLUSION**

In summary, public schools in most states are subject to liability in some situations that could arise out of the recreational use of school facilities. Nevertheless, public schools are protected by some form of governmental immunity in all states, and they are protected in many states by recreational user statutes from lawsuits arising out of injuries from recreational activities. In addition, the law of some states limits the amount of damages that may be assessed in tort lawsuits brought against public schools. While there are real liability risks, our survey of the law of all fifty states leads us to the conclusion that these risks are unlikely to be substantial enough to justify denying recreational access to children who are at risk of obesity. Some schools may have good reasons for closing their playgrounds after hours, but we are skeptical that liability risk is among them.