



## ELIMINATING BARRIERS FOR COMMUNITY RECREATIONAL USE OF SCHOOL PROPERTY: POLICY GUIDANCE ON LIABILITY AND SHARED USE

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Obesity rates are on the rise, in part because of the public's lack of access to safe and appropriate places to be physically active. One key strategy for promoting increased physical activity is to open school property for recreational use by the community during non-school hours. Research indicates that one of the main obstacles to this strategy is a fear among school administrators that if school property is opened to the community for recreation, schools will face additional legal liability for injuries that result. Whether real or misplaced, these concerns can stymie efforts to encourage physical activity.

### Considerations Prior to Initiating Policy Change

The starting point in addressing the fears about recreational use of school property during non-school hours is to understand the legal standards involved. State laws relating to school liability and community use of school property are complex, and vary from one state to another. In many states, careful analysis of applicable state laws and judicial decisions will show that liability fears are misplaced. Still, if a state's liability standards are not clearly stated in the law, and must instead be deduced by analyzing multiple statutes and legal decisions, the absence of an explicit and straightforward liability standard may itself block progress. In these instances, simply amending state law to clearly describe the existing liability protections can allay administrators' fears.

In other states, the risk of liability may truly be excessive, compared to the law's treatment of private landowners or the treatment of comparable public activities. For example, every state already creates legal protections for private landowners who open their properties for recreational use by the public, whether for hunting, fishing, boating, swimming, hiking or other outdoor activities. These laws limit the liability of private landowners in order to encourage them to open their property for public recreation. Similarly, every state has adopted some form of "governmental immunity", "sovereign immunity" or "state tort claims" law, limiting public liability for certain activities. Where liability concerns threaten activities essential to the public interest, it is not uncommon for laws to create liability protections that balance the need to protect injured victims against the need to encourage specific activities that benefit society as a whole. Thus, laws may create specific liability protections to encourage "Good Samaritans" to come to the aid of accident victims, or to encourage local governments to clean up contaminated industrial sites, or to encourage drug manufacturers to produce vaccines. In the same way, it may be appropriate in some states to modify the law to provide liability protections for the schools to promote public health, while still encouraging safe places for the public to be active.

## Drafting Considerations and Sample Language:

This information was developed as a starting point for thinking about the elements of a sound policy, and the decisions and trade-offs involved. It provides general information to help you get started, but is not intended as legal advice. Remember that each situation is different, and every policy proposal should be carefully tailored to the unique circumstances of the state involved. It is essential to work with a qualified legal expert, knowledgeable in the laws of your state.

With these considerations in mind, this document describes the most common elements of a possible policy proposal, including: 1) findings of fact, 2) a statement of purpose, 3) definitions, 4) liability provisions and exceptions, and 5) related measures that will ensure effective implementation. The discussion below addresses each of these elements and suggests key questions to consider as you develop your policy.<sup>1</sup>

**Findings of Fact:** Findings are brief statements of fact, statistics or other evidence that outline the issue being addressed and support the need for the policy. Depending on your jurisdiction, it may or may not be possible to include detailed findings. In some states, findings are not typically included in draft legislation; in others, findings are allowed as part of a proposal during the legislative process, but drop away and are not reprinted in the law books once a successful proposal is “codified” in state law. In still other jurisdictions, it may be necessary to present findings in a less official form—for example, as legislative testimony by the author of a bill. Where possible, try to include well-worded findings of fact, to help support the adoption of the policy. If the law is later challenged in court, these findings may be used to interpret the intentions of the legislature in passing the law, and may even ward off legal challenges. When using findings, it may be helpful to directly reference the sources of the statements or statistics.

### Sample Findings<sup>2</sup>:

*Whereas, lack of physical activity is an important public health issue, affecting obesity rates and health care costs.*

- *Obesity is a significant factor driving health care spending, accounting for an estimated 12 percent of growth in recent years and with one estimate putting the annual cost of being overweight and/or obese at \$117 billion per year.<sup>3</sup>*
- *Obesity increases the risk for more than 20 major chronic diseases, leading to a reduced quality of life and life expectancy.<sup>4</sup>*
- *Of all U.S. deaths from major chronic disease, 23% are linked to sedentary lifestyle.<sup>5</sup>*
- *If only one-tenth of Americans began a regular walking program, \$5.6 billion in heart disease costs could be saved.<sup>6</sup>*
- *Whereas, frequent physical activity is an important behavior for both individual and public health.<sup>7</sup>*
- *Whereas, many children are not getting enough physical activity in their daily lives.<sup>8</sup>*
- *Whereas, nearly 80 percent of adults and 82 percent of children do not get the recommended amount of physical activity each week.<sup>9</sup>*
- *Whereas, evidence to suggest that children who are physically active and fit are likely to have stronger academic performance.<sup>10</sup>*

Whereas, many communities lack access to recreational facilities.

- Whereas, nationally in 2006, only 28.8 percent of public and private schools provided community access to school recreational spaces outside of the school day.<sup>11</sup>
- Whereas, disadvantaged individuals and communities often live in urban areas with higher pollution levels, less green space and fewer recreational facilities.<sup>12</sup>
- Whereas, children in low income and predominately racial/ ethnic minority communities are more likely to be less active, in part, because they often lack access to safe, free or low cost, and convenient recreation and sport facilities.<sup>13</sup>
- Whereas, research indicates there may be disparities in community access to school after hours, with schools in higher income communities more likely to be available for community use than those in lower income districts.<sup>14</sup>

Whereas, community recreational use of school facilities supports active living

- Whereas, in underserved communities access to school recreational facilities during after-school hours improves the likelihood that community members will be physically active.<sup>15</sup>
- Whereas, research has shown that people who have parks or recreational facilities nearby exercise 38 percent more than those who do not have easy access.<sup>16</sup>
- Whereas, renovated recreational use facilities at schools can increase the number of children who are physically active and the level of physical activity.<sup>17</sup>

Whereas, community use of school property after hours can increase safety through the fishbowl effect.

- Whereas, community members may be more likely to participate in physical activities at schools based on perceptions of increased security and safety.<sup>18</sup>
- Whereas, increased use by community members could deter criminal behavior.<sup>19</sup>
- Whereas, urban greening initiatives have been shown to have social benefits, such as enhanced social networks and reduced crime, attributed to residents spending time outdoors and interacting with neighbors.<sup>20</sup>
- Whereas, providing after-hours programming for children can reduce delinquency and improve academic performance.<sup>21</sup>

Whereas, schools are a valuable community resource and should be available for community use when not required for school purposes

- Whereas, schools located in communities at a high risk for obesity can be safe, affordable and accessible places for community members to be physical active.<sup>22</sup>
- Whereas, access to green spaces increases social networks and enhances community connections.<sup>23</sup>
- Whereas, schools have been identified as a critical environment to facilitate physical activity through recreation and sport, both during and after school.<sup>24</sup>
- Whereas, shared use of facilities by school districts and local governments is important in promoting greater collaboration within governmental agencies and increasing physical activity.<sup>25</sup>
- Whereas, school facilities, especially those that are centered in the community, can be an excellent resource for recreation and exercise where there is limited availability or private options are too expensive.<sup>26</sup>
- Whereas, promoting recreational activities can spur economic growth in the sporting industry.<sup>27</sup>
- Whereas, schools can create access by opening existing facilities during non-school hours, integrating the opportunity for community use when planning new construction projects, or building collaborative relationships and entering into reciprocal agreements with local governments or community organizations.<sup>28</sup>

Whereas, allowing community recreational use can encourage community support for public schools.

- *Whereas, lack of coordination between local governments and school districts in land use and facilities planning can create schools that have less connection with community members.<sup>29</sup>*

Whereas national and international organizations support recreational use of school facilities

- *Whereas, Healthy People 2020 recommends that school recreational facilities be opened to the community before, during, and after school hours as well as on weekends, holidays, and over the summer<sup>30</sup>*
- *Whereas, the American Academy of Pediatrics has recommended increased access to school grounds after school hours<sup>31</sup>*
- *Whereas, the Institute of Medicine recommends the adoption of legislative policies, where necessary, to address liability issues that might block community access to school recreational facilities after-hours.<sup>32</sup>*
- *Whereas the National Physical Activity Plan recommends promoting programs and facilities in communities to provide easy access to safe and low cost opportunities for physical activity.<sup>33</sup>*
- *Whereas, the Leadership for Healthy Communities recommends increasing access to recreation facilities.<sup>34</sup>*

Whereas, many schools do not allow community recreational use based on the fear of liability

- *Whereas, a national survey of school principals in low-income and minority communities found that schools do not allow community access for recreational purposes for several reasons, including liability concerns (61%), insurance (61%), cost of programming (60%), staffing for maintenance and security (57%), and maintenance costs and responsibilities (57%).<sup>35</sup>*
- *Whereas, a study of four communities found that safety, insurance, and liability concerns were key perceived barriers to community use of recreational facilities after-hours.<sup>36</sup>*
- *Whereas, fear of liability among school administrators is a key perceived barrier to allowing community access to school sport and recreational facilities after-hours.<sup>37</sup>*

**Statement of Purpose:** The purpose is a statement that explains the goal the policy is intended to achieve.

Sample Purpose:

*The purpose of this legislation is to make school property available to community members outside of the school day for recreational activities to support active living, reduce obesity, reduce health care costs associated with obesity, increase community safety, maximize community resources, and promote community support for public schools.*

**Definitions:** Definitions prescribe the legal meaning of key terms used in legislation. Before adding definitions, it is important to be familiar with terms and definitions already in place in the laws of your state, to ensure that new language does not contradict existing usage or create confusion. Because the term “school” can have many different meanings, you will need to look to your state laws to find an existing definition for the schools you wish to cover by this policy change.

Sample Definitions:

*As used in this section [or subdivision], the following terms have the meanings indicated:*

1. *“Non-school hours” means any time prior to and after regular classroom instruction on a school day, and any time during weekends, holidays and vacation breaks.*



2. *“Public” means members of the community, including students during non-school hours and school staff when not working as employees of the school.*
3. *“Recreation” means any indoor or outdoor game or physical activity, either organized or unorganized, undertaken for exercise, relaxation, diversion, sport, or pleasure.*
4. *“School” means [add in existing language from state law or cross reference to existing state law, if needed].*
5. *“School property” means all indoor or outdoor structures, facilities and land, whether owned, rented or leased by the school or school district.*
6. *“Sport” means an activity requiring physical exertion and skill, and which by its nature and organization is competitive, includes a set of rules and generally accepted as being a sport.*

**Liability Provisions:** The main policy provisions of a law set out the essential requirements or prohibitions of the intended policy, identify the parties to whom the provisions apply, and specify any exceptions necessary to achieve the purpose of the policy. The appropriate provisions for a liability law will depend on the circumstances of your state.

In general, liability is a legal responsibility for injury, death or damages. The standards for holding someone liable differ depending on what and who caused the injury. Typically, for you to be held liable for someone else’s injuries, that person must prove that you had a legal responsibility to protect him or her from harm (otherwise known as a “duty of care.”). Then, that person has to show that you failed to protect him or her, and that as a result that person was injured in a way that was foreseeable. What obligation you owe to protect a person depends on the situation. The general expectation is that you act reasonably toward others given the circumstances. Failure to act with as much care as an ordinary, reasonable person in a given situation is called “negligence.” However, there are situations where the law holds a person or entity to a higher or lower legal responsibility to protect another from harm.<sup>38</sup>

As discussed above, it is critical to complete a state-specific legal analysis of the liability standards affecting schools that allow community recreational use of school property during non-school hours. In some cases, this may require only a simple amendment to existing statutes to make clear that they apply to school property. In other states, it may simply be necessary to amend a statute so that it reflects legal standards, or even specific language, that are already spelled out in judicial decisions that are not readily accessible to school administrators.

In some states, a school district is held to a negligence standard, which means that the schools are held to a “reasonable person” standard. Where it is necessary to actually alter the law to limit school liability, one possible approach is to look to recreational use statutes, Good Samaritan statutes or other statutes that limit liability in very limited circumstances. For example, under some recreational use laws, landowners will not be held liable for all injuries or damages. In another example, many states limit liability for individuals who use automated external defibrillators or “AEDs”. Yet in many state statutes, a landowner allowing recreational use or an individual using AEDs would remain responsible for injuries that result from the “willful or wanton” actions, “gross negligence” or other standard of care outlined by the statute.

The law should protect the school district and, if determined appropriate in the state’s statutory context, school personnel from general liability for injuries resulting from recreational use of indoor and outdoor school property. The law should define those conditions under which the school district will still be liable for injuries. To avoid confusion and potential uncertainty in application, it is helpful to use the same wording and standards already used in other comparable liability statutes of your state.

### Sample Language

*Except as provided in this subdivision, a school district [and school personnel] [is/are] not liable for any loss or injury arising from the use of indoor or outdoor school property and facilities made available for public recreation or sport during non-school hours. Nothing in this subdivision limits the liability of a school district [and school personnel] for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or acts or omissions constituting gross, willful or wanton negligence.*

**Related Measures that will Ensure Effective Implementation:** Statutory amendments alone are unlikely to increase community use of school property unless the amendments are actively implemented. Effective implementation should involve a set of complementary measures to increase understanding of the changes and put the policy into practice. Some of these measures may be included in the language of an amended statute, while others may take different forms, and could be introduced as part of an appropriations bill for a department of education, through an executive order, administrative regulations, policy pronouncements, as changes to ongoing programs or through less formal mechanisms. The best form for each of these initiatives will vary, depending on the practices and structure of a particular state.

Whatever form is used, complementary measures could include steps to disseminate and publicize the policy, eliminate other barriers and promote community recreational use of school property. These companion measures could include language that 1) encourages or requires school districts to allow community recreational use of school property during non-school hours; 2) authorizes and supports implementation of shared use agreements; 3) encourages or requires schools to work with community organizations to provide recreational opportunities for the community; 4) develops a centralized structure for training about liability, model shared use agreements, lists of technical assistance resources, community partners, and funding; 5) identifies statewide resources to promote community recreational use of school property; and 6) requires school districts to have a school health council (otherwise known as a “school wellness committee”) to address community recreational use of school property. You will need to be mindful of concerns about unfunded mandates when considering these options. Whether these elements are included in a legislative proposal, a departmental policy pronouncement, an administrative rule or some other format, sample language as a starting point for addressing these issues is suggested below:

### Sample Language

1. *[School districts/ schools] are encouraged to allow the public to use of indoor and outdoor school property during non-school hours for recreational purposes or sport, provided the use does not interfere with a school function or purpose.*
2. *School districts are encouraged to negotiate mutually acceptable, fiscally responsible, legally binding shared use agreements with governmental and community agencies and organizations to keep school- or district-owned facilities open for use by students, staff, and community members during non-school hours. “Shared Use Agreement” means a legal agreement that defines the rights and responsibilities of the school district and another organization or government agency for use of the school facilities for recreation or other purpose of importance to the community. Shared-use agreements should describe specific activities, times, and eligible participants and address supervision of minors; injury liability protections, funding sources, cost-sharing of utilities; and respective responsibilities for maintenance, cleanup, and security.<sup>39</sup>*
3. *[School districts/ Schools] [should/ shall] work with recreation agencies and other community organizations to coordinate and enhance opportunities available to students, staff and the public for physical activity during non-school hours.<sup>40</sup>*

4. *The Department of Education, in consultation with the Department of Health, [should/ shall] develop a toolkit for school districts. This toolkit [should/ shall] include: 1) information outlining liability protections for both the school district and school personnel for injuries resulting from community recreational use of school property; 2) model Shared Use Agreement language; 3) a list of technical assistance resources available for the school districts to promote community recreational use of school property; 4) a list of potential community partners for Shared Use Agreements; and 5) a list of any grants or funding opportunities available to the school districts to promote community recreational use of school property. This toolkit [should/ shall] be posted on a state website and [should/ shall] be reviewed and updated on a regular basis. The Department of Education, in consultation with the Department of Health, [should/ shall] provide online public access to school district policies or procedures that promote community recreational use of school property, in order to encourage information sharing among school districts. This information [should/ shall] be reviewed and updated regularly.*
5. *Every [school district/ school] [should/ shall] create and maintain a School Health Council, (also known as a School Wellness Committee), to improve the health of students, staff and the community. A School Health Council [should/ shall] include representatives of educators, administrators, parents, students, community members and other stakeholders, and [should/ shall] operate in accordance with procedures specified by the school district. School districts, in consultation with the School Health Council, [should/ shall] address community recreational use of school property.<sup>41</sup>*

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<sup>2</sup> Research conducted through the Robert Wood Johnson Foundation Active Living Research Program, and the translation and dissemination of this research, has been important to the American Heart Association advocacy efforts and policy development. In particular, Dr. Spengler's Robert Wood Johnson Foundation, Active Living Research funded research on macro-level policies relevant to the shared use of school recreational facilities has informed the AHA's efforts to develop this model legislation for schools around the country. Additionally, research briefs and syntheses, such as *Parks, Playgrounds and Active Living*, Research Synthesis: Active Living Research (2010) available at [http://www.activelivingresearch.org/files/Synthesis\\_Mowen\\_Feb2010.pdf](http://www.activelivingresearch.org/files/Synthesis_Mowen_Feb2010.pdf), and others, have reported the science that informs this sample language.

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<sup>5</sup> American Heart Association, *With a Very Heavy Heart, Obesity and Cardiovascular Disease*, at 1,

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<sup>9</sup> VL Roger, AS Go, et al., *Heart disease and stroke statistics— 2012 update: a report from the American Heart Association*.

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<sup>11</sup> U.S. Department of Health and Human Services. *Healthy People 2020: Physical Activity Objectives*, (2010), available at <http://www.healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicid=33>.

<sup>12</sup> Daniel J. Hutch et al., *Potential Strategies to Eliminate Built Environment Disparities for Disadvantaged and Vulnerable Communities*, 101 AM J PUBLIC HEALTH 587 (2011).

<sup>13</sup> P. Gordon-Larsen, RG McMurray et al., *Determinants of Adolescent Physical Activity and Inactivity Patterns*, PEDIATRICS. (2000);105:E83; LM Powell, SJ Slater et al., *Availability of Physical Activity-Related Facilities and Neighborhood Demographic and Socioeconomic Characteristics: A National Study*, 96 AM J PUBLIC HEALTH 1676-1680 (2006); LM Powell, FJ Chaloupka et al.,

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<sup>39</sup> This language was adapted from “Fit, Healthy, and Ready to Learn: A School Health Policy Guide,” Chapter D: *Policies to Promote Physical Activity and Physical Education*, Second Edition, by James F. Bogden, MPH, Martine G. Brizius, MCRP, and Elizabeth M. Walker, MS, National Association of State Boards of Education, 2011, In press.

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<sup>41</sup> Public Health Law Center, *Healthy, Hunger-Free Kids Act of 2010: School Wellness Policies*, (2011), <http://www.publichealthlawcenter.org/sites/default/files/resources/ship-fs-hbka-schoolwellnesspol-2011.pdf>; Public Health Law Center, *Promoting School Wellness in Minnesota Schools: Creating and Sustaining a School Health Council*, (2011), <http://www.publichealthlawcenter.org/sites/default/files/resources/Creating%20and%20Sustaining%20a%20School%20Health%20Council.pdf>.

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