

# RE: Football Play at Payden Field House

Kyle McClain <kmccclain@zcclawfirm.com>

Fri 10/2/2020 12:20 PM

Inbox

To: Dr. Matthew Conway <mconway@derbyps.org>;

Cc: Sara Saucier <SSaucier@zcclawfirm.com>;

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This is consistent with our opinion, particularly: "Until the CT DPH changes its position on contact sports, it is not advisable for either the town, or the board of education to even suggest that contact sports can advance through private action on any field, public or private." That applies to the issue of loaning equipment and even more so to permitting football to be played on school property. As he outlines at the end of his email, there are steps that can be taken to try to minimize liability and preempt a future claim, but no sure way to eliminate the potential for liability.

Regards,

**Kyle A. McClain**

Attorney at Law, Partner



**ZANGARI COHN**  
**CUTHBERTSON DUHL & GRELO P.C.**  
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*own advice based on their particular facts and circumstances from an independent advisor.*

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**From:** Dr. Matthew Conway <mconway@derbyps.org>  
**Sent:** Friday, October 2, 2020 12:08 PM  
**To:** Kyle McClain <kmclain@zcclawfirm.com>  
**Subject:** Fwd: Football Play at Payden Field House

Please share with Sara.

Thanks,

Matt

Dr. Matthew J. Conway, Jr.  
Superintendent of Schools  
Derby Public Schools  
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**Date:** October 1, 2020 at 7:53:55 AM EDT  
**To:** Rich Dziekan <[rdziekan@derbyct.gov](mailto:rdziekan@derbyct.gov)>  
**Cc:** Andrew Baklik <[abaklik@derbyct.gov](mailto:abaklik@derbyct.gov)>, "Dr. Matthew Conway" <[mconway@derbyps.org](mailto:mconway@derbyps.org)>, "Joseph DiMartino" (<[kajola@sbcglobal.net](mailto:kajola@sbcglobal.net)>)" <[kajola@sbcglobal.net](mailto:kajola@sbcglobal.net)>  
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Dear Mayor –

In light of the confusion created by the multiple Executive Orders issued by the Governor and the conflicting recommendations from the CT DPH, I have been asked to opine whether the City of Derby can permit football tournament play the Payden fieldhouse. The State has fumbled this issue. The failure of the State to have a clear unambiguous direction has left localities unsure of what to do.

On March 10, 2020, the Governor issued declarations of public health emergencies as a result of the coronavirus (COVID-19) global pandemic. See <https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200310-declaration-of->

[civil-preparedness-and-public-health-emergency.pdf](#). As part of his declaration, the Governor, in accordance with Connecticut General Statutes Section 19a-13 la (f), authorized the Commissioner of Public Health to delegate the powers regarding isolation or quarantine to municipal and district directors of public health and to apply relevant principles of risk management to decisions about whether to cancel, modify, or postpone large gatherings, public events, or travel.

The CT DPH has not recommended the resumption of contact sports. The Sector rules for Sports, Sports Clubs & Complexes, Gyms, Fitness Centers and Pools is inconsistent. See [https://portal.ct.gov/-/media/DECD/Covid\\_Business\\_Recovery-Sept-17-updates/Sports\\_FitnessCenters917.pdf](https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery-Sept-17-updates/Sports_FitnessCenters917.pdf) It lists football among the higher risk sports, (see page 15) and provides that higher risks sports can resume all normal activity beginning July 6<sup>th</sup>. Notwithstanding the Sector rules, the Governor has publicly stated that football should not resume and the CT DPH continues not to recommend it.

It is also worth noting that Executive Order 7PP provides in part at paragraph 1 that the “Sector Rules shall constitute legally binding guidance,” which guidance is wholly in conflict with the recommendations of the CT DPH.

On September 1, 2020, the Governor renewed his March 10, 2020 declarations and issued new declarations of emergencies. See <https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200901-Renewed-COVID-19-Emergency-Declarations.pdf>. In his renewed and new declarations, the Governor again authorized the Commissioner of Public Health to delegate the powers regarding isolation or quarantine to municipal and district directors of public health. When he issued his new declarations, he presumably was aware of the language in E.O. 7PP, but failed to address the conflict. It is therefore arguable the recommendations of the CT DPH should prevail over the Sector Rules.

The Connecticut Department of Health (“DPH”) has not approved full contact football. I see no legal authority for the local health director to independently deviate from the DPH’s recommendations. Connecticut Gen. Stat. §19a-207 provides in relevant part that “the local health director . . . shall enforce or assist in the enforcement of the Public Health Code as adopted by said commissioner. In an emergency when the health of any locality is menaced or when the local health director fails to comply with the recommendations of the DPH, said department may enforce such regulations as may be required for the protection of the public health.” On Monday, September 14, 2020, the acting commissioner of CT DPH issued a letter stating that it lacks sufficient information to conclude that the measures proposed by the CIAC would change the risk of spreading COVID-19. See [https://www.gametimect.com/files/2020/09/DPH-Statement-on-Fall-sports\\_9-14-2020.pdf](https://www.gametimect.com/files/2020/09/DPH-Statement-on-Fall-sports_9-14-2020.pdf) In reaffirming its recommendation against engaging in “higher risk” like football, the acting commissioner stated “the National Federation of State High School Associations (NFHS) Sports Medicine Advisory Committee has indicated that individual sports meeting their definition of ‘higher risk’

could be considered ‘moderate risk’ by having “protective equipment in place that may reduce the likelihood of respiratory particle transmission between participants”. To our knowledge, and as affirmed by representatives of the CIAC Sports Medicine Committee on our September 11th call, there is currently no scientific information available to determine: (1) the effectiveness of plastic shields that attach to the helmet or a cloth covering over the front grill portion of the helmet in preventing the spread of respiratory droplets among players and (2) that these specific prevention measures are safe for high school players to use during play. Without any additional data or documentation, DPH could not definitively say whether or not these technologies are safe to use or could be expected to work effectively from an infection control or epidemiologic perspective to reduce the spread of COVID-19.”

You can arguably allow tournament football play on municipal property pursuant to the Sector Rules providing that you believe that you can do so without risking the spread of the COVID-19 virus. Based on the September 14<sup>th</sup> reaffirmation of its position of the CT DPH, and since no credible evidence has been presented to conclude that there is no risk of spreading the COVID-19 virus to the participants of the tournament, countless others not in attendance through interaction with attendees, and to your community, I see no reason for the City to assume a risk or expose itself to any claimed liability. Until the CT DPH changes its position on contact sports, it is not advisable for either the town, or the board of education to even suggest that contact sports can advance through private action on any field, public or private.

I appreciate that this decision will be difficult and likely unpopular, but when deliberating the issue consider that the risks associate with playing include spreading the virus that could result in death, which could result in a lawsuit that the City acted with a reckless disregard for public safety. If you decide to allow play, I strongly recommend that you speak to the City’s insurance carrier to ensure that it has coverage for claims relating to COVID-19 and also require an insurance policy from the organizers that specifically insures against claims arising out of the spread of COVID-19 from activities on the City’s property. Additionally, all participants should be required to sign agreements, including the parents of the athletes, that acknowledges that determining how, when or where a person’s exposure to COVID-19 has taken place is difficult and problematic and, therefore, if anyone at the tournament contracts COVID-19, it is agreed that such infection shall be deemed to have resulted from a source other than a source relating to the City (i.e., a source other than City personnel or facilities) unless it can be proven by clear and convincing evidence that the infection resulted from a source relating to the City.

If you would like to discuss this further, please let me know.

Vin  
Corporation Counsel

## City of Derby

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