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CONFIDENTIAL MEMORANDUM

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Date: **September 30, 2020**

Re: **Derby Board of Education: Independent Football League Use of Equipment**

ISSUE

The Derby Board of Education is considering allowing children who are participating in an independent football league (U19 Pop Warner-Youth Football) to use their football equipment. What is the potential liability?

SUMMARY

An individual who participates in an independent football league that utilizes the school district's equipment and contracts COVID-19 may allege negligence against the school district. To successfully establish that the school district is liable, the individual must demonstrate that the school district committed negligence, and that the doctrine of governmental immunity does not apply. The individual can overcome governmental immunity if he or she can demonstrate that he or she was an identifiable person subject to imminent harm. Although Connecticut courts have not expanded the "identifiable person-imminent harm" exception to children who participate in activities *voluntarily after school*, it is possible (although unlikely) that the courts will expand the exception because the school district had knowledge that the dangerous condition – contraction of COVID-19 – was so likely to cause harm that the school district had a clear and unequivocal duty to act immediately to prevent the harm. While it is unlikely that the individual would ultimately be successful in his or her negligence action, the school district would open the door to unnecessary liability.

ANALYSIS

I. Negligence

An individual who participates in an independent football league that utilizes the school's equipment and contracts COVID-19 may allege negligence against the school district. The essential elements of a cause of action for negligence are a duty; a breach of that duty; causation; and actual injury. *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994). The first element requires "(1) a determination of whether the 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 . . . The first part of the test invokes the question of foreseeability and the second part invokes the question of policy." *Gazo* v. *Stamford*, 255 Conn. 245, 250, 765 A.2d 505 (2001). Although the first part of the test may be met, the next step is to determine 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. . . . [This] totality of the circumstances rule . . . is most consistent with the public policy goals of our legal system, as well as the general tenor of our [tort] jurisprudence." *Munn* v. *Hotchkiss Sch.*, 326 Conn. 540, 549, 165 A.3d 1167 (2017).

Although there is no authority that the school's duty to supervise students extends to individuals who *voluntarily* participate in an independent sports league *after* school hours presumably by virtue of their parents' permission, it is possible that the court will expand the school district's duty of care to individuals in an independent football league because the school district loaned its equipment with knowledge that it will be used for football. An ordinary person in the school district's position, knowing what the school district knew – that participation in football is "higher risk" during the COVID-19 pandemic and is contrary to state and federal public health directives – would anticipate that an individual who participates in such activity may contract COVID-19. *See Munn* v. *Hotchkiss*, 554 (courts have not found the duty applicable to off-campus occurrences that "are unconnected to any school programming. *See e.g., Boisson* v. *Arizona Board of Regents*, [236 Ariz. 619,] 621, 623-25 [(2014)] (no duty to supervise college students' independently organized excursion to Mount Everest during study abroad trip to China); *Concepcion* v. *Archdiocese of Miami*, [693 So. 2d 1103,] 1105 [(Fla. App. 1997)] (no duty to prevent after school fight that occurred on public sidewalk outside of school gates); *Anderson* v. *Shaughnessy*, 526 N.W.2d 625, 626 (Minn. 1995) (no duty to prevent harm once student disembarked school bus safely at scheduled destination)).

If the court determined that the school owed the individual a duty, the individual would be required to demonstrate that the school breached its standard of care. The individual may demonstrate that the school district breached its duty to care by utilizing the recent guidance from the Centers for Disease Control and Prevention ("CDC"), NFHS, the CIAC, the DPH, and other state and federal guidance that football is a "higher risk" activity during the COVID-19 pandemic. The CDC has stated, "[t]he more people a child or coach interacts with, the closer the physical interaction, the more sharing of equipment there is by multiple players, and the longer that interaction, the higher the risk of COVID-19 spread." CDC, *Considerations for Youth Sports*, (last updated May 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/youth-sports.html. The CIAC has cautioned that "school districts may assume a liability risk if a district merely loans equipment to student-athletes for play in an independent 11v11 full contact league. Liability is especially possible if the school district is loaning equipment that it knows will be used to perform activities that the 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).” The school district’s decision, therefore, acted against state and federal public health directives when it permitted an independent football league to utilize its equipment.

Next, the individual would be required to demonstrate that the school district’s negligence caused the individual’s injuries. “Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor’s conduct . . . . Because actual causation, in theory, is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions . . . The fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant’s negligent conduct . . . In negligence cases . . . in which a tortfeasor’s conduct is not the direct cause of the harm, the question of legal causation is practically indistinguishable from an analysis of the extent of the tortfeasor’s duty to the [victim].” (Internal quotation marks omitted.) *Malloy* v. *Colchester*, 85 Conn. App. 627, 633-34, 858 A.2d 813, cert. denied, 272 Conn. 907, 863 A.2d 698 (2004).

The individual, however, would most likely not be successful in demonstrating causation in fact. It would be extremely difficult for the individual to prove that *but for* the school district’s permission to loan football equipment, he or she would not have contracted COVID-19. Furthermore, the individual must prove that he or she contracted COVID-19 as a direct result of his or her playing football. As COVID-19 symptoms generally appear anywhere from two to fourteen days after exposure, the infected individual must prove that he or she did not have COVID-19 *prior* to playing football, and that he or she did not contract COVID-19 through any other exposure. For example, the infected individual must essentially prove that he or she did not have direct or close contact with any other individual or visit any other premises where there was at least one other person present in the two to fourteen days prior to developing symptoms. Even if the infected individual’s medical witness testimony demonstrated that the infected individual’s symptoms developed within two to fourteen days *after* playing football, the infected individual would also need to demonstrate that he or she contracted the virus from playing football. Unless the infected individual had evidence that another player or the coach tested positive for COVID-19, it would be sheer speculation that COVID-19 was present at the football game when the infected individual was present. The infected individual, therefore, will most likely not be able to demonstrate the requisite causation to sustain such an action. Causation would be *easier* to establish, for example, if all individuals of the football team tested positive for COVID-19 two to fourteen days after playing football, or if the coach who was in close direct contact with the individual was COVID-19 positive. Although these cases would be easier to demonstrate causation, the likelihood that such a claim would be successful remains low.

II. Governmental Immunity

The school district will not be held liable if it can demonstrate that governmental immunity applies. "A municipality's potential liability for its tortious acts is limited by the common law principle of governmental immunity." *Heigl* v. *Board of Education*, 218 Conn. 1, 4, 587 A.2d 423 (1991). There are three exceptions to governmental immunity. These exceptions include: (1) negligence in performing a ministerial act; (2) negligence in executing a governmental act where imminent injury to a specific individual was foreseeable; and (3) wanton, willful, or malicious misconduct (acts manifesting a reckless disregard of the consequences or rights and safety of others).

For purposes of this issue, an individual would most likely argue the identifiable person-imminent harm exception. The first exception would most likely not apply in the instant case because there is not a city charter provision, ordinance, regulation, rule, policy, or any other directive that *compels* the school district to act in any prescribed manner. *See Lewis* v. *Town of Newtown*, 191 Conn. App. 213, 418 (2019); *see also Blake* v. *Mason*, 82 Conn. 324, 327, 73 A. 782 (1909) (ministerial act is one which person performs in given state of facts, in prescribed manner, in obedience to mandate of legal authority, without regard to or exercise of own judgment on propriety of act being done). The third exception most likely does not apply because the school district's permission to loan football equipment does not constitute a reckless disregard for the consequences of the safety of others. *See Williams* v. *Housing Auth. Of Bridgeport*, 327 Conn. 338, 380, 174 A.3d 137 (2017) (extreme departure from ordinary care and the conscious choice of this course of action with knowledge of the serious risk of harm involved).

The identifiable person-imminent harm exception has three elements: "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm . . . [Our Supreme Court] [has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception." (Internal quotation marks omitted.) *St Pierre* v. *Plainfield*, 326 Conn. 420, 435, 165 A.3d 148 (2017) ("[t]he only identifiable class of foreseeable victims that [our Supreme Court] [has] recognized . . . is that of schoolchildren attending public schools during school hours" [internal quotation marks omitted]); *see Durrant* v. *Board of Education*, 284 Conn. 91 (2007); *Prescott* v. *City of Meriden*, 273 Conn. 759 (2005); *Cotto* v. *Board of Education of the City of New Haven*, 294 Conn. 11 (2009) (adult injured in slip in school bathroom was not a member of a class of persons subject to imminent harm).

"[T]he proper standard for determining whether a 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." (Internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 9, 176 A.3d 531 (2018), quoting *Haynes* v. *Middletown*, 314 Conn. 303, 322-23, 101 A.3d 249 (2014). This standard

focuses not "on the *duration* of the alleged dangerous condition, but on the *magnitude of the risk* that the condition created." (Emphasis in original.) *Haynes* v. *Middletown, supra*, 314 Conn. 322. "A harm is not imminent if it "could have occurred at any future time or not at all." *Evon* v. *Andrews*, 211 Conn. 501, 508, 559 A.2d 1131 (1989). "[T]he adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society." (Internal quotation marks omitted.) *Id.* "[T]he probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 706, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017). "In order to meet the apparentness requirement, the plaintiff must show that the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm . . . This is an objective test pursuant to which we consider the information available to the government agent at the time of her discretionary act or omission . . . ." *Id.*, 231-232; *see Doe* v. *Petersen*, 279 Conn. 607, 620 (2006) (although the supervisor in *Doe* knew that the instructor had offered Doe a ride in his car but had not taken her home, because the supervisor "never became aware of the alleged assault, it could not have been apparent to [the supervisor] that his response to [Doe's] concerns would have been likely to subject her to a risk of harm").

Here, an individual who contracted COVID-19 from the use of the equipment must demonstrate that he or she is an identifiable victim subject to imminent harm. Unlike schoolchildren who are statutorily compelled to attend public school during school hours, these individuals are *not* required by law to participate in an independent football league. *See Kusy* v. *City of Norwich*, 192 Conn. App. 171, 187 (2019) (even when schoolchildren are on school grounds, our courts have not classified them as identifiable victims if they are on school property as part of *voluntary* activities); *see Coe* v. *Board of Education*, 301 Conn. 112, 118-122, 19 A.3d 640 (2011) (holding that student, who was injured at school dance that occurred *after* school hours and that she *voluntarily* attended, was not an identifiable victim); *Costa* v. *Board of Education*, 175 Conn. App. 402, 408-409, 167 A.3d 1152 (holding that student was not identifiable victim for injuries sustained during senior class picnic because "[he] was not required to attend the senior picnic, but did so voluntarily" and he "voluntarily participated in pick-up basketball game in which he was injured), *cert. denied*, 327 Conn. 961, 172 A.2d 801 (2017).

The individuals who participate in the independent football league use the school's football equipment *after school* on a *voluntary* basis. These individuals, even if otherwise considered schoolchildren, who participate are not compelled to be at, or participate in, the independent football league. "[A]ny harm to which the [individual] was exposed appears to be self-inflicted as he engaged in conduct that was, if not inherently dangerous, certainly risky enough to give pause to anyone who might consider it." *Lowenalder* v. *Mallard*, Superior Court, judicial district of Danbury, Docket No. CV-08-5004054-S, 2009 Conn. Super. LEXIS 1988, *20 (July 10, 2009, *Shaban, J.*) (injury occurred *after* school during *voluntary* game). These individuals are "in the best position to protect [themselves] from any harm by simply not engaging in the activity" that may lead to possible COVID-19 infection. *Id.* Although Connecticut courts have previously been

reluctant to expand this exception, it is possible that it would declare that such an individual is an identifiable victim subject to imminent harm because the school district had knowledge that the dangerous condition – COVID-19 – was so likely to cause harm that the school district had a clear and unequivocal duty to act immediately to prevent the harm. In such an event, the school district would not be immune from liability.

CONCLUSION

Although it would be extremely difficult for the individual to successfully allege negligence and the absence of governmental immunity, the school district's decision to permit the use of football equipment, contrary to local and federal public health directives and other guidance, "opens the door" to liability.