SPORTS LAW YEAR-IN-REVIEW
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Legal Issues In Athletics Administration

Liability for sports injuries. Concussion management protocols. Title IX compliance. Student-athlete free speech rights. Student-athlete freedom of expression. Freedom of religion issues in school sports programs. Student-athlete privacy rights. Equal protection issues in athletics programs. Miranda rights in school and athletics settings. Hazing. Sexual harassment. Disabilities law applied to school sports programs. Federal and state legislation impacting athletics programs. Throughout 2013, federal and state court cases were decided, legislation was enacted, and administrative agency rulings were released impacting school sports programs. In each instance, the legal principles established by the legal pronouncement 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 athletics programs.

Liability for Sports Injuries

Throughout 2013, cases were decided demonstrating the need for athletics personnel to understand the extensive legal duties imposed on them by courts related to supervision, technique instruction, warnings, safe playing environment, safe equipment, evaluation of injuries, return to action protocols, immediate medical response, emergency medical response planning, and others categories of safe participation mandates.

In January, the final terms of a $14.5 million settlement were approved by a New Jersey Superior Court Judge in the sports injury lawsuit *Domalewski v. Hillerich & Bradsby (dba Louisville Slugger) and Little League Baseball*. In 2006, 12-year-old Steven Domalewski, playing in a Police Athletic League game in New Jersey, took a line drive off an aluminum bat to the chest, went into cardiac arrest, endured a long coma, and sustained permanent brain damage. The suit alleged a failure by Little League Baseball to exercise reasonable care to ensure that players were required to use safe athletic equipment and failures by the bat manufacturer with regard to design and warnings. Domalewski's case is the latest in what in over the last decade has been a series of severe injuries and deaths suffered by high school and youth ballplayers, especially pitchers, because of the dramatically faster exit speeds of balls off aluminum bats than off wood bats resulting from the "trampoline effect" of the metal. The suit and others like it, reinforce the decision two years ago by the National Federation of State High School Associations (NFHS) that effective January 1, 2012, only aluminum and composite bats that meet the Batted Ball Coefficient of Restitution (BBCOR) standard are allowed in high school competition and Ball Exit Speed Ratio (BESR) and Accelerated Break-In (ABI) bats are prohibited. State associations and local jurisdictions are free to enact protections exceeding the BBCOR standard – for instance, New York City, New Mexico, and South Dakota have enacted regulations requiring the use of wood bats at the high school level.

In February, a $1.5 million settlement was reached in *Asiamah v. City of East Hartford Connecticut and East Hartford Public Schools* related to the January 2012 physical education class drowning death of 15-year-old Marcum Asiamah. The original pleadings in the case asserted negligence against school officials and athletics personnel because of inadequate swimming safety protocols, including a lack of reasonable care regarding supervision, technique instruction, and emergency medical response. Also in February, an intent-to-sue filing was made related to the November 2012 physical education class drowning death of 14-year-old Manchester High School (CT) student Malvrick Donkor, an incident in which the boy was discovered at the bottom of the pool 17 minutes after surveillance cameras showed him climbing down a ladder into the deep end and disappearing below the water's surface. In May, the Connecticut legislature enacted a pool safety law that went into effect on July 1 establishing new pool safety standards, mandating a second supervisor for all school aquatic activities, including swim team practices (research by the legislator who introduced the bill indicated that in many schools a single individual would supervise a pool with up to 35 swimmers in the water), and requiring school districts to create and implement pool safety plans by July 1, 2014.

In March, a settlement with undisclosed financial terms was reached in the case of *Creviston v. Marysville USD* related to a 2010 physical education class soccer game at Marysville High School (CA) in which 16-year-old Cheyanne Creviston was attacked by another player and suffered a shattered orbital eye socket and other serious injuries to her face and jaw. The suit had alleged inadequate supervision, improper technique instruction, and encouragement by athletics personnel of overly violent play during competition. Extensive media coverage of the incident has brought renewed attention to the duty of athletics personnel to provide proper technique instruction to athletes, including guidance limiting excessively violent play, directives prohibiting the use of dangerous or illegal techniques, and immediate intervention by coaches to control physical confrontations and fights among student-athletes.

In June, the National Athletic Trainers Association (NATA) at its annual conference issued an inter-association task force position statement, endorsed by both the NFHS and the National Interscholastic Athletic Administrators Association (NIAAA), titled "Preventing Sudden Death In Secondary School Athletics Programs: Best Practices Recommendations." Although the policy guidance does not exhaustively cover all of the conditions leading to the death of high school student-athletes, it addresses in detail the four leading causes: catastrophic brain and neck injuries, exertional heat stroke, sudden cardiac arrest, and exertional sickling. It is a resource that should be read by every scholastic athletic administrator, coach, and trainer, because it represents a nationwide consensus of experts regarding best practices and the exercise of reasonable care to safeguard athletes. Although the recommendations included therein are primarily designed to improve safety standards in school sports programs, implementation of the guidelines will also serve to limit the legal exposure of schools and personnel by demonstrating that reasonable care has been exercised to protect the health and well-being of student-athletes. The position statement was published in the August issue of the *Journal of Athletic Training* and is available at *www.nata.org/sites/default/files/preventing-sudden-death.pdf.*

In September, in a case reflecting the legal risk for athletics personnel of operating in the gray area between intense coaching and abusive treatment of athletes, a New Jersey Superior Court dismissed a lawsuit filed in February 2012 by a high school football player (unnamed because he was a minor) against the Somerville Board of Education and Somerville high school's head football coach claiming the coach bullied him and retaliated against him for refusing to play with an injured leg. The original filings in the case asserted that the coach used extreme profanity in trying to harass the student-athlete into a premature return to action and then retaliated against the player for complaining to administrators about the coach's behavior. Although the court dismissed the case because of inadequate evidence to support the plaintiff's claims, the situation illustrates the difficulty for coaches in the modern sports environment of distinguishing between appropriate motivational strategies and those that cross the line into inappropriate harassment of athletes. Two years ago, representative of a trend occurring across the country, the New Jersey legislature enacted the Anti-Bullying Bill of Rights Act, a law introduced in response to the bullying-related suicide of Rutgers student Tyler Clementi and which sets forth procedures for prevention and remediation of harassment in educational institutions, including school sports programs. In the two years since the statute went into effect, numerous complaints have been filed across the state against college and high school coaches accused of bullying or harassing student-athletes, including the highly publicized firing of Rutgers basketball coach Mike Rice for physical and verbal abuse of his players. Similar increases in bullying complaints have occurred nationwide in professional, college, and high school sports, making it incumbent upon athletics personnel to recognize their potential legal exposure arising from over-the-line harassment of athletes, especially in the arena of education-based, school athletics program.

In October, a jury in *Swee v. Kansas City Blazers Swim Club* absolved the private swim team of liability for injuries sustained by a 13-year-old female swimmer during a 2008 practice when swimmers who failed to meet 25-yard interval goals were required to perform sets of pushups on the pool deck that would increase by a multiple of two for each failed interval time. Swee missed multiple consecutive interval objectives and because of the geometric increase in the required numbers, ended up performing 1024 pushups, resulting in shoulder injuries that have resulted in multiple surgeries and ongoing pain. Although the jury ruled against the injured swimmer because of technicalities related to proving that the pushups incident was the sole cause of her shoulder injuries, the issues considered during the trial – including the appropriateness of using extreme levels of physical punishment and coercion as a motivational technique and the need for athletics personnel to carefully monitor athletes for injuries and incapacities that might arise during extreme levels of physical exertion – have resulted in a reassessment of policies for coaches by USA Swimming, the national governing organization with which the Blazers Swim Club is affiliated.

A number of sports injury incidents occurred during 2013 that illustrate the need for both safety and legal reasons for athletics personnel to fully understand and exercise reasonable care with regard to the duties imposed by courts and legislatures on school sports programs. In March, Joshua Lorenzo Ramirez, a Hereford High School (TX) distance runner, died eight days after being hit in the hip by a discus thrown during the field events part of a track meet as he was stretching in preparation for his two-mile event. The overlapping layout of the warm-up and competition areas at the meet placed athletes in the direct "line of fire" of shot puts, javelins, and discuses, demonstrating the importance of the duty to provide a safe playing environment, one component of which is the responsibility to carefully evaluate the layout and setup of any sports venue to minimize the likelihood of injury from multiple, simultaneous activities in the event space.

In April, following an incident where several members of the Cascade High School (IN) track team were disciplined by coaches by being forced on a hot day to do "bear crawls" on an asphalt track, resulting in severe burns, several parents of the injured student-athletes stated their intent to sue the coaches and the Mill Creek Community School Corporation. The district responded promptly to reports of the incident by immediately initiating an investigation, placing the coaches on administrative leave, and satisfying the requirements of the state child abuse reporting law by notifying the Indiana Department of Child Services. The incident is similar to a number of other cases that have occurred in the last decade where courts have assigned liability to schools and athletics personnel on the basis that excessive corporal punishment constitutes a violation of the duties of proper technique instruction, selection and training of athletics personnel, and supervision.

Also in April, a police investigation was initiated related to injuries sustained at a team camp in July 2012 by a Thunder Mountain High School (AK) football player who was allegedly knocked unconscious by a coach during a series of boxing matches that had for undisclosed reasons been incorporated into the football

camp activities. The incident, captured on video that was turned over to police, allegedly showed the coach, after knocking out the 14-year-old freshman player, raising his arms and doing a victory dance around the room. An issue in the ongoing police investigation is whether school and athletics administrators, after receiving notification of the incident, satisfied the requirements of the applicable child abuse reporting law either in Alaska, where the school is located, or in Oregon, where the camp took place. The situation is another in a lengthy series of incidents and court cases in recent years where student-athletes have been injured by coaches during practice or other sports-related activities in violation of the duties of proper technique instruction, proper matching and equating of participants using safety-based criteria, and lack of proper supervision.

In November, the family of Donnovan Hill, a Lakewood, California, Pop Warner football player who sustained a catastrophic neck and spinal cord injury resulting in quadriplegia during a 2011 game, sued the Pop Warner organization and the team's coaches for allegedly teaching head-down tackling techniques and encouraging players to make helmet-to-helmet contact. The lawsuit asserts violation of the duties of proper technique instruction, selection and training of athletics personnel, supervision, and emergency medical response. Although Pop Warner rules at the time of the injury prohibited head-down contact and the organization announced in August of 2013 that it is joining the Heads Up Football program and will require coaches in all of its member associations nationwide to earn proper technique certification before the 2014 Pop Warner football season, the suit alleges that Donnovan Hill's coaches taught and required head-down tackling and berated players who complained that they might be hurt from helmet-to-helmet contact. The suit seeks damages sufficient to pay for the 24/7 medical assistance that Hill will require for the rest of his life.

Throughout 2013, discovery continued in a lawsuit against a school district and football coaches by the family of Isaiah Laurencin, a high school football at Miramar High School (FL) who died in July of 2011 from heatstroke after collapsing during a preseason practice in high temperatures. The suit alleges that coaches violated their duties regarding the evaluation of injuries and incapacities because they had knowledge that Laurencin had sickle cell trait, which made him more susceptible to heatstroke and other exertional issues. In a recent longitudinal study of heat-related deaths in college and high school sports, the National Center for Catastrophic Sports Injuries reported that about one such fatality had occurred per year from 1980 through 1994, but that roughly three heat-related deaths have occurred per year since 1995.

Concussions

In May, a Colorado jury awarded $11.5 million in damages to Rhett Ridolfi, a former high school football player who in 2008 suffered a concussion resulting in severe brain damage and paralysis during practice at Trinidad High School. Named as defendants in the lawsuit were the Trinidad School District, nine administrators and coaches, and football helmet manufacturer Riddell. $3.1 million of the damages was assessed against the helmet manufacturer, not for design defects but for negligence in providing warnings about the risks of concussions and exaggerated marketing claims regarding the extent to which the company's helmets would reduce the incidence of concussions. The remainder of the damages fell upon the district and its personnel based on the use during the football practice when Ridolfi was injured of a "Machine Gun Drill" in which players were allegedly forced by coaches to make repeated helmet-to-helmet collisions with teammates.

In September, a $2.8 million settlement was reached between the family of Ryne Dougherty, a Montclair High School (NJ) football player who died two days after collapsing during a 2008 game, and the Montclair School District and eight school administrators, coaches, and athletic trainers. The lawsuit asserted that despite Dougherty having sustained a concussion in a previous practice, he died from "Second Impact Syndrome" after coaches and trainers allowed him to return to action prematurely despite the fact that he was continuing to exhibit signs of a traumatic brain injury.

In October, a California court finalized the management and disbursement terms of a $4.4 million settlement reached in 2012 by the family of Scott Eveland, a former football player at Mission Hills High School who during a September 2007 game suffered permanent brain damage from aggravation of a prior head injury, with the San Marcos USD and six administrators, coaches, and athletic trainers. A separate $500,000 settlement had previously been agreed to with helmet manufacturer Riddell. Testimony offered in depositions, more than 250 of which were taken in the case, asserted that during the week before the game, Eveland had complained to coaches and trainers about the onset of headaches and other concussion indicia after he had sustained a helmet-to-helmet hit in practice, but that coaches had allegedly forced him to continue to practice and then play in the game. Most damaging to the defendants' case was testimony that immediately before the game was to begin, the team's head athletic trainer went to the head coach to report that Eveland should be held out of the game because he had a headache so severe that he couldn't focus his eyes and the coach responded by screaming at the trainer that "Scotty was his (expletive) football player and that if he wanted to put Scotty in the game, he was going to damn well put him in the game … you're not a (expletive) doctor."

In October, the Institute of Medicine & National Research Council of the National Academies, supported by a number of government health agencies and private organizations, issued a position statement summarizing the results of a multi-year study of sports-related concussions and recommending actions that should be taken by a range of constituents, including school districts and athletics personnel, to prevent and remediate concussions in sports. The report, titled *Sports-Related Concussions in Youth: Improving the Science, Changing the Culture,* provides a detailed examination of concussion rates by sport, treatment protocols for athletes, and strategies for changing the "culture of resistance" in sports to the reporting of possible concussions by athletes. The report, and the standards of practice set forth therein, could serve as a valuable tool for any

state association or school district seeking to refine and improve its concussion management protocols. The document is available at *www.iom.edu/~/media/Files/Report%20Files/2013/Concussions/concussions-RB.pdf*. On November 1, the NFHS issued a press release endorsing the report, especially its call for injury surveillance and a culture change regarding the disclosure of head injuries by student-athletes. The release noted that an important tool available to schools is the NFHS course, free and available online – *Concussion in Sports: What You Need to Know* – which since its 2010 launch has been completed by more than 1.2 million athletics administrators, coaches, officials, student-athletes, and parents. For more information, visit *www.nfhslearn.com*.

In June, South Carolina became the 49th state to enact concussion legislation. Mississippi is the only state yet to enact a concussion law; despite three bills introduced during its 2013 legislative session, none advanced beyond the committee stage. Most of the state laws enacted to-date contain three common tenets: ① any athlete suspected of having sustained a concussion must immediately be removed from play; ② the athlete may not be returned to action the same day; and ③ the athlete may be returned to action only after written clearance is provided by a licensed health profession (the definition of which varies widely from state-to-state). Some of the state laws contain additional requirements, including mandates that athletics personnel complete an annual concussion education course, that baseline testing be implemented by schools, or that student-athletes and parents be provided with concussion education materials and sign a concussion-information form. Administrators and coaches should be familiar with the details of their state's concussion statute; the full-text of each state law may be accessed through the National Conference of State Legislatures at *www.ncsl.org/research/military-and-veterans-affairs/traumatic-brain-injury-legislation.aspx*.

In May, U.S. Senator Jay Rockefeller (D-WV), introduced federal legislation – the *Youth Sports Concussion Act* – that if enacted would require the Consumer Product Safety Commission to set safety standards for helmets and regulate false safety claims regarding protection against concussions in the marketing of helmets, add-on products, and other sports equipment. The progress of the bill, S.1014, may be tracked using the Library of Congress' website for legislation currently in Congress at *www.thomas.gov*.

Title IX

In January, a report was issued by the U.S. Department of Education's Office for Civil Rights (OCR) quantifying its work over the four-year period from 2009 through 2012 and showing that out of 4,138 Title IX complaints filed, 1,264 focused on inequities in college and high school athletics programs and an additional 612 involved allegations of retaliation against those who had reported Title IX violations in sports programs.

In June, in the latest effort by Congress to enact federal Title IX reporting legislation applicable to school athletics program, an amendment was attached in a U.S. Senate committee to the proposed reauthorization of the *Elementary and Secondary Education Act* (*ESEA*) that would require high schools to annually report to the U.S. Department of Education and make available to the public Title IX-related data, including male and female sports participation rates and information about budgets and benefits for boys' and girls' sports. As of the end of 2013, the larger ESEA bill was stalled in committee in the U.S. House. The *High School Data Transparency Act*, if enacted, would parallel the Title IX reporting requirements already in place for college athletics programs pursuant to the federal *Equity in Athletics Disclosure Act* (*EADA*). The legislation's progress may be tracked at *www.thomas.loc.gov*.

In September, the OCR reached a settlement with the District of Columbia Public Schools (DCPS) regarding a complaint filed in May 2012 alleging Title IX inequities in DCPS athletics programs. The OCR investigation in the case revealed that 60% of the district's high schools had gaps between female enrollment and sports participation exceeding ten percent. Five percent or less is the generally acceptable range, often referred to by the OCR as Title IX's "safe harbor" for equal participation opportunity. The OCR investigation also identified inequities facing female student-athletes in DCPS schools in eight of the eleven Title IX areas of "other athletics benefits and opportunities," including facilities, coaching, uniforms and equipment, scheduling of games and practice times, travel, and resources allocated to sports. The resolution agreement sets forth a strict timeline under which DCPS schools must remedy the identified problems. The settlement provides a blueprint for athletics personnel seeking a more thorough understanding of the OCR's expectations regarding Title IX compliance and the full-text of the resolution agreement is available in the OCR's Reading Room at *www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html*.

Also in September, the Portland, Maine School District (PMSD) reached a resolution agreement with the OCR regarding a Title IX complaint filed in June 2012. The settlement mandates that the district must add 110 athletic participation opportunities for females and correct inequities in facilities, locker rooms, coaching, and budgets for girls' sports teams throughout the PMSD.

In May the OCR resolved a Title IX complaint filed two years ago by the National Women's Law Center against the Clark County (NV) School District as part of a class action against 12 districts across the U.S., one in each of the OCR regions. The investigation revealed participation gaps of up to 22 percent between female enrollment and sports participation rates and the settlement established a timeline for the addition across the district's 36 high schools of the 2,613 additional sports participation opportunities for girls necessary to equalize athletics opportunities. The settlement is available in the OCR's online Reading Room.

Throughout 2013, as in recent years, issues arose across the U.S. related to the participation of girls in sports that traditionally – decades ago – were limited solely to males. In Georgia, athletics administrators at Strong Rock Christian School, banned a middle-school girl from competing for its football team not for safety reasons but because, according to the girl's mother, "(the athletic director) told me students are coming of age

and the boys will have impure thoughts and urges and they have the locker room talk that it's not appropriate for girls to hear ... and he really feels that there's not supposed to be mixing of the genders." In Indiana, a lawsuit has been filed against the Eastern Pulaski Community School Corporation on behalf of a middle-school girl prohibited from trying out for the Winamac Middle School football team. The complaint states that the athletic director barred the girl from trying out for football solely because she is female and informed the girl that her sports choices were limited to volleyball or cross country. In Ohio, administrators for the Liberty Union-Thurston Local Schools settled a legal action challenging the ban of a middle-school girl from her football team based not on an individualized assessment of her ability to safely compete, but on a belief by district administrators that it is inappropriate for girls to play sports alongside boys. Courts have consistently ruled that, based on Title IX and equal protection guarantees, a girl must be allowed to try out for a boys' team when her school doesn't offer the sport for girls and she may be cut from the boys' team, but only for a lack of size, strength, skill, experience, and ability that impair her ability to safely compete and for which a boy of identical size, strength, skill, experience, and ability would have also been cut. According to 2012-13 participation data from the NFHS, 1,660 girls nationwide played on high school football teams and more than 11,000 girls played on boys' teams when their schools didn't offer a sport specifically for girls.

In April, in a case representative of a common scenario leading to Title IX disputes, female softball players at Batavia High School (BHS) and their parents have filed a lawsuit in a federal trial court in New York against the Batavia City School District alleging facilities inequities between the softball field, which doesn't have an outfield fence (because the softball venue overlaps with a soccer field), a grandstand, lights for night games, a scoreboard, a press box, bullpens, or covered dugouts, while the school's baseball team plays its games in an amenities-laden, city-owned, minor league baseball stadium. The suit is an instructive one for athletics personnel in that the underlying dispute originated from a perception of same-sport inequity focused solely on the differences between the baseball and softball venues, but once filed and under the control of the court will expand to include a Title IX three-prong-test review of sports participation opportunities for the girls enrolled at BHS and a thorough analysis of the entire BHS athletics program to determine whether inequities exist in the any of the eleven categories of "other athletics benefits and opportunities" attendant to sports participation. Athletics administrators must be highly proactive in constantly assessing all aspects of their sports programs in order to identify any possible perceptions of inequity between boys' and girls' sports and to remedy those issues before intervention by the OCR or courts. The full-text of the lawsuit filed against BHS is available at *www.empirejustice.org/assets/pdf/issue-areas/civil-rigths/batavia-city-school-district.pdf.*

In March, in the latest ruling in the ongoing case *Biediger v. Quinnipiac University*, a lawsuit originally filed in 2009 focusing on the issue whether competitive cheer may be considered a sport for Title IX purposes and whether participants in competitive cheer may be counted as student-athletes when calculating a school's compliance with Title IX's "substantial proportionality" measure, a U.S. District Court judge in Connecticut ruled that Quinnipiac University's has to-date failed to bring its competitive cheer squad into compliance with the criteria set forth by the OCR for determining whether an activity is a sport. The decision includes a detailed analysis whether competition was the primary objective of Quinnipiac's competitive cheer squad; whether the team operated under the umbrella of a governing organization; whether consistent rules and scoring systems were used for all competitions; whether the squad competed against appropriate levels of competition; and whether the team was structured and operated similar to all other varsity sports at the university. To learn more about the precise standards for classifying an activity as a sport for Title IX purposes, the OCR's 2008 policy guidance on the topic is available at *www2.ed.gov/about/offices/list/ocr/letters*.

Constitutional Law: Freedom of Speech

Courts continue to struggle with the issue whether schools have the authority to sanction students or student-athletes for inappropriate, off-campus postings on social media websites in violation of school or athletics codes of conduct. Some courts have held that such punishments violate student-free-speech rights while others have decided that schools may sanction such communications, but only if they create a substantial disruption at school, constitute bullying or harassment, or manifest a threat of violence.

In August, the U.S. Court of Appeals for the Ninth Circuit, in *Wynar v. Douglas County School District*, upheld the expulsion from school and extracurricular activities of a student at Douglas High School (NV) for online comments suggesting that he was going to perpetrate a mass shooting at the school. The court ruled that such a threat was presumptively considered to satisfy the "substantial disruption" standard from the U.S. Supreme Court's 1969 decision *Tinker v. Des Moines School District*.

In contrast, in July, a U.S. District Court in Nevada, in *Rosario v. Clark County School District*, refused to dismiss claims of free speech violations by a member of the Desert Oasis High School basketball team who was suspended for making a series of eight objectionable tweets about his coaches and school administrators. The court decided that one of the tweets met the legal definition of obscenity and thus was not entitled to any free speech protection, but that the other seven tweets, although profane, were not obscene and therefore might be entitled to protection in the absence of a showing by the school that they resulted in a substantial disruption. The case will proceed to a full trial on the issue whether such a disruption occurred because of the postings.

In September, a U.S. District Court in Oregon, in *C.R. v. Eugene School District 4J*, held that the district did not violate a student's free speech rights when he was suspended from school and extracurricular activities for off-campus speech in which the student directed sexually harassing comments at two classmates with

disabilities. The court ruled that harassment, bullying, or abuse of other students, even when perpetrated off-campus, satisfy the *Tinker* substantial disruption standard.

In February, a settlement was reached in *S.J.W. v. Lee's Summit R-7 School District* (MO), a case in which twin brothers were suspended in March 2012 from school and extracurricular activities for posting racist comments online about classmates. In October 2012, the U.S. Court of Appeals for the Eighth Circuit ruled that a lower court had erred in granting the brothers an injunction barring on free speech grounds their suspensions and the appeals court held that even though the postings were made off-campus, the situation must be analyzed using the substantial disruption standard. The case was on appeal to the U.S. Supreme Court at the time of the settlement which allowed them to return to school almost a year after the original suspension had been imposed.

Until the U.S. Supreme Court accepts and hears an appeal in a social media-free speech case and establishes a rule of law specifically tailored to the unique issues of off-campus digital communications, schools and athletics programs will continue to face the risk of judicial intervention in the suspension of students and student-athletes for online postings and uncertainty concerning the outcome of such cases.

Constitutional Law: Freedom of Expression

In March, a U.S. District Court judge in Indiana, in *Hayden v. Greensburg Community School Corporation*, upheld the district's dress code and grooming policy for student-athletes in deciding that a mandatory hair-length limitation for basketball players does not violate the students' due process and equal protection rights. The mother of a player who was dismissed from the team for refusing to get his hair cut requested an exemption from the policy for her son in separate meetings with the coach, principal, and superintendent before filing the lawsuit. The court, although acknowledging that under the U.S. Constitution's Fourteenth Amendment a person's hairstyle is a protectable liberty interest, held that participation in school athletics programs is a privilege, not a right, and may be conditioned on compliance with a student-athlete code of conduct, including regulation of hairstyle. The court also decided that the mother's three separate opportunities to discuss the hair-length rule with school personnel satisfied the minimal due process requirements required for an activity that is a privilege and not a constitutionally-protected property right.

Constitutional Law: Freedom of Religion

In May, a Texas state trial court judge ruled in *Matthews v. Kountze Independent School District* that the display by Kountze High School cheerleaders of banners bearing Bible verses does not violate the Establishment Clause in the First Amendment to the U.S. Constitution. In September 2012, the Kountze Independent School District, concerned that the display by a public school of the religious-themed messages violated the Establishment Clause because the banners displayed only New Testament verses and promoted a specific religious denomination, prohibited the banners at school sports events. The cheerleaders filed a lawsuit and the same trial court judge issued a temporary restraining order staying the implementation of the ban pending a full resolution of the case. After his May 2013 decision, the Kountze ISD filed an appeal with a state appellate court to clarify its obligations as a state actor regarding church-and-state issues. The appeal will be heard in 2014. Unclear from the trial court judge's written opinion in the case is whether he would have ruled the same way if the cheerleaders would have chosen to alternate the display of New Testament verses with quotations from other religious texts such as the Old Testament, the Koran, the Book of Mormon, the Buddhist Sutras, or the Hindu Vedas and Kountze community members had then objected to the display of religious verses promoting faiths with which they were not affiliated or with whose belief systems they disagreed.

In July, in an unusual sports-related freedom of religion case, *Sedlock v. Encinitas Union School District*, a California state trial court ruled that yoga activities incorporated into the district's physical education curriculum were secular health and exercise initiatives, not religious instruction in violation of the First Amendment's Establishment Clause. The parents who had filed the lawsuit on behalf of their children argued that yoga poses are religious and spiritual in nature and constitute coercive religious indoctrination. The court disagreed and found that the activity's sole purpose was improving the health and wellness of the students.

Constitutional Law: Invasion of Privacy

In May, in *Wyatt v. Fletcher*, the U.S. Court of Appeals for the Sixth Circuit ruled that two softball coaches at Kilgore High School (TX) were not liable for invasion of privacy for revealing a student-athlete's sexual orientation to the student's parents. The player, S.W., had revealed to close friends that she was a lesbian and the friends passed the information along to the coaches who, concerned about S.W.'s relationship with an older girl who they believed to be a bad influence, communicated S.W.'s sexual orientation to her mother. The court found that there is no "clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students' interests, even when private matters of sex are involved."

Constitutional Law: Equal Protection

The development of fair, practical, and legally sufficient policies regarding the inclusion of transgender athletes in sports activities is one of the latest civil rights challenges facing sport governing bodies and educational institutions. In August, California became the first state to enact legislation codifying the rights of

transgender students to choose whether they wish to participate in boys' sports or girls' sports based on self-perception of gender identity, regardless of birth gender, and to allow those students to use locker rooms and restrooms consistent with that self-perception.

Only recently have sport governing bodies begun to enact policies and specific regulations to address transgender issues. In 2004, the International Olympic Committee (IOC) became the first sport governing body to create a transgender participation policy. Effective beginning with the Summer Olympics in Athens, the protocol, known as the Stockholm Consensus, features a set of criteria for determining the eligibility of transgender athletes, including whether sex reassignment occurred before or after puberty, whether surgical anatomical changes have been completed, whether hormonal therapies have been administered, and whether legal recognition of the reassigned gender status has been conferred. The full-text of the IOC policy is available at *www.olympic.org*.

Following implementation of the IOC procedures, other sport governing bodies such as USA Track and Field, the United States Golf Association, and the National Collegiate Athletic Association (NCAA) developed transgender participation policies. The NCAA guidelines require member universities to follow the gender classification that has been granted to a student-athlete by his or her state, including sex status on the driver's license, voter registration, tax filings, and other official documents. The student-athlete must compete in the gender classification that matches his or her state classification. Details on the NCAA transgender eligibility policy are available at *www.ncaa.org*.

Although the NFHS has yet to develop uniform national criteria for evaluating the eligibility of a transgender high school student-athlete, four state associations – Washington, Colorado, Vermont, and Maine – have developed policies regarding the inclusion of transgender student-athletes in school sports programs and which might serve as models for districts attempting to develop transgender strategies at the local level. Each state's policy is available on its website. For additional guidance, consult a 2010 position paper titled *On The Team: Equal Opportunity for Transgender Student-Athletes* that was endorsed by the NFHS and NCAA. The 57-page document, available full-text at *www.nclrights.org*, sets forth detailed recommendations for policy development, protection of the privacy, safety, and dignity of transgender student-athletes, and best practices for schools, athletic administrators, and coaches.

Constitutional Law: Miranda Rights

In April, in a school law decision applicable beyond sports programs, *N.C. v. Commonwealth of Kentucky*, the Kentucky Supreme Court held that a high school student questioned by a school administrator and school resource officer regarding distribution of a controlled substance to a classmate on school grounds was entitled to Miranda warnings in advance of the questioning. After an empty prescription pill bottle for hydrocodone with N.C.'s name on it was found in a bathroom at Nelson County High School, a preliminary investigation revealed that N.C. had given some of the pills to another student. N.C. was then questioned by an assistant principal and the SRO, a deputy sheriff in uniform and wearing a gun. Eventually, N.C. was expelled from school and charged with a felony for dispensing a controlled substance. The Kentucky Supreme Court ruled that "any incriminating statements elicited under the circumstances of this case, with a school official working with the police on a case involving a criminal offense" require that the student be given Miranda warnings, including his right to remain silent and his right to have an attorney present during questioning. The Court therefore suppressed N.C.'s statements and held that they could not be introduced as evidence at his trial. The decision was appealed to the U.S. Supreme Court and in October, the Court denied certiorari and declined to review the case.

The implications of *N.C. v. Commonwealth of Kentucky* for sports programs would be in those situations where a student-athlete is being questioned about violation of an athletics program code of conduct provision that might also result in criminal charges against the student, including incidents such as hazing, sexual harassment, or other behaviors in contravention of criminal laws. In the absence of any intent by or legal mandate for a school to turn over information to law enforcement, the Kentucky Supreme Court's interpretation of Miranda requirements is unlikely to apply to the questioning of most student-athletes.

Hazing

Hazing continues to be a widespread problem in school athletics programs and one of the most highly litigated claims against districts and athletics personnel, with courts typically imposing liability either because of the failure to create an anti-hazing policy or for developing a policy that is substantively inadequate or ineffectively implemented.

In January 2013, a civil lawsuit was filed on behalf of four freshman soccer players against Maine Township High School District 207 (IL), administrators, and coaches for a September 2012 hazing incident, allegedly part of an ongoing pattern of athletics program hazing at Maine West High School, in which the minors were sexually assaulted (sodomy with foreign objects) under bleachers during soccer practice. The suit asserted inaction by administrators and coaches following repeated reports of hazing incidents at the school dating back to 2007. Criminal charges were also filed against the head soccer coach for hazing (pursuant to the Illinois state law criminalizing hazing), battery, and failure to report child abuse and his trial is docketed for late December of 2013 or early 2014.

Pursuant to an order by the Cook County State's Attorney to conduct a "complete top-to-bottom review" of all past and present hazing incidents at Maine West, a Chicago law firm hired by the district to conduct that investigation released in June a 24-page report with recommendations focusing on the creation of a strong and effective anti-hazing policy for the school's athletics program that is not merely a form-over-substance statement in the student-athlete code of conduct, annual in-servicing of coaches, student-athletes, and parents to ensure that the policy is thoroughly explained and understood by all parties, and additional measures to ensure that all athletics personnel constantly reinforce for student-athletes the purpose and importance of the policy and proactively monitor all sports programs to ensure that hazing is not taking place. In August, the Illinois legislature enacted a new statute criminalizing the failure by school employees to report hazing, a law with penalties as high as a three-year prison term and a $25,000 fine. In October, an Illinois trial court judge dismissed the civil lawsuit because of technical problems with the filings in the suit, but the attorney for the players stated his intent to refile the suit with a more specific statement of the facts as requested by the judge in his dismissal of the case.

Similar hazing episodes occurred across the country throughout 2013. In March, three members of the track team at the Bronx High School of Science (NY) were charged with assault, forcible sexual touching, and violations of New York's state hazing law for their roles in a locker room hazing incident, allegedly part of a long-time team ritual of which school personnel had been informed in previous years, in which upper-class squad members made physical contact with the genitals of nude underclassmen and threatened to rape them. The athletic director overseeing the track team and the squad's coaches were suspended and the New York State Education Department launched an investigation into the school's anti-hazing policies and in-service training protocols for school and athletics personnel.

In March, the drill team at Manzano High School (NM) was disbanded after upper-class members of the group hazed under-class girls on the team by forcing them to commit demeaning and inappropriate pranks before the Spirit State Championships, including leaving highly offensives messages at Albuquerque-area Catholic schools. Several members of the squad received long-term suspensions from school and the Albuquerque Police Department initiated an investigation to determine whether criminal laws were violated.

In May, the Florence Township School District (NJ) implemented a new hazing policy following a month-long investigation of an April incident where under-class baseball players were restrained and bitten by upper-class players as part of a team ritual that had allegedly been occurring for years. Four players were suspended, the team's head coach was replaced, and police initiated a criminal investigation that could lead to charges under New Jersey's state anti-hazing law.

In June, School Administrative District 46 (ME) instituted a new hazing policy after multiple November 2012 incidents of hazing during a football overnight activity at Dexter High School following which three players were charged under the state's anti-hazing law, 12 student-athletes were suspended from school, and their football coaches were sanctioned for inadequate supervision.

In October, a lawsuit was filed against the Olympia School District (WA), school administrators, and coaches for a Capital High School basketball hazing episode during a 2010 summer camp in Oregon where underclass players were hazed and sexually assaulted in their hotel rooms at night while their coaches had allegedly left the team unsupervised when they went to a bar to have a few beers. The coaches were fired and the district revised its hazing policy, including adding additional in-service training regarding hazing for all athletics personnel and tightening the supervision procedures for all overnight sports events.

Sexual Harassment

In March, 37-year-old former Ben Lomand High School (UT) swim coach Jamie Waite was convicted of four counts of felony forcible sexual abuse for a sexual relationship with a 17-year-old male student-athlete and her initial sentence of 1-to-15 years in prison for each count was reduced to 210 days in jail so that she will be able to retain custody of her children. No civil suits were filed against the Ogden School District or any school personnel because immediately upon learning of the inappropriate relationship, district officials properly notified law enforcement authorities pursuant to Utah state law, Waite was removed from her coaching position, and she was barred from school property and from any contact with students. Based on legal standards established by the U.S. Supreme Court, districts and school personnel will be liable for teacher-student or student-student sexual harassment only when "a school official in a position to take remedial action has knowledge that the harassment is occurring and exhibits deliberate indifference to correcting the situation" and in the Waite case, the Ogden School District fulfilled its legal duties under the knowledge-plus-deliberate-indifference standard by immediately, as soon as it became aware of the sexual abuse, taking corrective action.

In April, a lawsuit was filed against the Forest Hills School District (MI), the district superintendent, the district Title IX Coordinator, and the Forest Hills Central High School principal for allegedly failing to respond to the on-campus sexual assault by a star player on the school's basketball team of a female soccer player and the ongoing harassment and cyberbullying of the victim by the attacker that was so severe she was forced to transfer to another school. The suit asserts that when notified about the sexual assault, the principal discouraged the victim and her parents from going to the police and filing charges, but that the family, concerned about the possibility of attacks on other girls, ignored the principal and filed a police report. Two weeks later, while the police department was in the process of conducting its investigation and before the district had taken any action against the alleged attacker other than a temporary suspension from the basketball team, the player sexually assaulted another female student at the school. Felony charges were eventually filed against the perpetrator for

both sexual assaults. The complaint filed to initiate the suit, *Jane Doe v. Forest Hills School District*, provides a blueprint for school and athletics program personnel as to how *not* to handle allegations of sexual harassment and is available at *www.nwlc.org/sites/default/files/pdfs/doe_v._forest_hills_complaint_no._13-428.pdf.*

In August, Pennsylvania Attorney General Kathleen Kane launched an investigation into the actions of Central Mountain High School (CMHS) administrators regarding their initial handling of claims of sexual abuse by the family of Aaron Fisher, Penn State assistant football coach Jerry Sandusky's "Victim 1." CMHS is located 40 miles north of Penn State and it was at the school that Sandusky, who served as a volunteer assistant football coach, made his initial contact with Fisher who was a student-athlete and a participant in Sandusky's Second Mile charity for at-risk children. At issue are the actions of the CMHS principal who, after discovery of Sandusky's abuse of the boy, allegedly discouraged his mother from reporting the crime. In August, in his keynote address at the national Crimes Against Children Conference, the now 19-year-old Fisher described the 2008 meeting at CMHS where he revealed the abuse to his mother and the principal, whose reaction was to resist calling the police, to tell his mother that she "needed to think about how this was going to affect (Fisher's) family" and that "(Sandusky) had "a heart of gold," and to, when Fisher and his mother left CMHS to drive to the Clinton County Children and Youth Services office to file a report, to call ahead to tell Youth Services personnel not to take Fisher's report seriously. Although no criminal charges or civil suits have yet been filed related to the handling of the situation by CMHS personnel, the lesson-to-be-learned for districts and school personnel is that policies must be developed and implemented requiring that when an allegation of sexual harassment or sexual abuse is received, reports should immediately be filed with the district's federally mandated Title IX officer, other appropriate district administrators, and the state agency or law enforcement authorities set forth in the state's child abuse reporting statute. For schools and personnel to avoid liability under the U.S. Supreme Court's "knowledge plus deliberate indifference" legal standard, there must be no delay in making the required reports.

In November, Ohio Attorney General Mike DeWine announced the indictment by a grand jury of four employees of Steubenville City Schools related to the coverup of the rape by two Steubenville High School football players of a female classmate at an August 2012 team party and the alleged rape by members of the school's baseball team of a 14-year-old girl at an April 2012 party, crimes that gained national notoriety after online video of the sexual assault by the football players, text messages by team members, and social media postings about the incident went viral on the internet. Indicted were the district superintendent, an assistant football coach, a wrestling coach, and an elementary school principal (related to the alleged rape of the 14-year-old), with charges against the four including obstruction of justice, tampering with evidence, allowing underage drinking, contributing to the delinquency of a minor, and failure to report child abuse. In March, the two Steubenville football players were convicted of rape, sentenced to a minimum of one year in a youth correctional facility, and will upon their release be required to register as sex offenders. When interviewed by the New York Times in November 2012 about the rape by the football players, the Steubenville superintendent stated that he was satisfied at the time of the episode that the school's head football coach would take care of the matter and discipline his players and during their criminal trial in March 2013, a text message from one of the accused players was read into evidence stating that the football coach had said he would "take care of it" and that the coach "was joking about (the rape) so I'm not that worried." The indictment of the Steubenville officials reflects the critical importance for schools and athletics personnel nationwide of treating with the highest priority every allegation of sexual assault against students, of avoiding any delay in immediately informing the appropriate authorities pursuant to applicable state child abuse reporting laws, and of avoiding any actions that might be interpreted as an attempt to shield perpetrators from accountability for their actions.

Disabilities Law

Issues continue to arise in school athletics programs involving the application to sports activities of the Americans With Disabilities Act (ADA), the Individuals With Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act.

In January, the U.S. Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague Letter" clarifying the obligations of schools with regard to providing sports participation opportunities for students with disabilities. The guidance is available in the OCR's online Reading Room at *www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html.* The core message of the directive is that students with disabilities should be granted equal opportunity to participate alongside their peers in school athletics programs, club sports, intramural sports, and physical education courses.

"We make clear [in the letter] that schools may not exclude students who have an intellectual, developmental, physical, or any other disability from trying out and playing on a team, if they are otherwise qualified," said Arne Duncan, U.S. Secretary of Education. "We know that students with disabilities are all too often denied the chance to participate and with it, the respect that comes with inclusion. This is simply wrong. While it's the coach's job to pick the best team, students with disabilities must be judged based on their individual abilities, and not excluded because of generalizations, assumptions, prejudices, or stereotypes."

The new OCR directive does not create new law. It merely clarifies the legal obligations of educational institutions under already-existing laws dealing with the rights of students with disabilities. Specifically, schools are required to provide students with disabilities equal opportunity to participate in sports, meaning that schools must conduct an individualized assessment of a student with a disability to determine reasonable accommodations that might be provided to allow the fullest possible extent of participation in school athletics

activities. A reasonable accommodation is one that does not fundamentally alter the nature of the sport or activity, does not give the person with a disability a competitive advantage over competitors without disabilities, and does not present a safety risk to the person with a disability or to other competitors.

The OCR directive does not mandate that a student with a disability be automatically placed on a competitive school squad, only that an individualized assessment be made to determine whether a reasonable accommodation exists that might enable the otherwise qualified student with a disability to participate. The guidance states:

> "Of course, simply because a student is a qualified student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory."

If a student with a disability is not otherwise qualified and reasonable accommodations are not available to allow the student to participate in mainstream programs, the Dear Colleague letter makes it clear that pursuant to existing disabilities laws, schools have an obligation to provide sports participation opportunities through adapted athletics programs – ones specifically developed for students with disabilities – or allied programs – ones designed to combine students with and without disabilities together in a physical activity.

Schools should begin by developing a strategic plan for district-wide adapted and allied athletics programs that will best serve the needs of students with disabilities. Rely on organizations with experience in creating such programs such as the Inclusive Fitness Coalition (*www.incfit.org*), the American Association of Adapted Sports Programs (*www.adaptedsports.org*), and the U.S. Department of Education (read the working paper titled *Creating Equal Opportunities For Children & Youth With Disabilities To Participate In Physical Education & Extracurricular Athletics* at *www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf*).

Legislation

During 2013, three state legislatures – Arkansas, Colorado, and Tennessee – enacted so-called "Tim Tebow Bills," allowing homeschooled students to participate in interscholastic sports programs. In addition, the Indiana High School Athletic Association passed a rule permitting such participation, bringing to a total of 28 the number of states in which homeschooled students may play sports at their local public schools. The 24 states that, prior to 2013, already permitted such participation were Arizona, Florida, Idaho, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, and Wyoming. Specific regulations governing participation by homeschooled students in each of the 28 jurisdictions are available at each state association's website. Legislation on the issue has been introduced, but not yet finalized, in three other states – North Carolina, Texas, and Virginia.

In August, a statute was enacted by the Illinois legislature and signed into law by the state's governor requiring all public and private school districts in the state to provide catastrophic injury insurance for student-athletes. The legislation, named "Rocky's Law" after the late Rasul "Rocky" Clark who sustained a catastrophic neck and spinal cord injury resulting in permanent quadriplegia while playing for the Eisenhower High School football team during a 2000 game. The statute, which goes into effect January 1, 2014, requires that schools purchase a policy providing each student-athlete with $3 million in aggregate benefits or five years of coverage, whichever comes first, for medical expenses in excess of $50,000. Research done by the Illinois legislature prior to the law's enactment estimates that the coverage will cost districts approximately $5 per student-athlete.

During 2013, action was taken by the legislatures of South Carolina, Florida, Louisiana, and Texas that, if enacted, would have impaired the authority of their state athletic associations over the governance of high school sports. In March, the South Carolina High School League made changes to its own rule-making and enforcement procedures in response to a bill that would have eliminated the association and transferred its duties to the state Education Department under the control of an athletics commissioner appointed by the state Superintendent of Education. In May, proposed legislation that would have stripped much of the power of the Florida High School Athletic Association over student-athlete eligibility died at the close of the state legislature's session. Also in May, a bill in Louisiana that would have taken control of state playoffs away from the Louisiana High School Athletic Association was defeated in committee. And also in May, the Texas legislature voted to place the University Interscholastic League (UIL) under "sunset review" to evaluate whether increased legislative oversight of the association is warranted. Unlike most sunset reviews, the UIL will not be subject to abolishment, but the process could lead to impairment of the association's powers if some of its authority and control over high school sports were to be transferred to the legislature or other state agencies. Such bills present a worrisome trend because, if enacted, governance of education-based athletics by state associations that focus on core values related to doing what is best for student-athletes would be tainted by the prospect of politicians and political appointees without a complete understanding of the broad and long-term goals of school sports programs making narrow, ill-advised, partisan decisions at the behest of individual constituents involved in a sports-related dispute with interests that are in conflict with the true objectives of interscholastic athletics.