Inquiry &ANALYSIS

April 2008

National School Boards Association's Council of School Attorneys

1680 Duke Street

Alexandria, VA 22314-3493

(703) 838-6722

Fax: (703) 548-5613

E-mail: cosainfo@nsba.org

Web site: http://www.nsba.org/cosa

ADDRESSING LEAVE TIME ISSUES FOR SAME-SEX PARTNERS

By: Elizabeth J. Taylor, Monroe County Intermediate School District, Monroe, Michigan

Requests for leaves of absence from employees are a routine matter for most school administrators. An employee will follow procedures outlined in a collective bargaining agreement, policy, or employee handbook to request the leave; the school administrator, usually from human resources, will review the request and either approve it at that level or send it to the board for approval. Collective bargaining agreements generally list different types of leave that have been negotiated. Those leaves may be illness/injury, medical, educational, child care, bereavement, and personal, to name the most common. The agreements often spell out the familial relationship that must exist in order for the leave to be granted. For instance, the agreement may allow an employee illness/injury leave to care for a spouse, parent, or child, with "child" defined as a natural, step, or adopted child.[1]

But how should a school administrator respond to a request from an employee who is a partner in a same-sex union and wants leave to attend to a partner who has just given birth, to care for a partner who is ill, to care for an ill child of the partner, or to attend the funeral of a partner. Then the lines are not so bright nor are the choices automatic. Much depends upon the state in which you are located; but community mores also should be considered.

The statutes and court cases addressing same-sex unions have kept the issue in flux. Among the states that have addressed these unions, no two are alike. This article, therefore, will address one small corner of this issue: leave requests for employees in a same-sex union in a public school setting.

Same-Sex Marriage, Civil Unions, Domestic Partnerships

In 1996, the House of Representatives passed the Defense of Marriage Act[2] (DOMA) stating the statute was necessary "in light of the possibility of Hawaii giving sanction to same-sex 'marriage' under its state law, as interpreted by its state courts, and other states being placed in the position of having to give 'full faith and credit' to Hawaii's interpretation of what constitutes 'marriage.'"[3] Although the representatives authoring the analysis of the DOMA did not necessarily agree that would be the result, they noted that approximately 30 states were sufficiently alarmed by such a prospect "to have initiated legislative efforts to defend themselves against any compulsion to acknowledge same-sex marriage."[4]

Inquiry & ANALYSIS

A Membership Service of the
NSBA Council of School Attorneys

Lisa E. Soronen, *Editor*
and Senior Staff Attorney

ABOUT THE NSBA COUNCIL OF SCHOOL ATTORNEYS

Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

Inquiry & Analysis is a membership service of the Council, or can be purchased by subscription for $120 per year. Published electronically ten times a year, *Inquiry & Analysis* does not appear in March or September.

ISSN: 1069-0190

The DOMA was signed into law by then-President Clinton in September 1996. The DOMA had two immediate effects: (1) no state (or other political subdivision) need recognize a marriage between persons of the same sex, even if the marriage was concluded or recognized in another state and (2) the federal government may not recognize same-sex or polygamous marriages for any purpose, even if concluded or recognized by one of the states.[5] Supporters of the DOMA feared that without such a federal law, states would be forced to recognize same-sex marriages under the Full Faith and Credit Clause[6] of the U.S. Constitution. But where they could not get marriage, states looked for other avenues to recognize committed same-sex unions and to provide them access to state rights, benefits, and responsibilities.

Following close on the heels of the DOMA, the Vermont Supreme Court ruled in 1999 that the Vermont Constitution guarantees same-sex couples the same rights to marriage as heterosexual couples, but the court left it up to the legislature to decide how to provide marriage rights and benefits to same-sex couples.[7] When the Vermont Governor signed a civil union bill,[8] Vermont became the first state to legally recognize same-sex couples. Vermont's action generated a whirlwind of national conversation about same-sex marriages, civil unions, domestic partner[9] benefits, and reciprocal beneficiaries.[10]

In November 2003, Massachusetts legalized same-sex marriage.[11] Employers had to assess how the decision affected their employees and any benefits extended to employees. For example, most health insurance plans are covered by state law; therefore, Massachusetts employers have to provide the same benefits to married same-sex couples as they do to married opposite-sex couples. However, programs, such as FMLA, COBRA, cafeteria plans, are federal programs and as the federal government only recognizes marriage between a man and a woman, married same-sex couples in Massachusetts are not entitled to those programs.

At this time, only Massachusetts permits same-sex marriage. Its legalization of same-sex marriage prompted immediate action by many states to define marriage in terms of a union between a man and a woman or to declare same-sex marriages as prohibited. Forty-two states have enacted statutes similar to the DOMA. However, those statues provide little protection if a state court rules that the statute violates the state constitution.[12] Many states moved, therefore, to block same-sex marriages through a constitutional amendment. Twenty-seven states now have constitutional amendments defining marriage as a union between a man and woman.[13] Only three states, New Mexico, New York, and Rhode Island, have no law banning or condoning same-sex marriage.[14] Finally, 19 states have constitutional amendments that go beyond just defining a marriage as between a man and woman to potentially prohibiting other spousal rights.[15]

Other states have taken a different route and have chosen to offer civil unions, domestic partnerships, or reciprocal beneficiaries. At this time, Connecticut, Vermont, New Jersey, and New Hampshire are the only states to offer civil unions while California, Maine, Washington, and Oregon offer domestic partnerships and Hawaii offers reciprocal beneficiary rights. The level of spousal privileges and benefits with these nine states varies from bestowing all state-level rights to allowing just hospital visitation, organ donation, and inheritance without a will.

The movement of some states toward recognizing civil unions and the movement of other states toward adopting a Defense of Marriage Act[16] that mirrors or enhances the federal DOMA raises perplexing questions and, sometimes, dilemmas for school districts ranging from how to determine who is legally married or in a civil union and what, if any, benefits they are entitled to.

Federal law governs many employee benefits, the Family Medical Leave Act (FMLA) being one of the most important benefits and the focus of this article. The DOMA states that for the purposes of any benefit under federal law marriage is defined as a "legal union between one man and one woman as husband and wife," and a spouse is defined as "a person of the opposite sex who is either husband or wife."[17] As a result, an employer is prevented from offering certain benefits to a partner in a civil union or domestic partnership who does not have a recognized status under federal law.[18]

Family Medical Leave Act[19]

Since 1993, covered employers[20] have been required by the FMLA to grant eligible employees[21] up to 12 weeks unpaid leave during a 12-month period:

■ for the birth and care of the newborn son or daughter of the employee;

■ for placement with the employee of a son or daughter for adoption or foster care;

■ to care for an immediate family member (spouse, child, or parent) with a serious health condition; or

■ to take medical leave when the employee is unable to work because of a serious health condition.[22]

Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.[23] A son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability."[24]

It is clear from these definitions that same-sex unions are not afforded the benefits of the FMLA. Yet, the Human Rights Campaign (HRC), which is a gay/lesbian advocacy group, estimates that 3.1 million people live in same-sex relationships in the United States and that many of these couples raise children together.[25] What are the options, then, for school districts when faced with an employee requesting leave time to care for a sick domestic partner, or to attend to the birth of a child of a same-sex partner, or to attend the funeral of a same-sex partner? These are issues that can arise in any area of the country and any school district, large or small, urban or rural. School districts must be prepared to address the practical aspects of these requests such as, does the collective bargaining agreement permit such a leave, and the more sensitive issues including how will the school board or community view such requests?

State Enacted FMLA Laws and Same-sex Unions

Married couples have the protection of the federal law if they need to take a medical leave for a sick spouse. But if an employee in a domestic partner relationship needs to care for a sick partner, he or she will have to rely upon a voluntary employer sponsored leave allowance because federal law does not require the FMLA to be extended to domestic partners. Eleven states, plus Washington, D.C., have enacted state statutes that may enhance FMLA rights.[26] Many of those legislatures did so, in the words of Oregon's legislature, because "the ability to enter into a committed, long-term relationship with another individual that is recognized not only by friends and family, but also by the laws of this state, is a significant and fundamental ability afforded to opposite-sex couples by the marriage laws of this state" and that "it has long been the public policy of this state that discrimination against any of the citizens of this state is a matter of state concern that threatens not only the rights and privileges of the states inhabitants but menaces the institutions and foundation of a free democratic state."[27]

Of the 11 states that have "state-FMLA," nine offer either civil unions domestic partnerships or reciprocal beneficiary rights. Not all nine states, however, extend family leave to same-sex partners. The following states, plus Washington, D.C., allow partners to take family leave for illness of a same-sex partner or domestic partner:

■ California's Paid Family Leave Program[28] provides up to six week of partial pay per year to take time to care for a sick registered domestic partner and to bond with a newborn child.[29]

■ In 2006, New Jersey enacted a civil union law recognizing same-sex unions and providing civil unions the same rights, benefits, and responsibilities as married couples. New Jersey also has state FMLA, thus same-sex partners in a committed civil union have the same family leave rights as married couples.

■ Effective October 1, 2005, same-sex couples in Connecticut obtained legal recognition as members of a civil union and were provided the same family medical leave benefits as those provided to marriages.[30]

■ On January 1, 2008, civil unions become legal in New Hampshire. Parties entering a civil union are "entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together pursuant to RS 457" (the New Hampshire statute governing heterosexual marriage),[31] which includes rights to any state family leave.[32]

■ Since July 2000, Vermont has allowed parties to a civil union to have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.[33] This includes family leave benefits.

■ As of January 1, 2008,[34] the Oregon Family Fairness Act allows same-sex couples to enter into domestic partnerships that provide the same rights, benefits, and responsibilities as marriage under state law.[35]

■ Washington, D.C. has recognized domestic partnerships since 1992, but Congress prohibited any expenditure of public money on the domestic partnership registry until 2002. In Washington, D.C. domestic partners have the right to take sick leave to take care of a partner.[36]

In addition to family leave for couples in a civil union or domestic partnership, bereavement leave for the death of a partner may be available in these states.

Collective Bargaining Agreements

Most school districts, outside of the nine states that have adopted civil unions or domestic partnerships, have different kinds of leave language embedded in their collective bargaining agreements or employee handbooks. A typical collective bargaining agreement addresses bereavement leave, child care leave, and personal leave. It is not unusual to find layers of familial relationships delineated in a bereavement leave clause ranging from five days of paid leave for a close relation (spouse, child, parent) to three days of paid leave for a more distant relation. Given its plain meaning, such bereavement leaves do not allow a same-sex partner to take bereavement leave for a partner in a state that does not recognize civil unions or domestic partnerships. However, in a state that does recognize same-sex unions, districts will need to take a close look their state statutes definition of "spouse."[37]

The Michigan Court of Appeals ruled in 2007 that the Michigan Marriage Amendment prohibits universities and other state public institutions from providing benefits to employees on the basis of a same-sex partner relationship. However, if benefits are being provided under a collective bargaining agreement, those may continue until the agreement expires.[38]

Many contracts contain "personal leave" language which allows an employee to request personal leave, usually at the board's discretion, for a discrete period of time and not for the purpose of seeking other employment. A school administrator may well receive a request from an employee in a same-sex union to take personal leave to attend to a sick partner or attend the birth of a partner's child. School administrators should avoid reactive responses based on personal values and review the circumstances under which they have granted personal leave to other employees. Administrators might want to think twice about denying personal leave for an employee to tend to a sick partner or attend the birth of a partner's child if, in the past, personal leave has been granted to another employee to tend to a sick friend.

Considerations in Offering Domestic Partner Benefits

The decision to offer domestic partner benefits might not be as much a legal decision as a policy decision.[39] Some points to consider are:

- Nationally, through court cases, many states offer rights and benefits to same-sex partners.
- Determine if you must (or must not) provide same-sex benefits according to your state.
- Anti-discrimination laws in some states may be triggered if benefits are not offered to same-sex partners. Several states bar discrimination based on sexual orientation.
- Offering domestic partner benefits may help recruit and retain quality employees.
- Offering domestic partner benefits may help or harm the public's perception of the district, depending on the community.
- Studies suggest that costs for adding domestic partner benefits are minimal. According to a 2000 report by the Institute for Gay and Lesbian Strategic Studies, the likely cost increase is about the same as the increase in enrollment, typically between 0.5% and 1%.
- Consider any documentation requirements such as affidavits or other proof from same-sex partners and whether it is required from opposite-sex couples.

The discussion about civil unions and domestic partnerships will continue to be lively and changing, both on the legal front and at the bargaining table. School districts should keep informed at their state level on this issue and be prepared to make decisions about requests from employees about benefits associated with civil unions. I&A

End Notes

1 As an illustration of typical collective bargaining language in Michigan, see Master Agreement between the Board of Education and the Education Association of the Monroe County Intermediate School District, 2007-2010, p. 17.
2 1 U.S.C. § 7, P.L. 104-199 (Sept 21, 1996).
3 House of Representatives, Summary and Analysis of the Defense of Marriage Act as introduced on May 7, 1996, *available at* http://www.lectlaw.com/files/leg23.htm.
4 *Id.*
5 *Id.*
6 "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.
7 *Baker v. State*, 744 A.2d 864 (Vt. 1999).
8 18 Vt. Stat. Ann. §§ 1201, et seq.
9 Domestic partner refers to unmarried couples, including homosexuals, living together in long-standing relationships, who may be entitled to some of the same benefits as married people, such as job-related health plans.
10 A civil union provides only state level legal protections and benefits; no federal level protections are conferred. Domestic partnerships are a same-sex or heterosexual relationship but offer fewer protections than a civil union. They too only offer state level benefits. A reciprocal beneficiary program grants rights such as inheritance without a will, ability to sue for wrongful death, hospital visitation, and health care decisions.
11 *Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941 (Mass. 2003).
12 Christine Vestal, *Gay Marriage Decisions Ripe in Calif., Conn.*, Stateline.org, Mar. 6, 2008, *available at* http://www.stateline.org/live/details/story?contentId=20695.
13 *Id.* While Hawaii's amendment cuts judges out of deciding same-sex marriage rights, it does not include a definition of a marriage as being between a man and a woman.
14 *Id.*
15 *Id.*
16 1 U.S.C. § 7, P.L. 104-199 (Sept. 21, 1996). In 1996, President Bill Clinton signed the Defense of Marriage Act (DOMA) which codified states right to decide whether to allow or ban same sex marriage and defined marriage as a union between a man and a woman for federal purposes such as claiming tax breaks for spouses and receiving deceased partners' Social Security benefits. More than 42 states have adopted DOMA's.
17 1 U.S.C. § 7, P.L. 104-199 (Sept 21, 1996).
18 T.A. Solomon, & J.s. Adams, Domestic Partner Benefits: An Employer's Guide (Thompson Pub. Group 2006).
19 29 U.S.C. § 2601 (1993).
20 "An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed." 29 C.F.R. § 825.104(a).
21 "(a) An 'eligible employee' is an employee of a covered employer who:
(1) Has been employed by the employer for at least 12 months, and
(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite." 29 C.F.R. 825.110.
22 U.S. Dep't of Labor, Compliance Assistance - Family Medical Leave Act (FMLA), http://www.dol.gov/esa/whd/fmla// (last visited Mar. 20, 2008).
23 29 C.F.R. 825.113(a).
24 29 C.F.R. 825.113(c).
25 Camille A. Olson, Condon McGlothlen, & Gregory M. Davis, *Employers and Same-Sex Marriages - Does Anybody Benefit?*, Society for Human Resource Management, Mar. 2005, *available at* http://www.shrm.org/hrresources/whitepapers_published/CMS_011675.asp.
26 California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia.
27 Oregon Family Fairness Act, House Bill 2007 (April 11, 2007).
28 Employment Development Department, State of California, Paid Family Leave Program, http://www.edd.ca.gov/direp/pflind.asp (last visited Mar. 20, 2008).
29 Registered domestic partners share a common residence; agree to be jointly responsible for each others basic living expenses incurred during the domestic partnership; are both members of the same sex; and file a Declaration of Domestic Partnership with the California Secretary of State.
30 Public Act 07-245 (2007) http://www.cga.ct.gov/2007/ACT/PA/2007PA-00245-R00SB-01447-PA.htm.
31 N.H. Rev. Stat. Ann. § 457-A:2 (2008).
32 Gay and Lesbian Advocates and Defenders, New Hampshire Civil Unions (July 2008), *available at* http://www.glad.org/marriage/New_Hampshire_Civil_Unions.pdf.
33 Vt. Stat. Ann. tit. 23 §1204a.
34 Due to an injunction on the January 1, 2008, the law did not actually take effect until February 1, 2008.
35 Public Law No. 99, Oregon HB 2007.
36 D.C. Code § 9-114 (1992).
37 *See* Press Release, Governor Corzine, Governor Corzine Releases Letter to UPS Regarding Benefits for New Jersey Civil Union Partners (July 20, 2007), *available at* http://www.state.nj.us/governor/news/news/approved/20070720a.html.
38 *National Pride At Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139 (Mich. Ct. App. 2007).
39 Unless, of course, your district is in Michigan which prohibits benefit extension to same-sex partners.

NO PAIN, NO GAIN: LIABILITY FOR DEATHS AND INJURIES IN SCHOOL ATHLETICS

By: Chris W. McCarty, Lewis, King, Krieg & Waldrop, Knoxville, Tennessee

Few sounds are more frightening than a silent stadium. Every eye locks onto the field. Coaches and trainers stand huddled around a motionless athlete. His or her teammates gather off to the side, some staring into space while others hold hands and pray.

Although people fear the foregoing situation, they also expect it. Injuries and even deaths have always been a part of athletics. Until the 1970s, when helmets became effective, football players often died from traumatic head injuries. Yet football has never cornered the market on injuries. In 2005, the Consumer Product Safety Commission reported 409,799 basketball-related injuries and 317,041 cycling-related injuries. Recently, the American Medical Association estimated that brain damage or deterioration occurs in three out of four boxers with 20 or more professional fights. And never assume that certain sports are safer than others when cheerleaders remain the most often injured female athletes.

Assumed Risk

This common link between injury and sports lead most courts to bar liability against schools and coaches by using an assumed risk analysis. As Judge Cardozo wrote in 1929:

> One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.[1]

All sports, though, are not created equal. "[P]articipants in team sports, where physical contact among participants is inherent and virtually inevitable, assume greater risks of injury than nonparticipants or participants in noncontact sports."[2] Thus, "[t]he general rule is that participants in an athletic contest accept the normal physical contact of the particular sport."[3]

As the Maryland Court of Appeals concluded in 1994, parents of minor athletes rarely prevail when arguing that school officials are "negligent because of some failure to warn the plaintiffs of the possible dangers involved in voluntarily participating in [a] contact sport."[4] In fact, when examining "the vast majority of such cases . . . those asserting such claims cannot recover as a matter of law."

Of course, with the rise of comparative fault, many argue that assumption of risk should no longer be seen as an absolute bar to an athlete's claim. Instead, they argue that assumption of the risk may only act to mitigate liability rather than prohibit it.

In addressing this modern approach, the New York Court of Appeals noted that although assumed risk may not be an absolute defense under comparative fault, it can still be used to bar liability.[5] Here, assumption of the risk can and should be used to measure a defendant's standard of care. That defendant's standard of care increases or decreases based on the plaintiff's understanding of the situation at issue. As such, coaches and/or schools' standards of care greatly diminish due to athletes' knowledge and appreciation of those risks inherent to their chosen sports.

One finds the heart of this assumed risk argument within this idea of chosen sports. Hopefully, coaches and schools never force student athletes to play sports. Instead, students choose to play them. It is this element of choice that separates "injur[ies] occur[ing] during compulsory physical education classes rather than during voluntary participation in school athletic contests."[6] Put simply, "a participant chooses to participate in voluntary games, and so can avoid them if he or she is weak, slow, disabled, etc." Thus, not only do courts assume that athletes are knowledgeable; courts also assume that athletes are capable.

Duty of Care

Yet what happens when a knowledgeable and capable athlete dies of heat stroke after a

summer practice? From the outset, this may seem such a rare occurrence that it is not worth addressing. From 1995 to 2006, however, 35 young football players died of heat stroke in the United States.[7] More alarmingly, 2006 saw the first significant spike in these heat-related deaths since 1972.

Obviously, death—be it heat-related or otherwise—should never be considered a common risk of any school sport. Therefore, when faced with a lawsuit stemming from a student athlete's death, coaches and schools must look elsewhere for defenses.

In *Kleinknecht v. Gettysburg College*, for example, the Third Circuit Court of Appeals analyzed a lawsuit centering on the cardiac arrest and death of student athlete Drew Kleinknecht during a college lacrosse practice.[8] At the district level, the court held that "the College had no duty because the cardiac arrest suffered by Drew . . . was not reasonably foreseeable." The Third Circuit, however, observed that the district court's definition of foreseeability was "too narrow." Foreseeability, unlike proximate cause, "is not dependent on the foreseeability of a specific event." Thus, the Third Circuit held that Drew Kleinknecht's family "produced ample evidence that a life-threatening injury occurring during participation in an athletic event like lacrosse was reasonably foreseeable." As such, the College had a duty to provide adequate medical services.

To school districts and others involved in athletics, the Third Circuit's broad-brush painting of foreseeability may seem disheartening; nevertheless, it serves as an effective reminder that the core of any defense centers on duty of care. As one should expect, the "law recognizes the general duty of schools, principals and teachers to adequately supervise students placed within their care."[9] A school normally meets its general duty by providing adequate instruction, proper equipment, and comparable participants/opponents. Whether a school breaches this duty remains a question of fact.

Due Process

Based on the foregoing, it seems clear that coaches and schools possess a duty of care to their student athletes. However, some plaintiffs may incorrectly argue that a failure to meet this duty of care should be seen as a denial of due process.

In *Burden v. Wilkes-Barre Area School District*, for instance, a Pennsylvania district court analyzed a due process claim stemming from the heat-related death of student athlete James Burden, Jr., after an August football practice.[10] Therein, James Burden's family argued the school board's "decision not to hire a certified athletic trainer . . . denied the decedent his constitutional rights to life and liberty under the Fourteenth Amendment." Relying on the U.S. Supreme Court's decision in *Deshaney v.Winnebago County Department of Social Services*, the district court pointed out that "no constitutional obligation arises out of the State's failure to provide services even if such services or protection are necessary to secure life or liberty."[11] Therefore, James Burden, Jr., "was not deprived of any right guaranteed to him under the United States Constitution or Federal statute."

The Burden opinion illustrates the repeatedly overlooked gap between common law duties of care and constitutional due process protections. "[I]n certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."[12] Though with that said, the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation."

Governmental Immunity

As with the preceding due process argument, many creative plaintiffs will not only sue a school board, but also the student athlete's individual coach and/or coaches. When faced with these individual claims, defense attorneys are often aided by governmental immunity statutes.

In *Tarlea v. Crabtree*, for example, the Michigan Court of Appeals analyzed individual claims brought against coaches Jack Crabtree, Mike Price, and Randy Dunny as a result of the heat-related death of high school football player Jeremy Tarlea.[13] Under Michigan's Governmental Tort Liability Act (GTLA), "to be liable in tort, a governmental employee must act with gross negligence." This would suggest a "willful disregard of precautions or measures to attend to safety and singular disregard for substantial risk." And as coaches Crabtree, Price, and Dunny took "numerous precautions and safeguards to protect the safety of the football players in their charge," the GTLA barred Jeremy Tarlea's family's suit against his individual coaches.

Similarly to general governmental immunity, coaches and schools can sometimes find protection from liability under a so-called recreational use statute. Put simply, in an effort to encourage governmental agencies to build and maintain public parks and athletic fields, some state statutes provide tort immunity for incidents occurring at those facilities.[14]

In *Barrett v. Unified School District No. 259*, for instance, the Kansas Supreme Court analyzed whether a school district should be afforded immunity under the recreational use exception to the Kansas Tort Claims Act (KTCA).[15] Student athlete Robert Barrett's family brought suit as a result of his heat-related death after a summer practice. As the Kansas Supreme Court noted, however, the KTCA's recreational use exception provides governmental immunity for:

> any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

As Robert Barrett "died as a result of activity which occurred on a football field during football practice," the foregoing recreational use language applied, thus the KTCA barred the Barrett family from pursuing an ordinary

negligence claim against the school district and its coaches.

At first glance, a cynical person may assume that the immunity statutes discussed in both *Barrett* and *Tarlea* demonstrate some grand government conspiracy to protect its own. On the other hand, one could reach the more logical conclusion that states want to continue promoting healthy lifestyles by providing recreational and athletic opportunities for their citizens. As an apt example, without some form of protection, most school districts could not afford the risks and expenses associated with athletics.

Conclusion

For a moment, leave the world of legal analysis and return to the injured athlete lying motionless in the silent stadium. This dramatic and emotional scene should beg for one's sympathy, but not at the expense of one's common sense. If schools and coaches are going to be asked to provide students with athletic opportunities, then parents must assume and accept that injuries and deaths may sometimes result. These assumptions are not ideal, yet they are practical. And unless one can show gross negligence or reckless disregard on the part of these schools and/or coaches, then they should continue to be afforded strong defense (and sometimes immunity) from tort liability. I&A

End Notes

1 *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482-83 (N.Y. 1929).
2 27A Am. Jur. 2d Entertainment And Sports Law § 97. The Wyoming Recreational Safety Act, for example, defines "inherent risk" as "any risk that is characteristic of or intrinsic to any sport or recreational opportunity and which cannot reasonably be eliminated, altered or controlled." Wyo. Stat. § 1-1-122(a)(i).
3 *Albers v. Independent Sch. Dist.*, 94 Idaho 342, 345 (Idaho 1971).
4 *Hammond v. Board of Educ.*, 100 Md. App. 60, 65 (Md. Ct. Spec. App. 1994).
5 *See Morgan v. New York*, 90 N.Y.2d 471, 484 (N.Y. 1997).
6 *Hammond*, 100 Md. App. at 65 n.2.
7 *See Heat-related Deaths in Middle, High School Football Players Spike in 2006*, Science Daily (Aug. 7, 2007).
8 *See Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1365-71 (3d Cir. 1993).
9 *Leahy v. School Bd.*, 450 So.2d 883, 885 (Fla. 5th DCA 1984).
10 *See Burden v. Wilkes-Barre Area Sch. Dist.*, 16 F. Supp. 2d 569, 571-73 (M.D. Pa. 1998).
11 *Id.* (citing *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196-97 (U.S. 1989).
12 *Deshaney*, 489 U.S. at 198.
13 *See Tarlea v. Crabtree (In re Estate of Tarlea)*, 263 Mich. App. 80, 83-92 (Mich. Ct. App. 2004); citing Mich. Comp. Laws Serv. § 691.1407.
14 *See* Will Wohlford, *The Recreational Use Immunity of the Kansas Tort Claims Act: An Exception or the Rule?*, 52 Kan. L. Rev. 211 (2003).
15 *See Barrett v. Unified Sch. Dist. No. 259*, 272 Kan. 250, 252-64 (Kan. 2001); citing Kan. Stat. Ann. § 75-6104(o).

THANK YOU

The Council thanks the faculty of the 2008 School Law Seminar for contributing their time and expertise to the success of the seminar:

Anurima Bhargava, Director of the Education Practice at the NAACP Legal Defense & Educational Fund

Seámus P. Boyce, Church, Church, Hittle & Antrim, Fishers, Indiana

Heather Brickman, Hodges, Loizzi, Eisenhammer, Rodick & Kohn, Springfield, Illinois

Roger Clegg, President and General Counsel to the Center for Equal Opportunity

Mary Jo Dare, B&D Consulting, Washington, D.C.

David R. Day, Church, Church, Hittle & Antrim, Fishers, Indiana

Elizabeth Eynon-Kokrda, Baird Holm, Omaha, Nebraska

Barbara A. Erickson, Hodges, Loizzi, Eisenhammer, Rodick & Kohn, Springfield, Illinois

Ryan L. Everhart, Hodgson Russ, Buffalo, New York

Carl A. Gallagher, McAnany, VanCleave & Phillips, Kansas City, Kansas

James B. Gessford, Perry, Guthery, Haase & Gessford, Lincoln, Nebraska

Gregory J. Guercio, Guercio & Guercio, Farmingdale, New York

Sam S. Harben, Jr., Harben & Hartley, Gainesville, Georgia

Shellie Hoffman Crow, Walsh, Anderson, Brown, Schulze & Aldridge, Austin, Texas

David Z. Izakowitz, McGuireWoods, Charlottesville, Virginia

William J. Kowalski, Caplan & Earnest, Boulder, Colorado

Francisco M. Negrón, Jr., NSBA Associate Executive Director and General Counsel

Andrew Paulson, NSBA Webmaster

Gregory H. Perry, Perry, Guthery, Haase & Gessford, Lincoln, Nebraska

A. Dean Pickett, Mangum, Wall, Stoops & Warden, Flagstaff, Arizona

David B. Rubin, Metuchen, New Jersey

Michael E. Smith, Lozano Smith, Fresno, California

Lisa Soronen, NSBA Senior Staff Attorney

W. Stuart Stuller, Caplan & Earnest, Boulder, Colorado

Edward A. Sullivan, III, Baker & Daniels, South Bend, Indiana

Thomas E. Wheeler, II, Locke Reynolds, Indianapolis, Indiana

Jay Worona, General Counsel, New York State School Boards Association

Deryl W. Wynn, McAnany, Van Cleave & Phillips, Kansas City, Kansas

THANK YOU

The Council sincerely appreciates the time and expertise of the school attorneys who contributed to the publication **Religion and Public Schools: Striking a Constitutional Balance**:

Sam S. Harben, Jr., Harben & Hartley, Gainesville, Georgia

Lisa A. Brown, Bracewell & Giuliani, Houston, Texas

Spencer E. Covert, Barbara J. Ginsberg, Parker & Covert, Tustin, California

Cullen B. Casey, Anderson, Coe & King, Baltimore, Maryland

Stacy V. Reese, McGinnis, Lochridge & Kilgore, Houston & Austin, Texas

Hieu Nguyen, Harben & Hartley, Gainesville, Georgia

Kirk C. Herald, Roy H. Henley, Thrun Law Firm, East Lansing, Michigan

Norman H. Gross, Ferrara, Fiorenza, Larrison, Barrett & Reitz, East Syracuse, New York

Jay Worona, Kimberly A. Fanniff, New York State School Boards Association, Albany, New York

Christopher B. Gilbert, Bracewell & Giuliani, Houston, Texas

David B. Rubin, David B. Rubin, Metuchen, New Jersey

Perry A. Zirkel, Lehigh University, Bethlehem, Pennsylvania

David S. Doty, Utah System of Higher Education, Salt Lake City, Utah

Cynthia Lutz Kelly, Kansas School Boards Association, Topeka, Kansas

COSA AUDIO CONFERENCE

Special Education: What's On the Horizon?

Mark your calendar for Wednesday, April 16 at 1:00 p.m. Eastern Time. Join **Christopher Borreca**, Bracewell & Giuliani, Houston, Texas, **P. Tyson Bennett**, Reese & Carney, Annapolis, Maryland, **Dr. Allan Osbourne**, Principal, Snug Harbor Community School, Quincy, Massachusetts, and **Dr. Julie Fisher Mead**, Associate Professor, Department of Educational Leadership and Policy Analysis, University of Wisconsin-Madison in a discussion of what emerging substantive issues special education practitioners can expect and their implications for legal practice. Registration information is available on the Council's website at www.nsba.org/cosa under the link for Seminars.

2008 COSA NOMINATING COMMITTEE REPORT

On February 2, 2008, the NSBA Council of School Attorneys' Nominating Committee met in Washington, D.C. to select candidates to serve as officers and directors for the 2008-2009 year. The Nominating Committee* consists of the three Immediate Past Chairs of the Council and the Council Chair.

Elections for officers and directors will be held at the Council's annual meeting at 8:30 a.m., Saturday, March 29, 2008, at the Royal Pacific Resort at Universal Orlando, Orlando, Florida. During the meeting, the committee will thank retiring board members **M. Kaye DeWalt** (TX), **Patrick B. Mooney** (CO), and **Allison Brown Schafer** (NC) for their service to the Council. **Jay Worona**, 2007-2008 Chair (NY), will complete his term as Chair and will serve as Immediate Past Chair. **Anthony G. Scariano**, 2004-2005 Chair (IL), who has served as Immediate Past Chair for 3 years will complete his board service. The committee thanks all those who submitted candidates for consideration.

RECOMMENDED SLATE OF NOMINEES

Sam S. Harben, Jr. (GA) currently Chair-elect, becomes Council Chair without further vote of the membership.

Officers

Chair-elect ..... **A. Dean Pickett** (AZ)
Vice-chair ..... **Thomas E. Wheeler, II** (IN)
Secretary ..... **Patrice McCarthy** (CT)

Directors for First Two-year Term

John W. Borkowski (IN)
Justino D. Petrarca (IL)
Elizabeth B. Valerio (MA)
Maurice A. Watson (MO)

Directors for Second Two-year Term

Kenneth L. Childs (SC)
Shellie Hoffman Crow (TX)
Elizabeth A. Kaleva (MT)
Forrest Jack Lance (GA)

*Committee Members: Chair, David A. Farmelo, Anthony G. Scariano, Deryl W. Wynn, and Jay Worona.