

2017 Sports Law Year-In-Review
Montana Coaches Association Clinic

Legal Issues In Athletics Administration

Liability for sports injuries. Concussion management protocols for student-athletes. Hazing in school athletics programs. Title IX compliance and gender equity in sports. Freedom of speech and social media legal issues. Freedom of speech and national anthem protests by student-athletes. First Amendment freedom of religion issues in athletic programs. Student-athlete privacy rights. Due process legal protections for student-athletes. Equal protection issues in sports programs. Sports participation legal rights of transgender students.

Over the course of the year, lawsuits were filed, court cases were decided, legislation was enacted, administrative agency rulings were released, state athletic association decisions were issued, and other legal pronouncements were handed down impacting school sports programs. In each instance, the principles established illustrate the importance for school administrators and athletics personnel of understanding contemporary issues in sports law and proactively applying that knowledge to policy development and day-to-day management of their athletics programs.

Liability for Sports Injuries

In August 2017, in *Elias v. Winnetonka High School & Davis*, the Missouri Court of Appeals reversed a lower court dismissal of the lawsuit and ordered a full jury trial in the case of a high school football player who sustained multiple injuries, including a broken ankle, when one of his team's assistant coaches participated in a full contact scrimmage with the high school players. Although the lower court applied statutory immunity to shield the school and its athletics personnel from liability for ordinary negligence related to the decision to allow an adult of significantly greater size, strength, skill, and experience than the high schoolers to participate against them head-to-head, the Court of Appeals noted that statutory immunity does not block liability for gross negligence or intentional torts and that the case should go to a jury for a determination of whether the participation of the coach was so reckless as to constitute gross negligence or possibly even the intentional torts of assault and battery. The ruling illustrates the standard of practice that schools and athletics personnel have a duty to provide proper technique instruction to student-athletes and that allowing the participation of adults or others who might foreseeably injure young athletes violates baseline standards of reasonable care. The decision

also illustrates the limitations of the statutory immunity doctrine and the principle that schools and athletics personnel should not assume that the doctrine will in all situations shield them from liability for an injury to a student-athlete.

In June 2017, in *Ludman v. Davenport Assumption High School*, the Iowa Supreme Court ordered a new trial in a case involving a 2015 jury verdict that inadequate dugout screening was 70% responsible for $1.5 million of damages sustained by a high school baseball player who suffered a fractured skull when hit by a line drive foul ball while standing in the dugout, a determination that under the comparative negligence system resulted in an award to the injured athlete of $1.05 million (with the player being assigned 30% responsibility for failing to elude the foul ball and therefore having to forego $450,000 of the damages). The state Supreme Court ruled that erroneous jury instructions during the first trial may have deprived the school of the opportunity to establish that it had fulfilled its duty to provide a safe playing environment by designing a dugout that met minimum industry safety standards for screening and that the jury instructions also may have misled jurors into believing that they could not assign most or all of the fault for the injuries to the player for his alleged failure to keep a "proper lookout" for foul balls. The state Supreme Court failed to address on appeal another issue that was an important component of the jury's verdict – the refusal to recognize a preseason waiver of liability signed by the injured plaintiff and his parents because the player was a minor and did not have contractual capacity to bind himself to a waiver and because public policy generally prevents third parties such as parents from waiving the legal rights of others such as their children.

In September 2017, a $15 million wrongful death lawsuit was filed in New York, *Mileto v. Sachem Central School District & Sachem East Touchdown Club*, asserting that football coaches violated their duties of proper technique instruction, safe playing environment, and supervision, in a situation where a 400-lb log being carried by Mileto and four other players during a preseason football camp, in a simulation of a drill used in military special forces training, fell on Mileto's head, killing him. The primary issue to be resolved in the case is whether an activity engaged in by Navy Seals or Green Berets during training is reasonably safe for those with the typical size, strength, skill, and athleticism of high school student-athletes. A secondary issue in the suit is whether the school's football booster club – the financial sponsor of the preseason football camp – should be held liable for violation of the duties imposed on schools and athletics personnel to safeguard the health and well-being of student-athletes.

In August 2017, in *Ray v. Chelsea School District and Swager*, the Michigan Supreme Court reversed a lower court dismissal on statutory immunity grounds of a lawsuit filed by the family of a high school cross country runner who was severely injured when he was hit by a car while crossing a street during a pre-dawn team training run being conducted in darkness. The state Supreme Court relied on long-standing precedents that statutory immunity shields public entities (e.g. school districts) and public employees (e.g. athletic administrators and coaches) only against claims of *ordinary* negligence and that a full trial should be held to determine whether the facts of the case indicated that the decision to hold the training run in the dark constituted *gross* negligence by the coach. The ruling illustrates the standard of practice that the legal duty to provide a safe playing environment for student-athletes encompasses not just sports fields, courts, weight rooms, and other such physical venues, but also participation environs such as a route along city streets that a team might use for a conditioning run. The decision also

illustrates the limitations of statutory immunity, a doctrine that athletic personnel often mistakenly assume will shield them from any and all liability for injuries to student-athletes.

Concussions

In July 2017, in *Swank v. Valley Christian School*, the Washington Supreme Court held that a full trial should be held in the wrongful death lawsuit filed by the family of Drew Swank, a high school football player who died after allegedly being prematurely returned to action following a head injury sustained during a game. On the Monday following the Friday night contest where the initial injury occurred, the Swank family's doctor diagnosed a concussion and imposed "no practice, no play restrictions" on the young man. On Thursday, Swank told his mother that his headaches and other concussion symptoms had disappeared and that he wanted to play in the next day's game. His mother contacted the doctor, convincing him to lift the restrictions without a follow-up exam, and based on that medical clearance – despite the fact that before and during the contest Swank appeared to his team's coaches and athletic trainer to be sluggish, confused, and still exhibiting indicia of a concussion – Swank was allowed to participate in the game. Following a play where he sustained a blow to his head, Swank staggered to the sideline, vomited, and collapsed. He was airlifted to a hospital where he died two days later.

The case illustrates an important standard of practice for athletic personnel – the principle that even if a concussed athlete has been cleared by a doctor to return to action, if coaches or athletic trainers believe it is unsafe for the player to participate, the athlete should be withheld from competition. The Washington Supreme Court, in applying the Zackery Lystedt law – the nation's first concussion protocol law, enacted in 2009 – stated that "although the Valley Christian School argues it had a right to rely on Dr. Burns' note that Drew was fit to play, the Zackery Lystedt law does not permit [school athletic personnel] to ignore observable signs that Drew continued to suffer from the concussion he had earlier sustained and ignore its own concussion plan that required the school to remove Drew from play." Athletic directors, coaches, and athletic trainers often operate under the misconception that they cannot "overrule" the clearance-to-participate issued by doctor – the Swank case demonstrates the principle that if athletic personnel recognize the manifestation by an athlete of concussion indicia, the player should be withheld from competition, period.

Hazing

Throughout 2017, pre-trial discovery continued in the case of *Doe v. Hamilton County Department of Education,* a federal civil suit filed against an East Tennessee school district, a high school principal, an athletic director, and a basketball coach related to a high school basketball hazing incident. The plaintiff in *Doe* was a freshman on the Ooltewah High School basketball team, who as part of a hazing ritual, in the basement of a cabin in which the team was staying during a December 2015 road trip, was sodomized with a pool cue and sustained injuries so severe that he had to be rushed to a hospital for emergency surgery. Three other freshmen were also raped with the pool cue during the hazing. The hazing led to the cancellation of the

remainder of the team's 2015-16 basketball season. The three perpetrators of the attack were convicted in a juvenile court of aggravated rape and aggravated assault and received sentences of varying lengths in juvenile detention. The school's athletic director pleaded guilty to failure to report child abuse and entered a diversion program which upon completion will permit his record to be expunged. The head basketball coach pleaded not guilty to similar charges, arguing that the Tennessee Child Abuse Reporting Law is too vague concerning who is required to report instances of sexual assault, to whom the reports should be made, and how timely such reports must be. The pleadings in the civil suit allege knowledge by school personnel of a long history of hazing incidents in Ooltewah's athletic program and a failure to develop and implement effective anti-hazing policies. Based on U.S. Supreme Court precedents, schools and personnel will be held strictly liable when someone in a position to take corrective action has knowledge that such harassment is occurring and exhibits deliberate indifference to remedying the situation, a two-prong analysis resulting in automatic liability if the criteria of *knowledge* and *deliberate indifference* are both established in a civil suit.

A 23-page report issued following an investigation by the Hamilton County District Attorney's Office and a 27-page report issued following an investigation by a law firm retained by the Hamilton County Board of Education set forth numerous recommendations regarding the strategies that schools should adopt when developing and implementing anti-hazing policies for athletic programs, including directives that schools should specifically define prohibited behaviors in the policy, that reporting and investigation protocols should be detailed in the policy, that all athletics personnel should be in-serviced regarding the policy, that all athletics personnel should receive education regarding the state's child abuse reporting law (because most high school sports hazing victims are minors), that all student-athletes and their parents should receive copies of and education regarding the policy, that anti-hazing educational efforts should be focused on student-athletes and changing any culture of hazing that might exist in a school sports program, that appropriate team-building activities should be substituted for now-prohibited hazing rituals, and that athletic personnel should focus on supervising environments where hazing tends to occur, including preseason training camps, hotels during away game overnight stays, aboard buses during road trip transportation, and in unsupervised locker rooms.

Title IX

June 23, 2017 was the 45th birthday of Title IX of the Education Amendments of 1972, the broad-based federal statute banning any form of gender discrimination in educational institutions receiving federal financial assistance, including discrimination manifested through inequities between girls' and boys' high school sports programs. One of the many positive influences of Title IX is reflected in the impact the law has had on increasing sports participation opportunities for females. In 1972, the year of Title IX's enactment, NFHS sports participation data indicated that 294,000 girls participated in high school sports, which represented approximately one out of every 27 girls enrolled nationwide. In 2017, 3.4 million girls played high school sports, an increase to approximately one out of every three girls enrolled nationwide.

Beyond sports participation statistics, Title IX has also led to dramatic improvements in the "other athletic benefits and opportunities" accompanying participation by girls in high school sports – the eleven categories of issues set forth in the Title IX Regulations for evaluating the quality of the sports offerings for girls and boys, represented by the acronym *PLAYING FAIR*.

P - L - A - Y - I - N - G F - A - I - R
*P*rotective athletic equipment, uniforms, and athletic supplies
*L*ocker rooms and practice/competition facilities
*A*llocation of travel/transportation/per diem benefits
*Y*ears of experience, quality, and salaries of coaches
*I*nstitutional housing and dining facilities and services
*N*ature of publicity, marketing, and media services
*G*ame and practice times and scheduling
*F*acilities for and access to athletic training and medical services
*A*cademic tutoring services for student-athletes
*I*nstitutional support services for athletic programs
*R*ecruiting resources provided to athletic programs

In November 2017, in *Struthers et al v. Red Bluff Joint Union High School District*, a settlement was reached in a Title IX lawsuit that had been filed in federal court in California. Included in the resolution of the case was an agreement by the district to add sports for girls to remedy a deficiency in participation opportunities – although 52% of the enrollment at Red Bluff High School was female, only 38% of the school's sports participation opportunities were in girls' sports, a 14% difference that far exceeded the 5% gap generally allowed by the U.S. Department of Education's Office for Civil Rights, the federal agency charged with the responsibility of enforcing Title IX. Also provided for in the settlement were solutions to inequities in eight of the eleven areas of "other athletic benefits and opportunities," including deficient facilities for the girls' basketball team and softball program, a lack of equivalence in locker room quality, and a range of issues related to uniforms, equipment, access to quality coaching, publicity for girls' teams, fundraising support for girls' sports, and institutional support services for girls' teams. The case, like so many other similar Title IX suits, illustrates the importance for school districts of proactively evaluating Title IX compliance and providing timely corrective measures to any concerns identified by coaches of girls' teams, female student-athletes, or parents. In the Red Bluff case, the girls' basketball coach had for several years communicated to district administrators and school board members problems regarding the high school's compliance with Title IX, but she was ignored and eventually was fired, allegedly in retaliation for having raised Title IX concerns. And although retaliation was not part of the Red Bluff lawsuit or settlement, the U.S. Supreme Court, in the 2007 case *Jackson v. Birmingham Board of Education* – a suit involving a girls' basketball coach fired in retaliation for complaining about Title IX violations – ruled that Title IX prohibits retaliation against complainants and that such victims may sue for monetary damages.

In July 2017, in *I.W., A.A., & L.S. v. Huntsville City School District*, a settlement was reached in a case filed against an Alabama district based on what is likely the most common inciting issue nationwide for high school Title IX complaints and lawsuits – facility inequities in

a high school softball complex as compared to the institution's baseball stadium, with the difference in the facilities resulting from improvements to the baseball stadium funded by booster club money. The settlement included an agreement that Huntsville High School's softball facility would receive upgrades to make it equivalent to the institution's baseball stadium, including a regulation softball field, dugouts, fencing, a press box, concession stands, lighting, batting cages and pitching machines, a restroom, and a storage room. The case illustrates the principle that schools are permitted to receive financial support from outside sources, including booster clubs, fundraising, donors, and corporate sponsors, but that the school is nonetheless obligated to remedy any Title IX inequities resulting from the use of such monies to improve boys' sports programs.

Constitutional Law: Freedom of Speech & Social Media

In February 2017, the U.S. Fifth Circuit Court of Appeals refused to grant a rehearing in *Bell v. Itawamba County School Board*, an August 2015 decision by that appellate court sitting *en banc* (all 15 active judges participating) which reversed a December 2014 ruling by a Fifth Circuit three-judge panel that the district had violated the free speech rights of a student expelled from his extracurricular activities and suspended from school for posting online a video he created featuring a rap song that accused two coaches at Itawamba Agricultural High School (Mississippi) of inappropriate conduct with female students. In the 2015 *en banc* ruling, the Court of Appeals upheld the district's sanctions and ruled that it did not violate the student's free speech rights based upon the "substantial disruption" standard established in the U.S. Supreme Court's 1969 decision in *Tinker v. Des Moines School District,* concluding that the intimidating and harassing language directed at school officials in the postings could reasonably be forecast to cause a substantial disruption on school property and that, despite the fact that the postings took place off school property, the school had the authority to punish the offender.

Constitutional Law: Freedom of Speech & National Anthem Protests

As with so many other actions by professional athletes that filter down to college, high school, and youth sports, former San Francisco 49ers quarterback Colin Kaepernick's national anthem protests during the 2016 season have been imitated by athletes at all levels. During the 2016-17 school year, and again in the fall of 2017, hundreds of college, high school, and youth sports athletes have engaged in similar stands at the beginning of games. The issue facing school and athletic administrators has been whether to sanction players conducting such protests with suspensions or expulsions from their teams and whether such punishments would be constitutionally permissible or would violate the student-athletes' First Amendment rights to freedom of speech and protest.

Based on U.S. Supreme Court decisions interpreting the authority of schools to limit student speech, any penalties levied by a public school (a state actor) against a student sitting or kneeling during the national anthem would likely fail judicial scrutiny on constitutional grounds should the student file a free speech challenge. In the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District* (1969), a case in which students conducted an anti-Vietnam War protest that was just as controversial then as the national anthem protests are

today, Justice Abe Fortas made the now-famous statement in the Court's majority opinion that "students do not shed their constitutional rights at the schoolhouse gate" and concluded that schools do not have the authority to limit student speech unless it "materially and substantially" interferes with the educational process. Subsequent Supreme Court rulings clarified that schools may limit on-campus student speech that is lewd or profane, speech that is part of the school curriculum such as a student newspaper, and speech that advocates drug use by students in violation of a school policy. The national anthem protests that have taken place at dozens of high school sports events nationwide over the course of the last year do not fit into any of those categories of permissible restrictions on student speech. Although the protests have been controversial and have created a generalized buzz in schools and communities, there has been no evidence that a substantial disruption has occurred that interfered with the ability of the school to function or with the ability of teachers to conduct their classes. And courts have consistently refused to apply the legal standard that interscholastic sports participation is a privilege, not a right when freedom of speech issues are involved in a sanction imposed on a student – alleged free speech violations receive a higher level of review referred to by courts as "strict scrutiny."

Despite the objections from community members that sometimes arise when protests by student-athletes take place during the national anthem – blowback that is often highly vitriolic in nature – most school and athletic administrators have demonstrated strong and positive leadership on the issue. For instance, on October 6, 2017, a football player at Clear Creek-Amana High School in Iowa chose to kneel before a game to protest social injustice. In the following days, he was the victim of racist postings on social media and to show support for their teammate, on October 13, 2017, many of the players on the team joined him in kneeling pre-game. In advance of their actions, the players announced that they wanted the community to understand that they were not going to be protesting the national anthem itself, nor were they going to be protesting against the flag itself, nor did they intend any disrespect to those serving in the military (many of them stated that they had family members who had served or were currently serving in the armed forces) – instead, the team members emphasized that they were protesting only social injustice.

After the second-game protest, there was intense blowback from a small number of community members, with a few arguing that the players should be removed from the team and expelled from school. There were even a few social media postings calling for the players – all U.S. citizens – to be deported. The district countered by issuing a statement supporting the right of students to protest, with the release reading in part, "The Clear Creek-Amana Community School District, as an educational institution, supports the free exchange of ideas embodied by the First Amendment. The District will not interfere with a student's right of expression by peacefully kneeling or sitting during the traditional standing for the National Anthem." The school's athletic director, exercising the teachable-moment approach to leadership that is so common among those who work in education-based athletics, stated that not only did the student-athletes have the *right* of free speech, but as American citizens they have the *duty* to protest against any shortcomings they believe are occurring in the operation of our democracy, including social injustice. He also commented that his hope was that the education the student-athletes were receiving at Clear Creek-Amana High School would provide them with the

skills of informed critical thinking necessary for them to engage in a lifetime of political advocacy for their country.

Constitutional Law: Freedom of Religion

In October 2017, in *Kennedy v. Bremerton School District*, the U.S. Court of Appeals for the Ninth Circuit ruled that a Washington school district was not required to allow a high school football coach to pray on the field at the end of each game, an activity that often involved players, coaches, and other students. The decision was based on the U.S. Supreme Court's ruling in *Santa Fe ISD v. Doe* (2000), in which the Court held that prayer at sports events sponsored by "state actors" violates the Establishment Clause. Although the ruling prohibited prayer sponsored by schools or school personnel, the Supreme Court made it clear in its written opinion that the Establishment Clause does not limit the ability of student-athletes or students to pray anytime they choose on school property, including before, during, or after school sports events. The First Amendment bars only government involvement in that prayer by state actors such as public school employees and athletic personnel. Therefore, spontaneous prayers initiated by players in a locker room or on a field are permissible as private speech – it is only the involvement, endorsement, and promotion of religion or a particular denomination by a government employee such as a public high school coach that is constitutionally impermissible.

In September 2017, in *Matthews v. Kountze Independent School District,* a Texas Court of Appeals ruled that the display of Bible verses on run-through banners created and held aloft by cheerleaders at the beginning of Kountze High School football games was protected as "private speech." The dispute arose in September 2012 when the district, concerned that the display of the verses violated the First Amendment's Establishment Clause, prohibited the practice. Citing their free speech and free exercise of religion rights, the cheerleaders filed a lawsuit and a state trial court judge issued a temporary restraining order staying the implementation of the ban pending a full resolution of the case. In April 2013, the district changed its policy to allow such banners at school sports events and in May 2013, the same judge who had previously issued the temporary injunction ruled that the display of the banners was constitutionally permissible. The Kountze ISD then requested that a state appellate court clarify the district's obligations regarding church-and-state issues, but in May 2014, a Texas Court of Appeals ruled that the issue was moot because of the district's policy change. A January 2016 decision by the Texas Supreme Court stated that the issue was not moot, because the district could reinstate the ban in the future if it so decided, and remanded the case back to the Texas Court of Appeals for a full review of the First Amendment issues related to the situation, foremost the question whether the banners are school-sponsored speech, in which case they are impermissible under the Establishment Clause, or whether they are private speech by the cheerleaders, in which case they are permissible based on the Free Speech Clause and the Free Exercise of Religion Clause. The decision by the Texas Court of Appeals that the cheerleaders were engaged in private speech may not be representative of the approach of the courts in most states towards such issues – the Texas court sidestepped the fact that the cheer squad was a school-sponsored (government-sponsored) organization, that the cheer sponsor was a public employee (a government employee), and that the display of the Bible verses on the run-through banners carried the strong imprimatur of government-endorsed speech.

Constitutional Law: Invasion of Privacy

In May 2017, a plea deal was reach in a California criminal case, *State v. Mathers*, illustrating the need for operators of athletic facilities, including schools, to enact reasonable rules and safeguards designed to protect the privacy of individuals using restrooms, locker rooms, and shower rooms against surreptitious photography using digital cameras, smartphones, tablets, or other devices. The situation involved a former Playboy Playmate of the Year, Dani Mathers, 29, who took a picture of a 70-year-old woman in a locker room shower at an LA Fitness Center and posted the image on her Snapchat social media account, along with a mocking caption "fat-shaming" the elderly woman. Mathers received extensive backlash for the malicious act from her Snapchat followers, the media, and her radio-station employer, who fired her after the incident, and the victim is threatening a civil suit for invasion of privacy. Although Mathers argued to authorities investigating the incident that the victim did not have a reasonable expectation of privacy in a shower room, the Los Angeles City Attorney's Office – although acknowledging a diminished level of privacy against what presumably was a limited number of persons who might have been physically present in the fitness center locker room – concluded that no one would expect a nude photo taken without permission to be disseminated to tens of thousands on social media. The criminal charge filed against Mathers was an invasion of privacy cause of action called Dissemination of Private Images, which although it carried a possible sentence of up to six-months in jail, resulted in a diversion sentence for the defendant through which she pleaded guilty, paid a fine, and was ordered to perform community service, following which the conviction will be expunged from her criminal record. The lesson to be learned from the situation for school athletic programs is that student-athlete codes of conduct should include strict prohibitions on the use of cameras in any form, now ubiquitous in their presence in electronic devices, in locker rooms, shower rooms, and restrooms, and that an emphasis should be placed by athletic personnel on educating student-athletes regarding common sense parameters for the posting of images and messages on social media.

Constitutional Law: Due Process

In February 2017, in *DeLaTorre v. Minnesota State High School League*, a federal judge refused to reconsider his August 2016 ruling dismissing a lawsuit filed by a former high school soccer player who claimed that the state athletic association had violated his constitutional right to due process when it refused to grant to him an exception to the state's transfer and residency requirements for athletic eligibility. The case involved a student at Cretin-Derham Hall High School whose parents were divorced and who in 2012 had moved from Mexico with his mother and sister and played on the high school soccer team, followed by a decision to return to Mexico to live with his father for his sophomore year of high school. When he returned to CDH for his junior year and attempted to regain his eligibility to play interscholastic soccer, DeLaTorre discovered that he would be required to sit out a year and would not be eligible until his senior year. After an appeal to the MSHSL failed, he sued the association and several of its officials for a violation of his right to due process. In ruling that DeLaTorre did not have a constitutionally protected property or fundamental liberty interest to successfully make a due process claim, the judge cited numerous judicial rulings holding that participation in interscholastic athletics is a

privilege, not a constitutional right. The court therefore concluded that, because DeLaTorre had prior notice of the eligibility rules and transfer bylaws, along with receiving an opportunity to request a waiver and appeal the denial of that waiver, his legal interests had been more than adequately protected.

Constitutional Law: Equal Protection & Transgender Students

In March 2017, the U.S. Supreme Court, in *G.G. v. Gloucester County School Board*, vacated an April 2016 ruling by the U.S. Court of Appeals for the Fourth Circuit holding that the refusal by a school to allow the use by transgender students of school facilities (such as restrooms) consistent with their gender identity was unlawful because such restrictions constitute gender discrimination specifically prohibited under Title IX as clarified by a May 2016 Dear Colleague Letter issued by the Department of Education's Office for Civil Rights, a DCL withdrawn in February 2017 by the new presidential administration. The case involved a female-to-male transgender boy who had been using the boys' restrooms at Gloucester High School (Virginia), with no problems arising from his use of those facilities until community members objected on political grounds, followed by the school district enacting a ban on the practice. The Supreme Court had agreed to hear an appeal of the Fourth Circuit's ruling and a decision by the Court might have provided a nationwide precedent that would have provided clarity for schools regarding their legal obligations to transgender students and student-athletes regarding facilities usage. By instead vacating the Fourth Circuit's ruling and remanding the case for reconsideration in light of the withdrawal of the May 2016 DCL, the Supreme Court left the nation's school districts without bright-line guidance regarding their responsibilities to transgender students.