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MEMORANDUM

TO: Glenn M. Lungarini, Executive Director, CAS-CIAC

FROM: Jessica Richman Smith and Sarah Gleason

RE: Potential Liability of School Districts Related to Football Programs

DATE: September 28, 2020

We write in response to your request for legal advice on behalf of the Connecticut Association of Schools-Connecticut Interscholastic Athletic Conference (“CIAC”) regarding the potential liability of school districts related to football programs in the time of the COVID-19 pandemic health emergency (the “COVID-19 Pandemic”). Specifically, you requested legal advice on (1) “the potential liability for a school and/or coach if they engage in high risk full contact football against the recommendation of DPH, the Governor’s office, and CIAC” and (2) the potential liability of a school district if the district issues students “football safety equipment (i.e. helmet, shoulder pads, etc.) and/or a uniform” to students participating in independent football leagues. We address these questions below.

QUESTION ONE (FOOTBALL LIABILITY):

“What is the potential liability for a school and/or coach if they engage in high risk full contact football against the recommendation of DPH, the Governor’s office, and CIAC?”

SHORT ANSWER:

The premise of the question is that “full contact football” -- *i.e.*, 11-on-11 football with tackling and line play -- has been deemed a “higher risk” activity, and therefore not recommended, by the Connecticut Department of Public Health (DPH), CIAC, and other authorities for reasons related to the COVID-19 Pandemic (collectively, the “Football Guidance”). *See also* “Guidance for Opening Up High School Athletics and Activities,” National Federation of State High School Associations (NFHS) Sports Medicine Advisory Committee (SMAC) (Approved May 2020). The specific provisions of, and bases for, the Football Guidance are beyond the scope of this memorandum. However, our analysis of potential school district and coach liability presumes that full

contact football has been deemed by all relevant authorities to be a higher-risk activity for COVID-19 purposes, and therefore not recommended to take place at this time.

In light of the Football Guidance, the potential for school district liability in the event a COVID-19 outbreak can be traced to school-sponsored full contact football is high, and school districts should not count on waivers from participating students and/or their parents/guardians to protect them in the event of a lawsuit. Coaches may also be liable; however, if such coaches are acting in “the discharge of [their] duties or within the scope of employment or under the direction of the board of education” and their actions are not the result of “wanton, reckless or malicious behavior,” they likely would be indemnified by the school district in the event that liability attaches. The Superintendent, however, as the person responsible for deciding to move forward with full contact football contrary to the Football Guidance, may be subject to personal liability without indemnification if the decision is found to be wanton or reckless.

LONG ANSWER:

I. School District Liability.

A school district could be held liable for COVID-19 injuries allegedly resulting from holding full contact football under two theories of liability: negligence and recklessness. Each theory is discussed below.

There may be defenses to any such claims such as governmental immunity and contributory negligence. However, school districts should not rely on such defenses to protect them from liability in this circumstance. The highly unusual circumstance of knowingly acting in a manner contrary to public health and related guidance in the midst of a global pandemic may well lead any jury to hold a school district accountable for negligence or possibly recklessness where a defense might otherwise apply.

Negligence

To establish school district liability for negligence, a plaintiff must show that the school district employees or agents acted negligently and that governmental or statutory immunity does not apply. A person or entity will be liable for negligence only if each of four elements of negligence is met.

First, there must be a duty of care. School officials generally owe a duty of care to students at school and during school-sponsored activities, including school-sponsored athletic activities.

Second, the plaintiff must show that the school district has breached that duty of care, *i.e.*, a school official must act unreasonably under the specific facts of the case and/or must have failed to adhere to the applicable standard of care. Conversely, if the defendant has acted reasonably, there will be no breach of the duty of care. *See Carter*

v. Laidlaw Transit, Inc., 2004 Conn. Super. LEXIS 1355 (Conn. Super. 2004) (no liability for injuries when student slipped on wet stairs entering school bus; driver had no duty to warn of the evident, and not inherently dangerous, circumstance). In Connecticut, the standard of care may be established in various ways, such as by a requirement imposed by statute (*Gore v. People's Sav. Bank*, 235 Conn. 360 (1995)); building code provisions (*Considine v. City of Waterbury*, 279 Conn. 830 (2006)); and applicable regulations (*Wendland v. Ridgefield Construction Services, Inc.*, 184 Conn. 173 (1981)). Therefore, it is likely that DPH guidance and recommendations, Governor Lamont's Executive Orders, CDC guidance, and CIAC rules together would help to establish the standard of care in a negligence action for full contact football. If all relevant authorities are advising against full contact football, a plaintiff likely could establish that the applicable standard of care was *not* engaging in full contact football, and that the school district acted unreasonably by permitting full contact football to take place contrary to the Football Guidance.

Third, the plaintiff must establish that the unreasonable action or failure to act caused the injury. Under Connecticut law, causation is comprised of two components: (1) "causation in fact," or whether the injury would not have occurred but for the actor's conduct, and (2) "proximate cause," or "whether the defendant's conduct is a **substantial factor** in bringing about the plaintiff's injuries." See *Decastro v. Odetah Camping Resort, Inc.*, 170 Conn. App. 581, 590–91 (2017) (emphasis added). Whether the defendant's conduct is a "substantial factor" is determined by looking from the injury to the negligent act complained of for the necessary causal connection. Although the elements of a cause of action may be established on the basis of inferences drawn from circumstantial evidence, such inferences must be reasonable and logical, and the conclusions based on them must not be the result of speculation and conjecture. See *id.*

Causation in fact (or actual cause) may be difficult for a plaintiff to prove in a negligence action alleging that full contact football caused his/her infection with COVID-19. For example, a plaintiff would need to prove that he/she did not have the virus before the event, did not come in contact with anyone or any shared spaces on the way to the event, and did not come in contact with anyone or any shared spaces after the event. Proof of actual cause is further complicated by the long incubation period of COVID-19 which may be up to two weeks. On the other hand, it may be possible to trace the transmission of COVID-19 if a cluster of multiple people who attended the same event (*e.g.*, a football practice or game) became infected, and given that COVID-19 infection clusters have occurred with some frequency in Connecticut, this is a possibility that should not be underestimated. If a plaintiff can establish actual cause, the plaintiff likely would also be able to establish proximate cause because COVID-19 transmission is a foreseeable risk of playing full contact football (as evidenced by the Football Guidance).

Finally, the plaintiff must show that the plaintiff suffered actual injury.

Particularly instructive, although not directly relevant to the issue of athletics, is a recent case involving injury to a student on a school-sponsored international trip. In *Munn v. The Hotchkiss School*, 326 Conn. 540 (2017), a jury in federal district court awarded a student on a school-sponsored trip over \$40,000,000 after she suffered catastrophic injury as a result of being bitten by a tick in China. Upon appeal, the Second Circuit Court of Appeals certified two questions for Connecticut Supreme Court review: (1) Does Connecticut public policy support imposing a duty on a school to warn about or protect against the risk of a serious insect-borne disease when it organizes a trip abroad?; (2) If so, does an award of approximately \$41.5 million in favor of the plaintiffs, \$31.5 million of which are non-economic damages, warrant a reduction in damages?

The Connecticut Supreme Court held that there is no public policy in Connecticut against enforcing a duty against school officials to warn of such risks, stating, “it is beyond dispute that, as a general matter, *a school having custody of minor children has an obligation to use reasonable care to protect those children from foreseeable harms during school sponsored activities*, including educational trips abroad.” *Id.* at 556. (Emphasis added). Moreover, considering the specific facts, the court held that there was no public policy reason for upsetting the jury verdict, stating, “that the normal expectations of participants in a school sponsored educational trip abroad, involving minor children, are that the organizer of the trip would take reasonable measures to warn the participants and their parents about the serious insect-borne diseases that are present in the areas to be visited *and to protect the children from those diseases.*” *Id.* at 559 (emphasis added).

In light of *Munn*, school districts must not only warn participants of the inherent and foreseeable risks associated with a school-sponsored activity, but also must “use reasonable care to protect [students] from foreseeable harms during school sponsored activities” Even if a school district were to warn students of the inherent risks in playing full contact football at this time, conducting full contact football contrary to the Football Guidance may well be viewed as abdicating responsibility for the important obligation to exercise reasonable care in protecting students from foreseeable harm.

Recklessness

Common law recklessness is “more than negligence” and “more than gross negligence”; recklessness requires a “consciousness with reference to the consequences of one’s acts.” *See Dubai v. Irish*, 207 Conn. 518, 532–33 (1988). To infer recklessness from one’s conduct, “there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . [W]ilful, wanton or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.” *Id.* (citations and internal quotation marks omitted). Typically, common law recklessness is a high standard for a plaintiff to prove. However, it may be easier to

convince a jury to infer recklessness where a school district acts contrary to all applicable guidance on a particular matter, such as by holding full contact football contrary to the Football Guidance and during a global pandemic that has caused widespread illness, injury, and death.

Possible Defenses

Governmental Immunity

Even where negligence may be established, school districts and school officials may be immune from suit. First, there is statutory immunity – *i.e.*, situations in which the legislature has determined that public policy is best served by conferring immunity upon a person who takes action under certain circumstances. Statutory immunity is unlikely to apply here. Second, there is sovereign or governmental immunity. When immunity is found, the injured party cannot recover. As discussed below, however, there are important exceptions to the doctrine of governmental immunity, and we cannot predict with certainty when a court would determine that such exceptions apply and permit a lawsuit against a school district to proceed on the merits.

School districts in Connecticut generally are immune from liability for the discretionary acts of their agents. *See Doe v. Petersen*, 279 Conn. 607 (Conn. 2006) (municipal employee immune from liability for alleged negligence in not following up on sexual abuse report because response (or lack thereof) was a discretionary act). However, governmental immunity is not an absolute protection against liability claims brought against school districts and other governmental actors. Specifically, public officers and employees are not immune from suit (1) when their alleged acts involve malice, wantonness, or intent to injure, rather than simple negligence; (2) when a statute permits lawsuits; and (3) when the failure to act will subject an identifiable person to imminent harm.

The third exception, liability for conduct that subjects an identifiable person to imminent harm, is most likely to apply in the event a school district faces potential liability in connection with holding full contact football. Courts have held that school districts may be liable for various injuries to students. *See, e.g., Matthews v. Sklarz*, 5 Conn. Ops. 303 (March 15, 1999) (Conn. Super. 1999) (student injured when struck by a car while walking to school was “a foreseeable victim”). Notably, however, parents watching an athletic event have not been considered members of the identifiable class subject to the protection of this exception. *Prescott v. City of Meriden*, 273 Conn. 759 (2005) (holding that a spectator at a football game was not able to recover in his negligence action against Meriden’s department of education for injuries sustained when he fell on the moveable, wet, muddy bleachers because the spectator was not a member of an identifiable class of foreseeable victims subject to imminent harm). As to students, courts have required that a danger be specific as to time and place before a student will be considered an identifiable person subject to immediate harm.

The Connecticut Supreme Court’s standard for determining whether a potential harm was imminent is “whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.” *Haynes v. City of Middletown*, 314 Conn. 303 (2014). We are concerned that the Football Guidance could constitute notice to school districts of a “dangerous condition” that is “likely to cause harm,” thereby rendering the governmental immunity defense inapplicable to a lawsuit claiming that full contact football caused a COVID-19 outbreak and related harm to, at a minimum, the participating students. In light of the *Prescott* case described above, it is more likely (although not guaranteed) that governmental immunity could apply in any lawsuit brought by a parent or other spectator related to infection from COVID-19 that allegedly originated with a football game, rather than a lawsuit brought by an infected student participant.

Finally, as noted above, governmental immunity applies only to *negligent* acts, not reckless acts. If a jury determined that the school district acted recklessly by running a full contact football program, immunity would not apply.

Contributory Negligence

Under the Connecticut statute on contributory negligence, the person whose death was caused or who was injured or who suffered property damage is presumed to have exercised reasonable care at the time of the commission of the alleged negligent act or acts. Conn. Gen. Stat. § 52-114. If the defendant relies on the defense of contributory negligence, the defendant must affirmatively plead such defense and will have the burden of proving it. *Id.* Importantly, in causes of action based on negligence, contributory negligence does not bar recovery if the negligence was not greater than the combined negligence of the plaintiff and the defendant(s); instead, the economic or noneconomic damages allowed will be diminished in the proportion of the percentage of negligence attributable the plaintiff. Conn. Gen. Stat. § 52-572h. If, however, a plaintiff is found to be more than fifty percent responsible for his/her injuries, he/she cannot recover. *See Stafford v. Roadway*, 312 Conn. 184 (2014) (finding plaintiff to be more than fifty percent responsible for his injuries and therefore returning a verdict for the defendant).

It is difficult to predict with certainty whether a defense of contributory negligence would succeed in this circumstance. However, it is reasonable to conclude that if a school district invites students to participate in full contact football, the students and their parents could reasonably rely on the school district’s implicit representation that the activity is safe, particularly given that school districts generally owe a duty of care to their students in connection with school-sponsored activities. As such, it is unlikely that a student and his/her parents would be found to be more than fifty percent liable for their own injuries if they participate in a school-sanctioned and school-sponsored full contact football program.

Insurance

Insurance offers school districts an important economic protection from liability associated with various high-risk and other activities that occur within, or are sponsored by, a school. However, insurance coverage is not absolute, and there may be policy exclusions for certain activities, such as those that pose a known risk to health or safety and/or that relevant authorities have advised against. Some insurance policies may include a specific exclusion for communicable disease, virus, or pandemic. Other policies without such an exclusion may exclude coverage for activities, such as full contact football during the COVID-19 Pandemic, that public health authorities and similar officials have advised against. School districts therefore are well advised to audit their insurance policies to assure they have protection against such claims, which in this case would be claims related to proceeding with full contact football contrary to the Football Guidance.

II. Personal (Coach) Liability.

There is a strong public policy protecting members of boards of education and the persons employed by boards of education (including school coaches) from personal liability, including attorneys' fees, arising from claims made against them for actions they take (or do not take) pursuant to their official or employment duties, which actions were not wanton, reckless, or malicious. That public policy is reflected in the provisions of Conn. Gen. Stat. § 10-235 (the "Indemnification Statute"), which protects school officials and school employees from personal liability. The Indemnification Statute provides, in relevant part:

(a) Each board of education shall protect and save harmless any member of such board or any teacher or other employee thereof or any member of its supervisory staff . . . from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to or death of any person, or in accidental damage to or destruction of property, within or without the school building, or any other acts, including but not limited to infringement of any person's civil rights, resulting in any injury, which acts are not wanton, reckless or malicious, provided such teacher, member or employee, at the time of the acts resulting in such injury, damage or destruction, was acting in the discharge of his or her duties or within the scope of employment or under the direction of such board of education. . . .

Conn. Gen. Stat. §10-235(a).

The Supreme Court has construed the Indemnification Statute broadly. In *King v. Board of Education*, 195 Conn. 90 (1985) and 203 Conn. 324 (1987), the leading case interpreting the Indemnification Statute, the Court noted that "the protection afforded by

the statute has been expanded frequently both with respect to the persons covered and the circumstances under which indemnification is available.” 195 Conn. at 95. The Court also pointed to the “broad legislative sweep” of the term “any other acts” as used in the statute. 203 Conn. at 333. Thus, the statutory protection is interpreted in favor of insulating board members and school employees from liability for acts or omissions if such officials’ actions were (1) taken in “the discharge of [their] duties or within the scope of employment or under the direction of the board of education,” and (2) not the result of “wanton, reckless or malicious behavior.”

Importantly, the protection afforded by the Indemnification Statute extends to attorney’s fees. Generally, school districts appoint legal counsel to provide a legal defense for school district employees or the school board when claims are brought against them at the outset of the litigation, typically through an insurance carrier. Unless the board member or employee acted outside the scope of his or her duties or employment or in a wanton, reckless, or malicious manner, if liability is established against a board member or employee, a school district must indemnify that individual against any damages awarded to a plaintiff in such action. In this instance, districts are also responsible for any reasonable legal fees and costs incurred in defending against the claims, whether they provided the legal defense or not.

Moreover, under Conn. Gen. Stat. § 10-235(b), a school district must also protect and save harmless any board member or school employee even when a claim is made that the individual acted in a “malicious, wanton, or wilful act or *ultra vires* act” (an act outside of his or her authority) while acting in discharge of his or her duties. If the school official is found not to have acted in this manner, he or she is fully protected. However, if the school official is found to have engaged in such “malicious, wanton, or wilful act or *ultra vires* act,” the employee will not be indemnified against any resulting verdict, and the employee must reimburse the district for the costs incurred in providing a defense.

In short, there is a strong public policy, and broad statutory protection, for board members and school employees who work on behalf of the public in good faith. Therefore, a coach who, under the direction of a school district, coaches full contact football and does not engage in “wanton, reckless or malicious behavior” (beyond agreeing to coach full contact football contrary to the Football Guidance) is likely to be protected from personal liability under the Indemnification Statute. It is possible, however, that a court could find a coach’s decision to coach in these circumstances -- even at the direction of his/her employing school district -- was itself wanton or reckless. In that case, the Indemnification Statute would not protect the coach from personal liability. It is more likely, however, that the employee ultimately responsible for deciding to proceed with full contact football against the Football Guidance -- *i.e.*, the Superintendent -- could face personal liability if that decision were found to be wanton or reckless.

III. Waivers and Permission Slips.

Given the liability risks described above, school officials might ask whether they may guard against liability by requiring that students and parents/guardians execute releases absolving the district of liability for any injuries related to participation in a full contact football program. This strategy will not fully protect school districts, if at all, from liability. The Connecticut Supreme Court ruled in 2005 that public policy prohibits enforcement of a release from liability for future negligence, even if the release is stated in clear language. *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn. 314 (2005). This decision supersedes prior decisions in which releases have been enforced because their language was clear and the parties had equal bargaining power. *See also Munn*, 326 Conn. 540 (release signed by student seriously injured on a trip to China void as against public policy).

By contrast, requiring students and parents to review and sign a “notice of risks” and “informed consent” (together, “Permission Slips”) may help to mitigate liability in the event of a lawsuit related to a high-risk school-sponsored activity. Permission Slips do not purport to serve as a waiver of future liability claims, but rather provide notification to students and parents of school activities that are out of the ordinary and/or particularly risky. Moreover, Permission Slips can serve an important function: they provide the parents notice of the special situation, give the parents the opportunity to bring any special concerns to the attention of school personnel (such as underlying health conditions that could put students or their family members at high risk of serious infection from COVID-19), and warn parents and students against participating in an activity if they deem the risk of injury or infection to be too high. On the other hand, Permission Slips can themselves subject school districts to certain risks. If a parent and/or student puts school personnel on notice of special circumstances through a Permission Slip or otherwise (such as a student’s or student family member’s underlying condition that places the student or family member at high risk of serious infection from COVID-19), a failure by the school district to take precautions may result in a finding of liability for negligence.

QUESTION TWO (INDEPENDENT FOOTBALL LEAGUES):

“Now that the CIAC has canceled its fall football season, there are several independent football leagues popping up. How would you advise a CIAC member school in terms of liability if they issue a student football safety equipment (i.e. helmet, shoulder pads, etc.) and/or a uniform?”

SHORT ANSWER:

A school district’s potential liability in this circumstance may be analyzed under (1) the pure negligence framework described in response to Question One and (2) a theory of negligent misrepresentation. **It is important first to review a school district’s potential liability for operating a full contact football program itself before**

reviewing a school district’s potential liability for loaning equipment that may be used for full contact football. If the underlying activity carries a certain degree of risk with possible liability exposure, anyone involved in causing, enabling, authorizing, or sponsoring that activity -- particularly where the risks are foreseeable, as they are here -- could be liable for any foreseeable injury that results. To be sure, the risk of liability is diminished as the connection between the actor and the activity becomes more attenuated. However, we are concerned that there may be public policy reasons to hold a school district liable in this circumstance given that the school district is not running a football program itself precisely because of the risks associated with it, and yet could be viewed as enabling or tacitly condoning full contact football by loaning equipment for student use outside the school setting.

With respect to the pure negligence theory, there are important distinctions between a circumstance in which a school district loans equipment and when it runs its own full contact football program. The significance of these distinctions is that the risk of liability for loaning equipment is lower -- perhaps even far lower -- than the risk of running a full contact football program. Specifically, it would be harder to establish the duty of care and causation elements of negligence where the school district merely loans equipment as opposed to running the program itself. Moreover, students who voluntarily participate in a private football league against official guidance and knowing that CIAC and school districts have canceled football for reasons related to the COVID-19 Pandemic arguably could be more than fifty percent liable for any COVID-19 injuries they sustain as a result of their participation, which would constitute a complete defense to recovery under the theory of contributory negligence.

Importantly, however, school districts should be aware that liability for negligence if a district merely loans equipment is still possible. Liability is especially possible if the school district is loaning equipment that it knows will be used to perform activities that DPH has expressly advised against (*e.g.*, equipment that is designed for use in connection with 11-on-11 football and/or football that includes tackling and line play). By contrast, where a school district loans equipment that could be used in manner that DPH generally has deemed to be acceptable (*e.g.*, a helmet or uniform that could be used in connection with a 7-on-7 style of football in certain lower-risk circumstances), the likelihood of liability may be diminished.

Under a theory of negligent misrepresentation, a school district could be liable for harm caused by loaning equipment either for implicitly representing that football is safe by virtue of the loan, or by failing to disclose the potential risks associated with using the equipment to play football when it has a duty to make such a disclosure. Such duty to disclose may arise “from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act.” *See Faillace v. Soderholm*, No. CV 950322549, 1997 WL 684900, at *7 (Conn. Super. Ct. Oct. 27, 1997). However, requiring students and parents to review and sign a Permission Slip expressly notifying them of the risks associated with playing football contrary to the Football

Guidance, and requiring that they knowingly and voluntarily assume such risks, may help to mitigate (or possibly eliminate) liability in the event of a lawsuit based on a claim of negligent misrepresentation.

LONG ANSWER:

I. Negligence.

The framework for reviewing the issue of loaning equipment under a pure negligence theory is set forth exhaustively in response to Question One and need not be repeated here. Below, we focus on the specific aspects of a negligence claim that may be analyzed differently when a school district is loaning equipment for use in connection with a private football league rather than running the program itself.

Duty of Care

One of the key questions related to a school district's liability for loaning equipment is whether the school district owes a duty of care to anyone participating in, or watching, the private football league. School districts generally owe a duty of care to students at school and during school-sponsored activities, including school-sponsored athletic activities. That duty generally does not extend to students when they are off school grounds and engaging in private activities. However, there are circumstances when a school district, through its actions, could expand its duty of care, even inadvertently.

There is “no universal test” for duty of care; rather, the “nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual.” *See Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 328–29 (2015). Courts in Connecticut have analyzed the duty of care as follows:

- “[T]he test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant’s position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant’s responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.” *Ruiz*, 315 Conn. at 329.
- With respect to the public policy analysis, the *Munn* decision discussed in response to Question One notes the following: “[A] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant’s responsibility should extend to such results. . . . [I]n considering whether public

policy suggests the imposition of a duty, we . . . consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.” *Munn*, 326 Conn. at 548–49.

In light of the legal standards above, we are concerned that a school district could be deemed to have expanded its duty of care to participants in a private football league by loaning football equipment to its own students for use in connection with an activity that presents known and foreseeable risks and that may be considered contrary to the important public policy of safeguarding public health in the midst of the COVID-19 Pandemic. School districts know how the equipment will be used; they know that such use is contrary to the Football Guidance and to their own decision to cancel school-sponsored football; they are aware of the risks associated with spreading COVID-19 through full contact football; they are aware of the risks associated with COVID-19 infection; and there are key officials *discouraging* participation in full contact football, including school districts themselves, as evidenced by their cancellation of school-sponsored football. Moreover, there may be an additional public policy reason to impose a broader duty of care on school districts when they are acting in a manner that directly affects the students for whom they stand *in loco parentis* during the school day and during school-sponsored activities. Therefore, while it is not certain a court would find that school districts owe a duty of care to their own students and perhaps to other participants in private football leagues (but likely not to spectators or others) in this circumstance, a plaintiff would have compelling arguments to support the “duty of care” element of negligence.

Breach of the Duty of Care

As discussed in response to Question One, it is likely that DPH guidance and recommendations, Governor Lamont’s Executive Orders, CDC guidance, and CIAC rules (the “Football Guidance”) together would help to establish the standard of care in a negligence action for full contact football. If all relevant authorities are advising against full contact football, a plaintiff likely could establish that the applicable standard of care was *not* engaging in full contact football, and that a school district that loans equipment it knows will be used to engage in full contact football has acted unreasonably by enabling and/or condoning such activity through such loan.

The conclusion may be different, however, if a school district were to loan equipment -- such as a helmet or uniform -- that could be used in connection with a style of play that DPH generally has deemed to be acceptable, such as 7-on-7 football in certain lower-risk circumstances. Specifically, DPH has issued guidance for the continued operation of sporting activities for private, municipal, and interscholastic youth and adult sports leagues (the “DPH Guidance”). See DPH, General Guidance for the Operation of Interscholastic, Youth and other Amateur Sport Activities during the COVID-19 Pandemic Fall/Winter 2020 (Last Updated: September 25, 2020). The DPH

Guidance describes the risks associated with various sporting activities and offers recommended risk mitigation strategies, including recommendations for the operation of various sporting activities for different sports based on the designated level of risk associated with such sports (*i.e.*, “lower risk sports,” “moderate risk sports,” and “higher risk sports”). A 7-on-7 style of football is categorized as a “moderate risk sport,” and there are different recommendations for different “tiers” of activities which themselves have different designated risk levels. For “moderate risk” sports, the following **outdoor** activities are considered acceptable:

- **Tier 1:** Individual one-to-one training, small group aerobic conditioning, and small group sport-specific non-contact skill development drills.
- **Tier 2:** Team practices, intra-squad scrimmages.
- **Tier 3:** Interscholastic or in-state contests, meets, or tournaments.

The following activities are not considered acceptable, whether indoors or outdoors, for **any** sport:

- **Tier 4:** Interscholastic or other contests between teams from different states (particularly states on the Connecticut Travel Advisory List).

In addition, the DPH Guidance recommends considering certain “mitigation strategies” in connection with playing sports during the COVID-19 Pandemic, including, but not limited to:

- Moving indoor activities outdoors and keeping individuals in small cohorts
- Increasing and maintaining the distance between participants
- Implementing rule changes that reduce the number, frequency, duration, and/or exertional level of person-to-person physical contact
- Limiting the sharing of equipment without appropriate cleaning and disinfection
- Adding face covering masks that completely cover the nose and mouth to the required equipment for players and coaches

Id. However, DPH advises caution with respect to implementing such mitigation strategies, noting that “[t]he ability to operationalize and ensure compliance with appropriate mitigation strategies in a way that does not introduce additional safety risks or unintended consequences to health are other important factors that should be considered and applied to decision-making for various sports, in consultation with sports medicine professionals.” *Id.*

In previous guidance, DPH advised that “playing a ‘7v7’ style of football that eliminates tackling and line play **may be** modifications that would allow [football] to be

considered in the ‘moderate risk’ outdoor sports category.” *See* Letter from Deidre S. Gifford, MD, MPH Acting Commissioner, DPH (August 23, 2020) (emphasis added). DPH further cautioned in its previous guidance that “considering that the specific rules and training recommendations for high school sports have been developed and fine-tuned over many years in consultation with sports medicine experts, DPH would strongly recommend that CIAC consult with their sports medicine committee, and give them ample time to study and fully vet any proposed changes prior to implementing rapid changes to how any high school sport is played in our state.” *Id.* While it is unclear whether the DPH Guidance fully supersedes DPH’s August 23, 2020 letter, school districts should be aware of DPH’s prior guidance and “strong” recommendations which could be trotted out by a plaintiff in a lawsuit against a school district. In any case, it is more reasonable for a school district to knowingly facilitate a “moderate risk” activity that DPH generally has deemed to be acceptable than to facilitate an activity that has been deemed “higher risk” and recommended not to occur.¹

Causation

Of all the elements of a negligence claim against a school district for loaning equipment, this may be the most difficult to establish and ultimately could be fatal to such a claim. A plaintiff would have to prove (1) that the school district’s actions in loaning equipment were an actual cause of the plaintiff’s injuries -- that is, that the injuries would not have occurred but for the school district’s actions, and (2) that the school district’s actions in loaning equipment were the proximate cause of, or a “substantial factor” in, causing such injuries. *See Decastro*, 170 Conn. App. at 590–91. As noted in response to Question One, there are significant challenges with establishing actual causation even where the school district runs the football program itself. For example, with respect to any COVID-19-related injuries, a plaintiff would need to prove that he/she did not have COVID-19 before the event, did not come in contact with anyone or any shared spaces on the way to the event, and did not come in contact with anyone or any shared spaces after the event.

Establishing that an equipment loan by a school district was a “substantial factor” in causing a plaintiff’s injuries likely would be even more challenging. A school district

¹ It bears mentioning that the Sector Rules for Sports, Sports Clubs & Complexes, Gyms, Fitness Centers and Pools (“Sector Rules for Sports”) established pursuant to certain of Governor Ned Lamont’s Executive Orders by the Connecticut Department of Economic and Community Development (DECD) classify 7-on-7 football as a “higher risk” sport. *See* https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery-Sept-17-updates/Sports_FitnessCenters917.pdf. However, notwithstanding this classification (which is inconsistent with the DPH Guidance), the Sector Rules for Sports have allowed “higher risk sports” to engage in, among other activities, scrimmages, games, meets, matches, etc. post July 6, 2020. In any event, we believe the Sector Rules for Sports (along with the other rules for businesses and social and recreational gatherings included in certain of Governor Lamont’s Executive Orders and established pursuant to such orders by DECD) do not apply to public school districts.

would have compelling arguments that the mere act of loaning equipment could not have been a substantial factor in a plaintiff's infection with COVID-19. The more obvious substantial factors in such circumstance would be (1) the formation and existence of the independent football league contrary to the Football Guidance; (2) any failure by the league's leadership and/or coach(es) to adhere to applicable public health guidance related to COVID-19; (3) the student's/parents'/guardians' decision to allow the student to participate in the football league contrary to the Football Guidance; and (4) any other possible sources of the COVID-19 infection separate and apart from the football league.

II. Negligent Misrepresentation.

Connecticut courts have long recognized liability for negligent misrepresentation. An action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result. *Coppola Const. Co. v. Hoffman Enterprises Ltd. P'ship*, 309 Conn. 342, 351–52 (2013). Courts have held that “even an innocent misrepresentation of fact ‘may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth.’” *See D’Ulisse-Cupo v. Bd. of Directors of Notre Dame High Sch.*, 202 Conn. 206, 217–18 (1987). In addition, a claim of negligent misrepresentation may be based on a defendant's failure to speak when he has a duty to do so. *Faillace*, No. CV 950322549, 1997 WL 684900, at *7. “A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act.” *Id.*

Under Connecticut law, negligent misrepresentation typically has been used to recover in actions involving pecuniary harm (*e.g.*, real estate and business transactions), and not in actions involving personal injury or other noneconomic damages. While some lower courts have held that a negligent misrepresentation claim may properly seek to recover damages for personal injuries such as emotional distress, the issue has not yet been addressed by the Connecticut Appellate or Supreme Courts. *See, e.g., Schlierf v. Abercrombie & Kent, Inc.*, No. CV055003467X02, 2012 WL 3089387, at *3–4 (Conn. Super. Ct. July 2, 2012). Therefore, it is unclear whether a claim for negligent misrepresentation could be successfully used to recover for any harm (economic or otherwise) suffered in connection with COVID-19-related injuries resulting from playing football in the midst of the COVID-19 Pandemic.

If a plaintiff were to make a claim of negligent misrepresentation, he/she could argue that the school district either implicitly represented by loaning equipment that using such equipment to play football was safe, or that the school district had a duty to inform students of the risks associated with using the equipment in this circumstance because the district reasonably could have anticipated “that harm of the general nature of that

suffered was likely to result” from the district’s actions. In any event, the first element of a negligent misrepresentation claim -- the alleged misrepresentation itself or the failure to speak -- may be defeated if the school district required students and parents/guardians to review and sign a Permission Slip expressly notifying them of the risks associated with using the equipment to play football contrary to the Football Guidance, and requiring that they knowingly and voluntarily assume such risks.

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We hope this information is helpful. Please let us know if you have any additional questions. Thank you.