



## Issues – Concussion Litigation

### Background

The October 30, 2013 report brief issued by the Institute of Medicine and the National Research Council, entitled “Sports-Related Concussions in Youth: Improving the Science, Changing the Culture” (hereafter, “IOM Report”) states, “In the past decade, few subjects at the intersection of medicine and sports have generated as much public interest as sports-related concussions—especially among youth. . . . Currently, there is a lack of data concerning the overall incidence of sports-related concussions in youth, although the number of reported concussions has risen over the past decade. A number of factors may have contributed to this increase, including more awareness and better recognition of such injuries.”

An October 11, 2013 article in StamfordAdvocate.com reports that, according to the Centers for Disease Control and Prevention, 62% of sports-related injuries occur during practice rather than in games. The IOM Report states that, “among male athletes at the high school and collegiate levels, football, ice hockey, lacrosse, wrestling, and soccer consistently are associated with the highest rates of concussions. Among female athletes, high school and collegiate sports associated with the highest rates of concussions are soccer, lacrosse, basketball, and ice hockey. There has been little research on the frequency of concussions among athletes in intramural and club sports and in athletes younger than high school age.” (Report brief can be found at:

<http://iom.edu/Reports/2013/Sports-Related-Concussions-in-Youth-Improving-the-Science-Changing-the-Culture/Report-Brief103013.aspx>.

The full report can be found at [http://books.nap.edu/openbook.php?record\\_id=18377&page=R1](http://books.nap.edu/openbook.php?record_id=18377&page=R1).)

### Litigation

The number of lawsuits filed by high school students who have concussion-related injuries has increased, and is expected to increase, particularly in light of the NFL retiree litigation as well as various other lawsuits involving concussions around the country. Often, these cases are unpublished in an official report, and, therefore, have no precedential impact. This is true, at least in part, because each case tends to be very fact-specific. Nevertheless, the lawsuits are typically based on one or more of the following assertions:

- Coaches, athletic trainers, and/or school administrators violated/ failed to follow applicable guidelines in their own policies or applicable state law or regulation, and/or industry rules, codes and standards
- Personnel failed to warn or instruct student athletes about the dangers of traumatic brain injury
- Athletic personnel allowed or forced players to use unsafe or otherwise defective equipment
- Personnel failed to properly supervise athletic practice
- Personnel directed practice drills which were inappropriate given equipment made available, and other circumstances

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- Personnel failed to evaluate, or otherwise reacted in inappropriate, and, therefore, illegal ways, to symptoms displayed by a player after a first concussion or reports from the player or his/her teammates of concerning behavior or pain
- Personnel failed to seek medical assistance for an injured player
- Personnel failed to remove the player from further play in a game or in practice, and, in some cases, specifically directed the player to return to the game
- Personnel failed to monitor the player
- School personnel failed or refused to make academic and non-academic accommodations necessary for a student in a post-concussion situation, and, in at least one case, chose to manipulate a student's grades to "justify" graduation
- Helmet manufacturer failed to sufficiently warn its customers of concussion danger

#### **Duty to supervise: courts do not appear to specify provision of particular equipment, personnel, or steps:**

***Limonas v. School District of Lee County***, 111 So.3d 901 (4/8/2013) – Although not a concussion-related case, this very recent case is instructive as to coaches' duty to adequately supervise student athletes, and illustrative components of that duty. This duty may include: (1) providing adequate instruction (2) supplying appropriate equipment (3) reasonably selecting or matching athletes (4) properly supervising the event and (5) utilizing appropriate post-injury efforts to protect the injury against aggravation. The Court found that the school board had a common law duty to use appropriate post-injury efforts to prevent aggravation of injury suffered by high school student who collapsed on field while playing soccer. However, in considering the scope and extent of that duty, the court found that the duty did not include making available, diagnosing the need for, or using an automated external defibrillator (AED). In an earlier case in which a varsity basketball player sued the opponent school, and argued that the school was negligent for failure to provide her with a trainer during the game, the court found no such duty on the part of the opponent school.

#### **Return of Injured Player to Game; Failure to Monitor Following Injury**

***Dougherty lawsuit***, NJ, September, 2013 - \$2.8 million settlement in lawsuit filed by Montclair NJ family against the school and township's Board of Education based on the 2008 death of football player Ryne Dougherty. The junior linebacker died after suffering a seizure moments after tackling a player from the opposing team. The settlement came 10 days after the NFL agreed to pay former players \$765 million to settle concussion-related lawsuits. The family claimed that the school's athletic trainers violated their own guidelines by failing to properly monitor Ryne during a 5-day cooling off period when they were supposed to gauge his fitness to return to play following a concussion suffered the previous week. The family alleged that there were signs he was still coping with the after-effects of the earlier concussion. After the first concussion, Dougherty and other players on the football team underwent the ImpACT test. According to a report on SI.com, the scores of all of the players were voided because the disruptive behavior of one student in the room had altered the results. The boy had been cleared by his personal physician to play football, allegedly without reviewing the results of the ImpACT test and despite his complaints about fatigue.

#### **Equipment Manufacturer: Failure to Warn**

***Ridolofi v. Riddell Sport, Inc.*** April 15, 2013: A former Trinidad, Colorado prep football player, Rhett Ridolofi, who suffered severe brain damage and paralysis from a concussion during a practice in 2008 won an \$11.5 million lawsuit against Riddell Sport, Inc., the nation's largest football helmet manufacture and several high school officials. Riddell was ordered to pay 27%, or \$3.1 million for failing to sufficiently warn its customers of concussion danger. He was not rushed to the hospital. The 3 defendants previously settled in court prior to the ruling; 2 coaches remain as defendants. Appellate rulings may alter this result.

#### **Return of Injured Player to Participation; Failure to Monitor Following Injury; Failure to Provide Academic Accommodations:**

***Robert Wellman, v. Butler Area School District, and Dr. John Wyllie, Individually, and in his capacity as principal of the Butler Area High School***, filed 5/1/13 (U.S. District Court for the Western District of Pennsylvania). <http://nflconcussionlitigation.com/wp-content/uploads/2012/01/download-160.pdf> Plaintiff's suit alleged Violation of

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Section 504, Title II of the ADA, Equal Protection Act, and Retaliatory treatment. He sought jury trial and award of compensatory damages, punitive damages, attorney fees, costs and all other relief as is just and appropriate.

Robert suffered an injury resulting in concussion on August 31, 2009 when playing flag football in gym class. He “was not seen by the school nurse” and attended football practice after school that afternoon. He suffered additional injuries during practice. It was ultimately confirmed that Wellman had sustained a concussion.

His mother sought accommodations: that he be removed from German class and physical education class so that he would have extra study halls so that he could rest; that his teachers and football coach be made aware of his situation “so that Wellman would not have to engage in any unsuitable activity, or any activity which might aggravate his symptoms or condition.” Despite his mother’s instructions, two of his teachers pulled him out of extra study halls so that he could take make-up exams. Although Children’s Hospital physician wrote to the principal seeking academic accommodations and asking to be contacted with questions, “his letter was ignored and Wellman was not given any accommodations.”

He was not immediately removed from physical education; this failure continued despite multiple contacts by the boy’s mother. On September 30, mother called football coach, informed him of concussion, and explained that, though her son would be at that evening’s football game to support his teammates, he was not cleared to participate. “. . .[His coach ignored Ms. Wellman’s warnings, and told Wellman to act as a lineman and hold one of the flags on the side of the field. Wellman was not dressed to participate in the game, and was not wearing any protective gear.” He was reinjured when a player ran into him; he was knocked over, and hit his head off the ground when he fell backwards.

A number of allegations reflect his worsening condition and teachers’ continuing to ignore his doctor’s requests for accommodations. When the principal responded in a “dismissive” way when Ms. Wellman asked that he treat Wellman like he has a learning disability until he was healed, she asked his doctor to put him on homebound instruction until he improved. He was approved for homebound instruction, which proved to be ineffective as delivered. He tried to return to school the following year, but was overwhelmed and uncomfortable because he had been out most of previous year. His request to change lunch periods so he could eat with a friend to lessen his anxiety level was ignored.

#### **Failure to render aid post-injury; failure to monitor**

***Ripple v. Marble Falls Independent School District and Cord Woerner [his coach], individually***, (U.S. District court for the Western District of Texas, Austin Division).

September 2012 – <http://nflconcussionlitigation.com/wp-content/uploads/2012/01/Concussed.pdf>. Suit alleges that student Ripple, a one time National Honor Society member who is now “unable to live independently, let alone go to college” suffered over thirty concussions or sub-concussions during a 3-year period while under the supervision and direction of Coach Woerner, coach of the H.S. football team. Claims include violations of 14<sup>th</sup> Amendment, exclusion from educational activities available to well-bodied and uninjured students in violation of Section 504 and the ADA, Section 1983 policy and custom of the school (not to train and supervise and monitor coaches) and conscious indifference to Plaintiff’s rights, liability under Section 1983 for conscious disregard of the right to bodily integrity and acts that were conscience-shocking, and state law.

Allegations include:

- Trainer failed to render aide post-concussion, and did not continue to observe plaintiff
- Following a December 2009 car accident which did not, allegedly, aggravate the head injuries, the student and his parents met with the coach to explain his medical limitations. “Coach Woerner told Plaintiff that if Plaintiff could not perform at 110%, that he did not want Plaintiff on the team. Woerner continued to punish Plaintiff with excessive physical exercises and rills in order to force him to play for the team.
- In light of team’s chances to make it to the playoffs, the Coach pressured the student excessively, and made him fear retaliation at school and in the community.
- Coach released confidential medical information to scouts without Plaintiff or his parents’ permission
- Complains of extensive and continuing injuries, necessitating home bound schooling from the fall of his senior year until graduation, and inability to play football. He had had the highest points in the greater Austin area for the lineman’s challenge.

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- The district “has covered up the facts surrounding Plaintiff’s injuries; it has refused to investigate or appropriately respond to the report of a serious injury; it has retaliated against an injured child, it has branded his family as a problem for the School District, and has refused . . . to accommodate the injury.”
- Requested remedies include recovery for physical pain and suffering, mental anguish, past and future medical expenses, future loss of wage earning capacity, costs of a FAPE, any other damage properly recoverable.

**Failure to supervise practice, failure to monitor post-injury and quickly provide medical attention, violation of various industry rules, codes and standards.**

*Doyer* cheerleading case against **Poland Regional High School**, Auburn Maine, September 2012 (not available on the web). Complaint alleges that on March 15, 2010, during a Poland Regional High School cheering team practice, Olivia Doyer fell to the floor while performing a cheering stunt known as a “basket toss.” Although unspecified damages were sought in the lawsuit, Plaintiff’s earlier notice to school district of possibility of lawsuit claimed \$10 million in damages,

**Failure to warn or instruct student athletes about dangers of traumatic brain injury; failure to remove from play; failure to render appropriate assistance**

*Alt v. Highlands School District*, filed 3/2012 in U.S. District Court for the Western District of Pennsylvania, <http://nflconcussionlitigation.com/wp-content/uploads/2012/01/Alt-v-Highlands-School-Dist.-Order-.pdf>. Plaintiff was involved in helmet-to-helmet collision. Almost immediately after, coach returned boy to play with instructions to deliver a “substantial hit” on the opposition. Plaintiff suffered a second helmet to helmet collision. Despite obvious symptoms and reports from plaintiff’s teammates, Coach took no action to monitor or evaluate injuries. Appropriate academic accommodations were not provided. Plaintiff’s grades were manipulated to allow him to graduate.

**Failure to remove from play**

*Harris* lawsuit against **North Medford School District** in Oregon, found only in media reports, was brought by the mother of Noah Harris, a junior varsity football player. The suit says Harris was hit twice in a game against a rival team, that he told coaches he had a concussion, but they told him to “just try and stick it out.” The suit says he was hit again, collapsed and was taken to the hospital, where doctors induced a coma. It says he is now 17 and suffers multiple effects from the injury.

**Failure to remove from play, Failure to properly supervise, Provision of defective equipment**

*Demond Hunt v. East St. Louis (Illinois) School District* was filed by student’s mother, according to media reports. In 2008, Demond, a 16-year-old linebacker for **East St. Louis** (Illinois) High School, collapsed on the sideline during a game. A blood vessel had burst in his brain, which sent Hunt into multiple seizures and strokes. Earlier in the game, Demond, according to the lawsuit, had complained of a concussion-like headache to his coach, who told him in so many words to suck it up and keep playing. The suit alleged that the coach ridiculed and taunted Hunt and other injured players, creating an atmosphere in which injuries were not reported or were underreported, and that the coach wouldn’t inform parents that their children were injured including with concussions. The suit also claims the boy was supplied with a football helmet that was defective, despite warnings that the helmets were in an unsafe condition because of school’s failure to maintain proper air inflation.

**Failure to be medically evaluated; Failure to remove from game**

*The Lystedt Law.* In May 2009, the state of Washington passed the Lystedt Law, which protects young athletes from the life threatening or potentially life-long consequences that returning to the game too soon can cause. The law, named after Zackery Lystedt, a young athlete who was permanently disabled after sustaining a concussion in 2006, and prematurely returned to the game, requires any youth showing signs of a concussion to be examined and cleared by a licensed health care provider. Despite the first blow, Zack shook it off and by the start of the 3rd quarter, he was back in the game. After a hard-played 2nd half, the boy collapsed on the field and was airlifted to a hospital where he underwent emergency life-saving surgery to remove the left and right side of his skull to relieve the pressure from his injured and swelling brain. He experienced numerous strokes, seven days on a ventilator and three months in a coma before he awakened. The result of Zack’s having prematurely returned to the game included four weeks in a nursing home, two months in a children’s hospital for rehabilitation, nine months before he spoke his first word, 13 months before he

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## Failure to remove from the game, coaches' failure to comply with applicable rules

*Yatsko v. Berezwick*, not reported, 2008 WL 2444503 (M.D. Pa., June 13, 2008) – Allegations include violation of due process liberty interests in bodily injury and freedom from state-created danger, an a practice, custom or policy of reckless indifference, negligence based on the actions of the coaches and against the school district based on improper hiring and supervision of the coaches. When a basketball player landed after jumping for a rebound, the top of her head struck the top of another player's head. She didn't play after being hurt. At the end of the game, an assistant coach took girl to her mother who was watching game: she was "bumped around in the game." The assistant coach did not take the girl to trainer during game because she did not want the trainer to say she could not play. The next day, the student went on the bus with other students to a scheduled game. During warm-ups for the game, she had difficulty participating, felt weak and shook. Coaches observed these problems, and her teammates told the coaches that she had suffered a concussion in the previous game. According to plaintiff, coaches "set up a signal that made plaintiff responsible for telling coaches when she needed to leave the game. The coaches told her she was the team's tallest player and needed to remain in the game. She did play, and at the end of the game, feeling ill, she collapsed. The coaches asked the girl if they should send for an ambulance, but "instead, the two coaches helped plaintiff board the bus back to school."

Plaintiff asserted that all these actions were contrary to the handbook of the Pennsylvania Interscholastic Athletic Association, whose rules require "that a school exclude any athlete who has suffered a serious injury from competition until a doctor pronounces her physically fit," and declare as "unethical" coaches "striving to win at any cost."

The court held that the dispositive question for determination of the constitutional claims was whether the behavior of any of the defendants "shocked the conscience." Here, the court found that "an ill-advised decision to allow a player to participate does not shock the conscience," and the likely conclusion that the coaches were negligent, despite allegations of their knowledge of her debilitating injuries, does not shock the conscience. The court therefore dismissed her federal constitutional claims.

## Failure to properly conduct practice drill

*Wahrer v. San Bernardino City Unified School*, 2006 WL 350461 (Cal. 2006). Plaintiff argued that because a football "wrap-up" drill was ordered by coaches to be performed at full speed, it was more like a "tackling drill" and should have been prohibited unless pads and helmets were worn. But the actual injury suffered by plaintiff occurred when he wasn't going very fast, and the court opined that the injury was an inherent risk of the drill, not a result of the coaches' directive.

### Academic Accommodations

Teaching staff should be made aware of a concussed student in order to provide an appropriate learning plan until symptoms clear. The coach (or other designated official/administrator) will be responsible for notifying teachers of the presence of a concussed athlete in the classroom.

**\*\* (Various options that may be available to schools, and should expressly be subject to/conditioned by medical direction)**

Accommodations to be considered include: excused absence from class, shortened school day, rest periods during the school day, extension of assignment deadlines, postponement or staggering of tests or quizzes, extended time on timed tests and excuse from certain tests, early dismissal to avoid crowded hallways. Mental exertion increases the symptoms from concussions and affects recovery. To recover, cognitive rest is just as important as physical rest. Reading, studying, computer usage, testing, texting – even watching movies if a student is sensitive to light/sound – can slow a student's recovery. In accordance with the Centers for Disease Control's toolkit on managing concussions, boards of education may look to address the student's cognitive needs in the following ways.

Other accommodations include permission to wear a cap or sunglasses for students with sensitivity to light or noise, excuse from physical education activities, preferential classroom seating to dampen distractions and other measures.



## Resources

**Suggested Guidelines For Management Of Concussion In Sports**, National Federation of State High School Associations (NFHS), Sports Medicine Advisory Committee (SMAC)  
<http://www.nfhs.org/uploadedFiles/2011%20NFHS%20SMAC%20Suggested%20Guidelines%20for%20Management%20of%20Concussion%20in%20Sports.pdf>

**Managing Risk in Interscholastic Athletic Programs: 14 Legal Duties of Care** – Marquette University Sports Law Review, Volume 17, Article 11 by Sports Law Consultant Janis K. Doleschal, 2006,  
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1385&context=sportslaw>

New Jersey State Interscholastic Athletic Association Concussion Acknowledgement Form:  
[http://www.pthsd.k12.nj.us/pdf/NJSIAA\\_Concussion\\_Policy.pdf](http://www.pthsd.k12.nj.us/pdf/NJSIAA_Concussion_Policy.pdf)  
Tennessee Secondary Schools Athletic Association, <http://www.tssaa.org/concussion.pdf> - Revised procedures, 2013

Pop Warner Football Concussion Policy: <http://www.popwarner.com/safety/concussionpolicy.htm>

National Federation of State High School Associations Football – Rules Interpretation, 2013:  
<http://www.nfhs.org/content.aspx?id=9418>.

Resources offered by Sports Concussion Institute, <http://www.concussiontreatment.com/>

Guidelines for the Medical Management of Concussions as applied to Cheerleading  
<http://www.aacca.org/media/resources/AACCA%20Cheerleading%20Concussion%20Recommendations.pdf>, with additional information related to Cheerleading available at <http://www.aacca.org/concussions> (American Association of Cheerleading Coaches and Administrators)

For more information and safety resources, visit: [www.cdc.gov/Concussion](http://www.cdc.gov/Concussion)

SAY Soccer National Concussion Policy <http://saysoccer.org/concussionpolicy.aspx>

Idaho High School Athletic Association, Concussion Management Implementation Guide, Creating Concussion Policy, and Model Policy  
<http://www.idhsaa.org/concussions/report/Creating%20Concussion%20Policy.pdf>

New Jersey Model Policy and Guidance for Prevention and Treatment of Sports-Related Concussions and Head Injuries:  
<http://www.nj.gov/education/aps/cccs/chpe/concussions/policy.pdf>

Nationwide Children's, Highlights of the OHSAA Concussion policy (Ohio) <http://www.nationwidechildrens.org/ohsaa-concussion-policy-highlights>

Centers for Disease Control and Prevention, [Injury Prevention & Control: Traumatic Brain Injury](#), Get a Heads Up on Concussion in Sports Policies  
<http://www.cdc.gov/concussion/pdf/HeadsUpOnConcussionInSportsPolicies-a.pdf>

Mayo Concussion Test and Post-Concussion Symptoms Scale  
<http://www.mayoclinic.org/medicalprofs/enlargeimage5992.html>

**Managing Risk in Interscholastic Athletic Programs: 14 Legal Duties of Care** – Marquette University Sports Law Review,” Volume 17, Article 11 by Sports Law Consultant Janis K. Doleschal, 2006  
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1385&context=sportslaw>

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