



Liability Risks for After-Hours Use of Public School Property to Reduce Obesity:

NORTH CAROLINA

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This memorandum summarizes North Carolina law governing liability for after-hours recreational use of school facilities. It should be read with this project's overview memorandum, which can be found at www.changelabsolutions.org/publications/liability-schools-50-states. It does not provide the kind of detailed analysis necessary to support the defense of a liability action, nor is it a substitute for consultation with a lawyer. If there are important cases, statutes, or analyses that we have overlooked, please inform us by sending an email to info@changelabsolutions.org.

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For a negligence action in the state of North Carolina, a plaintiff must prove four elements: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the duty of care, (3) proximate cause, and (4) damages.¹ For purposes of evaluating the legal rules that affect the liability risk involved in opening up schools to after-hours recreational use, the crucial issues involve the duty of the school system, in particular the potential application of sovereign and governmental immunity.

Part A of this memorandum addresses the duty of the school system. Part B addresses issues relating to limits on damages. Part C addresses two risk management issues that involve legal questions susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district.

A. Public Schools, the Duty Element, and After-Hours Use

Absent special liability protection, school districts and other providers of recreational facilities have the legal duty to take *reasonable* precautions to prevent injury. What is reasonable is very context specific and depends on many things, but most importantly the nature of the harm, the difficulty of preventing it, and generally accepted standards in the management of recreational facilities.

As any lawyer who has tried to explain the concept of negligence to a layperson knows, the standard of reasonable care can seem frustratingly vague and imprecise. Yet it is the standard that generally governs liability risk for organizations and individuals in the United States. On the whole, it is a flexible standard that does a good job of balancing the competing interests of the providers and users of many kinds of services.

This section explains the ways North Carolina law limits the legal duty of school districts. As we explain in subsection 1, North Carolina law significantly insulates school districts from liability, so that school districts that do

not take reasonable precautions may still be able to avoid legal responsibility for any resulting injuries. North Carolina law does this through two related forms of immunity: sovereign immunity and governmental immunity. In our judgment, sovereign immunity will protect school districts against liability for injuries relating to recreational use unless school districts waive that immunity by purchasing liability insurance. Subsection 2 discusses the liability and indemnification of school employees, a topic closely related to school districts' overall liability risk.

Subsection 3 discusses recreational user statutes, which sometimes also offer liability protection to school districts. Unlike those in many other states, however, North Carolina's recreational user statute does not apply to governmental entities, so that statute does not provide any protection to school districts. The statute would likely provide protection to an organization that entered an agreement with the local board of education, consistent with their rules and regulations, to use the property for recreational use.

Subsection 4 discusses the impact of the North Carolina courts' use of traditional distinctions among different categories of entrants on land as an important factor in determining whether the possessor of land has exercised reasonable care. Section 5 concludes this part of the memorandum by comparing the legal duties that a school already faces for activity during the school day with the legal duties that the school would face if it permitted after-hours use of its facilities.

1. Limited Duty Due to Sovereign and Governmental Immunity

North Carolina distinguishes between sovereign and governmental immunity.² Under the doctrine of sovereign immunity, "the State is immune from suit absent waiver of immunity."³ Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.⁴ Governmental immunity is more limited and covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.⁵

The State of North Carolina is protected by sovereign immunity for all of its functions, whether governmental or proprietary.⁶ The Supreme Court of North Carolina has held that "[a]n action against a Commission or Board created by Statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State."⁷ North Carolina statutory law vests the state board of education with the general supervision and administration of the free public school system and defines the powers and duties of the board of education.⁸ The chapter subheading preceding this statute, Administrative Organization of State and Local Education Agencies, further indicates the state board of education was created as a state agency.⁹ As a state agency, the state board of education is entitled to immunity for governmental and proprietary functions. North Carolina courts have also held that county or city boards of education, as governmental agencies, are immune from tort suit unless the boards have waived their sovereign immunity.¹⁰

There is one instance in which boards of education should be aware of a potential waiver of such immunity. Under North Carolina General Statute § 115C-42, if a local board of education obtains liability insurance for damages by reason of death or injury to person or property caused by the negligence or tort of any agent or employee acting

within the scope of employment, it is considered a waiver of immunity to the extent that the board is indemnified by insurance for such negligence or tort.¹¹

Under sovereign immunity, North Carolina boards of education are very well protected from liability if they decide to open school facilities for after-hours recreational use. However, protection under sovereign immunity is considered waived if the board of education has purchased liability insurance. Even in that case, the waiver is for liability only up to the amount indemnified by the insurance policy. So the board of education does not face any immediate additional financial exposure. There may be a slight risk of increased insurance premiums if the board of education has an insurance policy and faces suit in tort for negligence during after-hours recreational use of school facilities. However, that risk is minimal.

2. Duties and Indemnification of Public School Employees

North Carolina law recognizes public official immunity from individual liability for public officials “engaged in the performance of their governmental duties involving the exercise of judgment and discretion, and acting within the scope of their authority”¹² if they acted without malice or corruption. A public official is “one whose position is created by the N.C. Constitution or the N.C. General Statutes and exercises some portion of sovereign power and discretion.”¹³ A public employee, on the other hand, is one who performs ministerial duties and is not entitled to immunity.¹⁴ (The discretionary/ministerial distinction is discussed in greater detail in the overview memorandum.)

School board employees sued in their representative capacities or individually are unlikely to be subject to liability for discretionary acts if they act in good faith and within the scope of their authority as employees since public official immunity would apply. However, school board employees are likely to be subject to liability for negligently performed ministerial acts. Ministerial acts are those that “involv[e] merely the execution of a specific duty arising from fixed and designated facts.”¹⁵ The North Carolina courts have determined that teachers perform ministerial duties and therefore are not entitled to public official immunity.¹⁶ In the context of an after-hours recreational program, it is likely that a school board’s decision to host recreational programming would be deemed discretionary while the actual daily distribution of recreational equipment to children would be deemed ministerial.

Local boards of education may, but are not required to, provide for the defense of any civil or criminal action brought against board of education members or employees in either official or individual capacity on account of an act in the scope of duty as a board member or employee.¹⁷ Similarly, local boards of education may, but are not required to, pay part of a claim made or any civil judgment entered against any of its members or employees for an act in the scope of employment as long as the act was committed without fraud, malice, or corruption.¹⁸

3. Limited Duty Under Recreational User Statute

North Carolina's recreational user statute limits the liability of landowners who open their land to the public free of charge for recreational purposes.¹⁹ Unlike those in many other states, the North Carolina statute applies to most kinds of land, not only to rural or undeveloped land.²⁰ The North Carolina statute excludes dwellings and the property around dwellings used as a living space.²¹ However, the statute does not apply to governmental entities²² and thus does not protect school districts from liability for recreational after-hours use of school facilities.

4. Limited Duty Due to the Historical Distinctions Among Entrants on Land

North Carolina uses a hybrid approach to the three traditional classifications of entrants on land,²³ which does not provide additional protection to school districts that open their facilities for recreational use as part of an effort to combat childhood obesity. Instead of treating trespassers, licensees, and invitees differently, North Carolina has eliminated the distinction between licensees and invitees and now requires a standard of reasonable care toward all lawful visitors.²⁴ The North Carolina Supreme Court retained a separate classification for trespassers. A trespasser is one who enters without permission or other right.²⁵ The possessor of land owes a trespasser only the limited duty to refrain from the willful and wanton infliction of injury.²⁶

Participants in after-hours recreational programs and their parents and guardians would be lawful visitors to school facilities. As such, in the absence of immunity, school districts would owe participants the customary standard of reasonable care.

5. Duty During the School Day and After: A Comparison

When deciding whether to open up school facilities for recreational use, it is useful to evaluate how the legal risk arising out of opening the school grounds for recreational use compares with the legal risk arising out of the use of school grounds for programs that the school already runs.

During the school day, boards of education are protected from liability by sovereign immunity, unless they have waived such immunity. After the school day, boards of education are protected from liability in two ways. If the after-hours use is considered an extracurricular activity, then sovereign immunity offers protection from liability.²⁷ If the after-hours use of school facilities is instead sponsored by a third party, then specific protection is granted to boards of education under North Carolina General Statute § 115C-524.²⁸ This statute grants local boards of education authority to enter agreements permitting nonschool groups to use school property for nonschool purposes.²⁹ The provision further mandates that “[n]o liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property pursuant to such agreements.”³⁰ North Carolina courts have interpreted § 115C-524 to explicitly preclude liability from attaching to schools when the school facilities are being used for nonschool purposes.³¹

B. Limits on Damages

North Carolina waives sovereign immunity in suits against the state board of education and its agencies through the Tort Claims Act. In cases where the state board of education would otherwise have immunity for negligently performed acts, the Tort Claims Act waives such immunity and permits a plaintiff to seek redress. General damages for tort claims are not reduced because of North Carolina's collateral source rule. Only punitive damages are limited under North Carolina statute.

1. Damages Limits Under State Tort Claims Act

The North Carolina Tort Claims Act³² is a statutory limited waiver of sovereign immunity³³ meant to “enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment.”³⁴ The Tort Claims Act created the North Carolina Industrial Commission to hear and pass upon tort claims against the state board of education and other agencies of the state.³⁵ North Carolina courts have interpreted the statute to apply only to actions against state departments, institutions, and agencies; the Tort Claims Act does not apply to claims against county and city boards of education.³⁶ In an action, if the commission finds (1) negligence (2) on the part of an officer, employee, or agent of the state (3) while acting within the scope of his authority, (4) that was the proximate cause of an injury, and (5) there was no contributory negligence on the part of the claimant, then the commission will determine the amount of damages that the claimant is entitled to be paid.³⁷ The amount of damages awarded shall not exceed \$1 million.³⁸

The Tort Claims Act is strictly construed and “applies only to actions against state departments, institutions and agencies and does not apply to claims against officers, employees, involuntary servants and agents of the State.”³⁹ However, a plaintiff may still “maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence.”⁴⁰ Local agencies, such as city and county school boards, are considered agents of the state.⁴¹ As such, the Tort Claims Act's waiver of immunity does not apply to local school boards; however, a state agency, such as a state school board, could be held vicariously liable as principal for the acts of a local school board as agent.⁴²

2. General Damages Limits for Tort Claims

North Carolina statutory law limits the amount of recovery in all actions seeking an award of punitive damages.⁴³ Although the North Carolina Constitution guarantees that every person shall have remedy by due course of law “for an injury done him in his lands, goods, person, or reputation,”⁴⁴ North Carolina courts have held that the statutory law limiting the amount of recovery in actions seeking an award of punitive damages⁴⁵ is not contrary to the constitution.⁴⁶

North Carolina General Statute § 1D-25 requires the trier of fact to determine the amount of punitive damages separately from the amount of compensation for all other damages.⁴⁷ It then limits the punitive damages awarded against a defendant to three times the amount of compensatory damages or \$250,000, whichever is greater.⁴⁸

It is unlikely that a claim against the school board for the after-hours use of school facilities would result in an award of punitive damages. Should that situation arise, North Carolina law provides protection in the form of a \$250,000 limit on punitive damages.

In North Carolina, “the collateral source rule typically is applied only in actions arising under tort law.”⁴⁹ The effect of the collateral source rule is that a tortfeasor will be prevented from reducing “his own liability for damages by the amount of compensation the injured party receives from an independent source.”⁵⁰ The collateral source rule does not provide additional protection to school boards from liability or potential damages awards resulting from a tort suit for opening school facilities for after-hours use.

C. Selected Risk Management Issues

In this section we consider two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers, and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district. In brief, we conclude that North Carolina courts would be unlikely to enforce liability waivers. Further, both boards of education and third parties providing after-hours recreational programming on school facilities would be protected from liability. Boards of education would be protected by sovereign immunity, while third parties would be protected under the recreational user statute.

1. Liability Waivers

North Carolina law disfavors exculpatory contracts for exemption from liability for negligence. Such agreements are strictly construed against the party claiming exemption.⁵¹ However, North Carolina courts have held that “an exculpatory contract will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest.”⁵² North Carolina courts have determined that the following liability releases are unenforceable: (1) release signed by a customer before accepting a cosmetology school’s services,⁵³ (2) release from liability for injuries caused by negligence of a motorcycle safety program instructor,⁵⁴ and (3) release from liability for a parking lot proprietor’s negligence.⁵⁵

Liability waivers, signed by recreational program participants, or their parents or legal guardians, may be unenforceable if North Carolina courts construe unequal bargaining power between the recreational program sponsor and the parents of participating children. It is more likely, however, that courts will find these liability waivers unenforceable as contrary to the substantial public interest of protecting children during after-hours use of school facilities.

2. Providing Access Through Third Parties

Providing access to after-hours recreational programs through third parties offers protection from liability to both the third parties and the boards of education. Under the recreational user statute, North Carolina provides protection to

third parties from liability risk posed by running a recreational program on school grounds. A third party owes only the duty of care owed a trespasser so long as it is a nongovernmental legal entity with any fee, leasehold interest, or legal possession that permits use without charge for education or recreational purposes.⁵⁶ The third party, as sponsor of after-hours use of school grounds, need only refrain from willful and wanton infliction of injury to participants to avoid liability.⁵⁷

Further protection is granted to boards of education under North Carolina General Statute § 115C-524. This statute grants local boards of education authority to enter agreements permitting nonschool groups to use school property for nonschool purposes.⁵⁸ The provision mandates that “[n]o liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property pursuant to such agreements.”⁵⁹ North Carolina courts have interpreted § 115C-524 to explicitly preclude liability from attaching to schools when the school facilities are being used for nonschool purposes.⁶⁰ Additionally, the purchase of liability insurance does not constitute a waiver of immunity for liability for personal injuries if the nonschool use of the property is consistent with the rules and regulations adopted by the local board of education for nonschool use.⁶¹

The liability risk of schools or third parties running after-hours recreational programs is an important question that will be addressed in future research on joint venture agreements for public schools.

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¹ Estate of Mullis by Dixon v. Monroe Oil Co., 505 S.E.2d 131, 135 (N.C. 1998).

² Evans v. Hous. Auth., 602 S.E.2d 668, 670 (N.C. 2004).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Prudential Ins. Co. v. Powell, 6 S.E.2d 619, 622 (N.C. 1940).

⁸ N.C. GEN. STAT. § 115C-12 (2012).

⁹ *Id.*

¹⁰ Herring v. Liner, 594 S.E.2d 117, 119 (N.C. Ct. App. 2004).

¹¹ N.C. GEN. STAT. § 115C-42. (“...[I]t shall be no defense to any such action that the negligence or tort complained of was in pursuance of governmental, municipal or discretionary function of such local board of education if, and to the extent, such local board of education has insurance coverage as provided by this section.”)

¹² Price v. Davis, 512 S.E.2d 783, 787 (N.C. Ct. App. 1999).

¹³ Mabrey v. Smith, 548 S.E.2d 183, 186 (N.C. Ct. App. 2001).

¹⁴ *Id.*

¹⁵ Meyer v. Walls, 489 S.E.2d 880, 889 (N.C. 1997).

¹⁶ Farrell, ex rel. Farrell v. Transylvania County Bd. of Educ., 682 S.E.2d 224,299 (N.C. 2009); *see also* Isenhour v. Hutto, 517 S.E.2d 121, 128 (N.C. 1999), determining duties of a crossing guard to be ministerial.

¹⁷ N.C. GEN. STAT. § 115C-43(a) (2012).

¹⁸ *Id.* § 115C-43(b).

¹⁹ *Id.* § 38A-1.

²⁰ *Id.* § 38A-2(3) (“Land” means real property, land, and water, but does not mean a dwelling and the property immediately adjacent to and surrounding such dwelling that is generally used for activities associated with occupancy of the dwelling as a living space.).

²¹ *Id.*

²² *Id.* § 38A-2(4) (“Owner” means any individual or nongovernmental legal entity that has any fee, leasehold interest, or legal possession, and any employee or agent of such individual or nongovernmental legal entity.).

²³ Nelson v. Freeland, 507 S.E.2d 882, 892 (N.C. 1998).

²⁴ *Id.* at 892.

²⁵ *Id.* at 884.

²⁶ *Id.*

²⁷ Webb ex rel. Bumgarner v. Nicholson, 634 S.E.2d 545, 547 (N.C. Ct. App. 2006) (holding immunity applies since local school boards are governed by statute as having the responsibility for supervision and oversight of extracurricular activities); *see also* N.C. GEN. STAT. § 115C-47(4) (2008).

²⁸ N.C. GEN. STAT. § 115C-524.

²⁹ *Id.*

³⁰ *Id.*

³¹ Lindler v. Duplin County Bd. of Educ., 425 S.E.2d 465, 468 (N.C. Ct. App. 1993).

³² N.C. GEN. STAT. § 143-291.

³³ Meyer v. Walls, 489 S.E.2d 880, 884 (N.C. 1997).

³⁴ *Id.* at 887 (quoting Wirth v. Bracey, 128 S.E.2d 810, 813 (1963)).

³⁵ N.C. GEN. STAT. § 143-291(a).

³⁶ Meyer v. Walls, 489 S.E.2d 880, 885 (N.C. 1997).

³⁷ N.C. GEN. STAT. § 143-291(a).

³⁸ *Id.* § 143-299.2.

³⁹ Meyer v. Walls, 489 S.E.2d 880, 885-86 (N.C. 1997).

⁴⁰ *Id.* at 886.

⁴¹ Meyer v. Walls, 489 S.E.2d 880, 885 (N.C. 1997).

⁴² *Id.*

⁴³ N.C. GEN. STAT. § 1D-25 (2008).

⁴⁴ N.C. CONST. art. I, § 18.

⁴⁵ N.C. GEN. STAT. § 1D-25.

⁴⁶ *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 86 (N.C. Ct. App. 2002).

⁴⁷ N.C. GEN. STAT. § 1D-25(a).

⁴⁸ *Id.* § 1D-25(b).

⁴⁹ *Wilson v. Burch Farms, Inc.*, 627 S.E.2d 249, 257 (N.C. Ct. App. 2006).

⁵⁰ *Fisher v. Thompson*, 275 S.E.2d 507, 513 (N.C. Ct. App. 1981).

⁵¹ *Jordan v. E. Transit & Storage Co.*, 146 S.E.2d 43, 48 (N.C. 1966).

⁵² *Fortson v. McClellan*, 131 N.C. App. 635, 636 (1998).

⁵³ *Alston v. Monk*, 373 S.E.2d 463, 467 (N.C. App. 1988).

⁵⁴ *Fortson*, 131 N.C. App. at 636.

⁵⁵ *Miller's Mut. Fire Ins. Ass'n of Alton, Ill. v. Parker*, 65 S.E.2d 341, 344 (N.C. 1951).

⁵⁶ N.C. GEN. STAT. § 38A-4 (2008).

⁵⁷ *Nelson v. Freeland*, 349 N.C. 615, 618 (1998).

⁵⁸ N.C. GEN. STAT. § 115C-524(b).

⁵⁹ *Id.*

⁶⁰ *Lindler v. Duplin County Bd. of Educ.*, 425 S.E.2d 465, 468 (N.C. Ct. App. 1993).

⁶¹ *Seipp v. Wake County Bd. of Educ.*, 510 S.E.2d 193, 194 (N.C. Ct. App. 1999).