SPORTS MEDICINE

LEGAL DIGEST

QUARTERLY LEGAL NEWSLETTER FOR THE NATIONAL ATHLETIC TRAINERS' ASSOCIATION

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NATIONAL ATHLETIC TRAINERS' ASSOCIATION

Photo by Renee Fernandes/NATA

House Passes Bill that Will Shield Athletic Trainers Who Travel Out of Town

The U.S. House of Representatives has passed The Sports Medicine Licensure Clarity Act (H.R. 302), sponsored by Reps. Brett Guthrie (R-KY) and Cedric Richmond (D-LA), which protects athletic trainers and other sports medicine professionals who travel out-of-state with an athletic team to provide care. The bill, which has the support of the National Athletic Trainers' Association (NATA), has been introduced in the U.S. Senate, where if passed it will go to the President to be signed into law.

NATA President Scott Sailor, EdD, ATC said the legislation will not only benefit NATA's 44,000 members, but will also "support health care professionals all over the country, including our initial partners in this effort, the American Academy of Orthopaedic Surgeons (AAOS) and the American Medical Society for Sports Medicine (AMSSM)."

"This is a great piece of legislation," said Tommy Dean, LAT, ATC, ITAT and the owner of Concussion Solutions, LLC (*http://www.concussion-solutions.com*). "All members of the sports medicine team, specifically athletic trainers and the team physician, will now have the autonomy to provide the best service to their athletes without the risk of breaking the practice act of the state that they have traveled to.

"Think about it this way: Texas has a more comprehensive AT practice act that allows for them to provide comprehensive services (more in line with NATA's best practice recommendations) vs. here in Louisiana. So if an AT with a team at any level travels to Louisiana and a catastrophic event takes place and the members of that sports medicine team are sued for negligence, their level of service will be based off of their state's practice act, instead of Louisiana's much more limited practice act. I also think that, eventually, this will allow more states to get on the same page as far as state practice acts are concerned."

H.R. 302/S. 808 clarifies medical liability rules for athletic trainers and other medical professionals to ensure they are properly covered by their liability insurance while traveling with athletic teams in another state. Under the bill, health care services provided by a covered athletic trainer or other sports medicine professional to an athlete, an athletic team or a staff member in another state will

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be deemed to have satisfied any licensure requirements of the secondary state. In addition, the providers will be able to treat injured athletes across state lines without the fear of incurring a great professional loss. This bill reinforces the sports medicine team collaborative approach to care among physicians, athletic trainers and others. It is also vital in light of playoffs, championship games and college bowl games where teams travel a great distance with little notification.

"H.R. 302 addresses a unique problem that sports medicine professionals face when traveling with their teams out of state," said Rep. Guthrie. "There is a lot of uncertainty regarding the legal protection for these practitioners who are licensed and covered by malpractice insurance to practice in their home state, but may not be covered when they travel to another state for a game, tournament or other sporting event. H.R. 302 clarifies that these professionals can provide quality and timely health care for injured athletes without putting their personal and professional lives at risk."

Expert: Bill Would Allow Sports Medicine Professionals 'To Do Their Jobs'

"The bill is designed to provide legal protection for those who are licensed and covered by malpractice insurance to practice in their home state, but may not be covered when they travel to another state for a game, tournament or other sporting event," said John Wolohan, a sports law professor at Syracuse University who has written about athletic trainers in the past. "While the bill's passage may seem like a no brainer, medical professionals who 'practice medicine' by treating the athletes under their care currently risk large liability lawsuits or having their insurance coverage denied. Therefore, this bill just recognizes the current business environment for sports medicine professionals who work for college and professional sports teams and need to travel with their athletes out of their home states.

"It should be noted, however, that nothing in the bill would exempt sports medicine professionals from liability if they were negligent in the performance of their duties. The bill only requires that the professionals be treated as if they committed the negligent acts in their home states and would thus be protected under their professional malpractice insurance. Therefore, the bill is important because it allows sports medicine professionals to do their jobs without worrying about liability."

For more on the Sports Medicine Licensure Clarity Act, visit: *https://www.govtrack.us/congress/bills/115/hr302*

U.S. House debate, Jan. 9, 2017 (Video)

www.nata.org/advocacy

Father of Cheerleader Embroiled in Lawsuit Against Coach in Concussion Lawsuit

BY MIKE GRASSI, OF SPORTS LAW ASSOCIATES, LLC

A legal battle is shaping up between the father of a cheerleader, who suffered multiple concussions, and the cheerleader's coach.

The plaintiff filed the claim in Montour County (Pennsylvania) Court and alleged the following:

Daughter suffered three brain injuries on Sept. 10 and 11 of 2014;

Defendant and coach had not undergone training in the proper management of concussion, despite the school district's requests for the coach to do so;

Daughter exhibited signs and symptoms of suffering a brain injury, yet each time the coach returned the cheerleader to the floor to practice stunts;

The coach failed to notify her parents of her head injury and failed to have her assessed by an athletic trainer or other medical personnel; and

Daughter suffered serious and permanent injuries, including traumatic brain injury, post-traumatic headaches, multiple concussions, tremors, difficulty in learning and anxiety disorder.

Plaintiff's attorney amended the complaint, adding allegations of "reckless and callous disregard to the plaintiff's 14th Amendment due process rights to life, liberty and bodily integrity."

This led the defendant's lawyer to ask the court to remove the litigation to federal court, since the plaintiff claimed that the defendant violated his daughter's constitutional rights.

RELATED RESOURCES

- Concussion Care Requires Communication
- Concussion Handout
- Parents and the New Concussion Paradigm
- Concussion: Differentiating from concern and paranoia
- Concussion Baseline Testing: Preexisting Factors, Symptoms, and Neurocognitive Performance
- Cervical Injury Assessments for Concussion Evaluation: A Review
- Concussion-Like Symptoms in Child and Youth Athletes at Baseline: What Is "Typical"?
- Epidemiologic Measures for Quantifying the Incidence of Concussion in National Collegiate Athletic Association Sports
- "Playing Through It": Delayed Reporting and Removal From Athletic Activity After Concussion Predicts Prolonged Recovery
- High Baseline Postconcussion Symptom Scores and Concussion Outcomes in Athletes
- Examining Academic Support After Concussion for the Adolescent Student-Athlete: Perspectives of the Athletic Trainer
- Age Differences in Recovery After Sport-Related Concussion: A Comparison of High School and Collegiate Athletes

Family Seeks Upward of $20 Million in Wake of Defendants' Alleged Failure to Follow Concussion Protocol

The family of a high school football player in Montana has sued a group of defendants—including the school district, its insurers, the employer of an athletic trainer and multiple individual defendants—after the player was inserted into a game before he had been given medical clearance to return to play from a concussion he had suffered a week earlier.

The player suffered a head injury during a football game Sept. 5, 2014. He was taken to the hospital's emergency room where he was diagnosed with a minor concussion.

The football player rested at home for a couple of days, bypassing both the classroom and the practice field. He then went to see a doctor at a local clinic who evaluated him and affirmed the diagnosis of a concussion. The doctor told him he was not to resume practice until Sept. 15, 2014. The athlete reportedly delivered the note from the clinic on Sept.10, 2014 to his head coach.

> *"[His] future medical care is extensive. That burden should not fall upon the family."*

The head coach, allegedly, exchanged text messages about the player's symptoms with the athletic trainer, who was employed by the hospital system. The athletic trainer allegedly told the head coach that the athlete could possibly have the flu. She also allegedly told the head coach that an ImPACT test may help determine the athlete's readiness to return to play. The head coach had the player take an ImPACT test. According to the lawsuit, the athletic trainer reviewed the results of the test Sept. 11, 2014, and determined that he had passed the test, allegedly without reviewing the medical records at the hospital. The player was allowed to return that day to a noncontact practice.

Just before the game Friday, Sept. 12, 2014, the head coach and/or the athletic trainer verbally cleared the athlete to play, according to the lawsuit, even though he had not been medically cleared. While he did not suffer any major collisions during the game, the damage was apparently done. While standing on the sideline at halftime, the player collapsed. Unconscious and unresponsive, he was taken by ambulance to the hospital, where he underwent an emergency craniotomy. As a result of the incident, the athlete has severe neurological and brain deficits. He is a quadriplegic, who cannot speak, requiring 24-hour care.

The attorney representing the plaintiffs said the athlete and his family have incurred more than $1 million in medical bills. "Absent a miraculous recovery, this is the way he's going to be," the attorney told the media. "[His] future medical care is extensive. That burden should not fall upon the family."

The attorney has named the school district, head football coach, hospital system, the athletic trainer, and three insurance companies as defendants in the lawsuit.

The complaint alleges that the head coach and the athletic trainer failed to follow the established return-to-play concussion protocol by permitting the player to return to the field without medical clearance. The protocol is based on the Dylan Steigers Protection of Youth Athletes Act, which was passed by the 63rd Montana Legislature in 2013. It specifically requires that a youth athlete who exhibits signs, symptoms or behaviors consistent with a concussion be removed from participation until medical clearance is obtained.

The plaintiffs also challenged, on Constitutional grounds, Montana Code Ann. § 2-9-108, Montana Code Ann. § 25-9-4, and Montana Code Ann. § 25-9-411.

The first challenge is to "Limitation on governmental liability for damages in tort," or *http://leg.mt.gov/bills/mca/2/9/2-9-108.htm*

The second challenge is to "Amount of interest," or *http://leg.mt.gov/bills/mca/25/9/25-9-205.htm*

The third challenge is to "Medical malpractice non-economic damages limitation," or *http://leg.mt.gov/bills/mca/25/9/25-9-411.htm*

Some Similarities with Another Concussion Lawsuit in Montana

The latest lawsuit comes on the heels of another legal action of the state of Montana that was just resolved involving a football player and the school

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LEGAL EXPERT COLUMN

NEW CALIFORNIA LAW SEEKS TO PROTECT STUDENT ATHLETES FROM SUDDEN CARDIAC ARREST

BY TODD A. GOLUBA & A. CHRISTOPHER DURAN
ATKINSON, ANDELSON, LOYA, RUUD & ROMO

With studies now showing that sudden cardiac arrest is one of the leading causes of death for young people under the age of 25, and knowing that student athletes are at a greater risk due to more frequent physical exertion, school districts have been looking for ways to protect student athletes from catastrophic events and to reduce potential legal liability. A new California law now addresses this issue.

In the fall of 2016, the California legislature enacted the Eric Paredes Sudden Cardiac Arrest

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district. A settlement calls for the athlete and his parents to receive $300,000 as well as lifetime medical care up to $5 million through a catastrophic insurer.

The parents of the injured football player filed the lawsuit against the school district, claiming that their son suffered a life-altering traumatic brain injury as a result of his participation in the school's football program.

The complaint, filed in district court, alleged that the player's coaches were negligent when they sent him back on to the field to practice with the team, in spite of a doctor's recommendation.

According to the lawsuit, the athlete and another player suffered concussions and were vomiting on the field after being involved in a head-to-head tackle during practice Aug. 21, 2009. It was the second such head collision the athlete in the lawsuit had experienced that day.

"The complaint, filed in district court, alleged that the player's coaches were negligent when they sent him back on to the field to practice with the team, in spite of a doctor's recommendation."

A doctor later diagnosed the player with a concussion and ordered that he not play for 11 days. When the coaches were notified of his limitations, they "indicated that if [the player] wanted stay on the team, he would have to show up for practices, but that he would not be asked to play football until medically cleared," the court document states.

However, the parents claimed that six days after his initial injury, the coaches told the athlete "to get out and hit bags, stating it wouldn't be considered contact play." They "also told [the athlete] that if he wanted to play varsity, he would have to get off the bench and run some plays," which he did, according to the suit. During these plays, a shoulder-to-helmet hit with the team's largest linebacker knocked the athlete unconscious and "he woke to find himself being carried off the field."

"Despite being knocked unconscious and receiving an obvious second concussion, the coaches did not call 911, did not contact the school nurse and did not contact [the athlete's] parents," in violation of school policy, the lawsuit alleged. Instead, "they merely sat him on the sidelines and sent him home after practice."

RELATED RESOURCES

+ NATA Position Statement: Management of Sport Concussion
+ Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and Colleges
+ Concussion Care Requires Communication
+ Concussion Handout
+ Parents and the New Concussion Paradigm
+ Concussion: Differentiating from concern and paranoia
+ Concussion Baseline Testing: Preexisting Factors, Symptoms, and Neurocognitive Performance
+ Cervical Injury Assessments for Concussion Evaluation: A Review
+ Concussion-Like Symptoms in Child and Youth Athletes at Baseline: What Is "Typical"?
+ Epidemiologic Measures for Quantifying the Incidence of Concussion in National Collegiate Athletic Association Sports
+ "Playing Through It": Delayed Reporting and Removal From Athletic Activity After Concussion Predicts Prolonged Recovery
+ High Baseline Postconcussion Symptom Scores and Concussion Outcomes in Athletes

COLUMN, *continued from page 04*

Prevention Act (AB 1639), named after a 15-year old student-athlete who died from a sudden cardiac arrest. AB 1639 mandates that school districts meet certain requirements to address student athletes with suspected heart ailments. The law is effective July 1, 2017, and is partially based upon a codification of current California Interscholastic Federation ("CIF") Bylaws 22.B.9 and 503. The new provisions of law may be found in Education Code sections 33479 to 33479.9.

Education Code Section 33479.5 provides that a student athlete "who passes out or faints while participating or immediately following an athletic activity, or who is known to have passed out or fainted while participating in or immediately following an athletic activity, shall be removed from participation at that time by the athletic director, coach, athletic trainer, or authorized person." A student athlete who otherwise exhibits other known warning signs of cardiac stress during an athletic activity may also be removed from participation by an athletic trainer or other authorized person if it is reasonably believed that the symptoms are cardiac-related. A student athlete who has been removed from play under this section may then only return to play after being evaluated and given written clearance to return to participation "by a physician or surgeon or a nurse practitioner or physician's assistant who have been practicing in accordance with standardized procedures or protocols developed by the supervising physician and surgeon."

Section 33479.2 mandates that the California Department of Education post on its website certain guidelines, videos and other relevant materials to inform and educate students and parents and to train coaches about the nature and warning signs of sudden cardiac arrest and the risks associated with continuing to play or practice with known signs of cardiac stress. School districts will be required to send all students participating in California Interscholastic Federation-governed sports a sudden cardiac arrest information sheet every school year. (Ed. Code § 33479.3.)

Coaches will be required to complete a sudden cardiac arrest training course and retake the training course every two years thereafter. (Ed. Code § 33479.6(a).) On or after July 1, 2019, coaches violating this training requirement will be suspended from coaching until completion of the required training. (Ed. Code § 33479.6(b).)

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Appeals Court Agrees that Tenure Should Not Save Athletic Trainer Who Failed to Renew License

A state court judge in New Jersey has denied the appeal of an athletic trainer who had been removed from his position as athletic trainer at a high school in that state after he failed to renew his license as an AT.

The appellant argued unsuccessfully that he should be exempted from the requirement because of his tenure or that the school board should be "required" to rehire him once he was current with his license.

The instant opinion stemmed from an appeal of a final agency decision of the Commissioner of Education, which adopted the initial decision of an Administrative Law Judge (ALJ) affirming his removal from his position as an athletic trainer with the Board of Education of the school board.

> *The court noted that "a school district must remove any teaching staff member who fails to maintain a mandated license, certificate, or authorization. N.J.A.C. 6A:9-5.1(c). There is no statutory or regulatory exception for a tenured teaching staff member or hardship.*

The court began its analysis with a review of the Athletic Training Licensure Act (ATLA), New Jersey Statutes Annotated (N.J.S.A.) 45:9-37.35 to 37.50, which governs licensing of athletic trainers in this state. A person must have an athletic trainer license issued by the State Board of Medical Examiners (BME) in order to practice as an athletic trainer to athletes engaged in interscholastic, intercollegiate, or intramural athletic activities or to professional athletes. N.J.S.A. 45:9-37.37(a)-(b)(1)(a). It is unlawful for any person, other than a licensed athletic trainer, to practice athletic training in this State. N.J.S.A. 45:9-37.40(a). An athletic trainer license must be renewed every two years. New Jersey Administrative Code (N.J.A.C.) 13:35-10.4(a). A license not renewed within 30 days of its expiration is automatically suspended. N.J.A.C. 13:35-10.4(d).

Furthermore, the court noted that "a school district must remove any teaching staff member who fails to maintain a mandated license, certificate, or authorization. N.J.A.C. 6A:9-5.1(c). There is no statutory or regulatory exception for a tenured teaching staff member or hardship."

On Sept.1, 2001, the appellant began working for the district as an athletic trainer. At that time, he held a valid athletic trainer license and a valid educational services certificate with an endorsement as a school athletic trainer. He was granted tenure in September 2004.

The appellant's AT license expired Jan. 31, 2009, and had not been renewed as of the commencement of the 2013-14 school year. He did not notify his employer that he lacked a valid athletic trainer license. On Aug. 28, 2013, the BME notified the principal that the appellant lacked an active athletic trainer license, in violation of N.J.S.A. 45:9-37.37. The superintendent then advised him that he was not in compliance with the athletic trainer license requirements and was removed from his position pursuant to N.J.A.C. 6A:9-5.1(c), effective September 4, 2013. The board then appointed a new school athletic trainer.

Approximately three weeks after the appellant's removal, his athletic trainer license was reinstated. He attributed his failure to timely renew his license to unfortunate personal circumstances that began in November 2010. The board responded that it was not aware of his personal circumstances, which came into play almost five years after his failure to renew his license.

The appellant filed a petition with the Commissioner, arguing that notwithstanding his lack of an athletic trainer license, since he maintained a valid certificate, he had tenure protections pursuant to N.J.S.A. 18A:6-10, including the right to formal charges and a hearing. The Commissioner transmitted the

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Be aware that a physician's written medical clearance of a student athlete to return to play does not remove the district's responsibility to make sure the athlete is ready to actually participate in his/her sport. Athletes who previously exhibited cardiac symptoms should be closely monitored and evaluated by athletic trainers and nursing staff to make sure they remain symptom free as they return to sporting activities.

Legal Recommendation

Student athletes who are found to have warning signs of cardiac stress must be evaluated and released by a specified medical professional before returning to play in his/her sport. Schools should provide annual informational notices to their student athletes and required training for coaches. Thorough documentation of annual informational notices, coaches' training and monitoring of student athletes will be important not only in keeping athletes safe but also in reducing a district's risk of liability for unanticipated cardiac events.

RELATED RESOURCES

- NATA Position Statements
  - Preventing Sudden Death in Sports
  - Emergency Planning in Athletics
- NATA Consensus Statements
  - Inter-Association Task Force for Preventing Death in Secondary School Athletics
  - Appropriate Medical Care for Secondary School Athletes
  - Recommendations on Emergency Preparedness and Management of Sudden Cardiac Arrest in High School and Collegiate Athletic Programs

Additional resources related to sudden cardiac arrest are compiled on the NATA website.

LICENSE, *continued from page 06*

matter to the Administrative Law Judge (ALJ) for a hearing as a contested case.

Following a hearing, the ALJ rejected the appellant's argument and found that: "the law required appellant to have both an athletic trainer license and a certificate; he failed to maintain an athletic trainer license; N.J.A.C. 6A:9-5.1(c) mandated his removal; there was no exemption for a tenured individual; there was no authority requiring the Board to rehire him once he was removed; and his personal circumstances, which post-dated the expiration of his license, did not justify his failure to renew his license." The ALJ concluded that the board's decision "was not arbitrary, capricious, or unreasonable."

The Commissioner agreed with the ALJ's findings and conclusions, and also determined there was no authority permitting a board of education or the Commissioner to retain an individual whose work was also governed by the BME and who failed to conform to its requirements. The Commissioner also emphasized that the appellant's personal circumstances post-dated the expiration of his license and did not constitute cause to circumvent the mandate of N.J.A.C. 6A:9-5.1(c). The Commissioner adopted the ALJ's initial decision and dismissed the petition, leading to the appeal.

The appeals court affirmed "substantially for the reasons expressed by the Commissioner in the February 12, 2015 final decision."

It also added the following: "For employment as a school athletic trainer, the law clearly required appellant to have a valid athletic trainer license and a valid educational services certificate and school athletic trainer endorsement. N.J.S.A. 18A:26-2, -2.4; N.J.A.C. 6A:9-5.1(a)-(b). The appellant had no valid athletic trainer license, rendering him ineligible for employment as a school athletic trainer and subject to mandatory removal pursuant to N.J.A.C. 6A:9-5.1(c), which provides no exemption for tenured individuals or hardship.

"In addition, contrary to the appellant's argument, although not formally revoked or suspended, the appellant's educational services certificate and school athletic trainer endorsement were effectively invalid. Appellant's educational services certificate required a school athletic trainer endorsement pursuant to N.J.A.C. 6A:9B-14.17. N.J.A.C. 6A:9B-14.1(a)(4). The athletic trainer endorsement required the appellant satisfy the requirements established by the BME pursuant to N.J.A.C. 13:35-10.4, including the biennial license renewal required by N.J.A.C. 13:35-10.4(a). N.J.A.C. 6A:9B-14.17(b)(2). The appellant's lack of an athletic trainer license effectively rendered his educational services certificate and endorsement invalid, thus making him ineligible for employment as a school athletic trainer, ineligible for tenure protections, and subject to mandatory removal. N.J.S.A. 18A:26-2; N.J.S.A. 18A:26-2.4; N.J.S.A. 18A:28-5(a); N.J.A.C. 6A 9-5.1(a) and(c)."

> *"For employment as a school athletic trainer, the law clearly required appellant to have a valid athletic trainer license and a valid educational services certificate and school athletic trainer endorsement."*

RELATED RESOURCES

+ Certification Maintenance Requirements
+ New Jersey Department of Education Certificate

SHARE YOUR THOUGHTS

Do you have feedback or a content suggestion for the *Sports Medicine Legal Digest* editorial team? Contact us with your feedback so we can continue to improve this new resource.

Q & A

HERALDED SPORTS LAWYER IS STILL AN ATHLETIC TRAINER AT HEART

BY HOLT HACKNEY

David Cohen, ATC, Esq., has risen to the top of the food chain in sports law as the general counsel for the Tampa Bay Buccaneers. But his first love, as a profession, is rarely far from his thoughts.

Q: How did you become interested in becoming an athletic trainer?

My involvement in athletic training began while I was in high school in Baltimore. The Boys' Latin School of Maryland was one of the first secondary schools in Maryland to have a full-time AT. Jim Talbert, the school's head athletic trainer, had a sports medicine club.

Q: Tell us about your career path as an AT.

When I was in high school, I wanted to be an athletic trainer in the NFL. I went to WVU, and my sophomore year was accepted into their athletic training program. Shortly after that, I sent resumes to all the NFL teams looking for an internship. In response, I got a stack of rejection letters on really nice letterhead. I quickly learned that professional sports (and

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While Sympathetic to Injured Athlete, Judge Sides with District and Coach

A federal judge from Pennsylvania has granted a school district's motion to dismiss a lawsuit brought by the parents of a student athlete, who had claimed that the district and one of its employees did not do enough to prevent their son from suffering multiple concussions and the debilitated effects that ensued.

In so ruling, the court determined that the parents failed to provide sufficient evidence in support of their claim that the school district and employee/coach violated their son's Constitutional rights as well as protections afforded by the "state-created danger" theory of liability. In addition, it found that the employee/coach was entitled to qualified immunity.

The son in the case participated in the school's football program beginning in July 2008.

On Nov. 1, 2011, the athlete was participating in football practice at the high school when he was hit by a teammate running full speed toward him. After the hit, he reported feelings of numbness and/or disorientation to the coaching staff, and his behavior became erratic. Immediately after the incident, the coaches told the player to continue practicing, according to the complaint. They also allegedly failed to perform a medical evaluation, concussion test or to send him to the athletic trainer.

Later on, during the same football practice, the football player was hit again, causing him to be confused, dazed and unable to continue practice. He was taken to the school's athletic trainer but could not provide complete information to the AT regarding the two hits he sustained, according to the complaint.

The court noted that at the time of the incident, the district was using a series of policies and procedures outlined in its 2011-2012 Athletic Handbook to inform the coaches and parents about the district's policies, procedures, rules and regulations, and general guidelines relating to its athletic program. The handbook outlines several policies requiring, inter alia, the exclusion of any player from play who has suffered injury or illness until that player is pronounced physically fit by a physician. The handbook also details the duties and responsibilities of various employees in the athletic program, including the head coach, who is required to inform the athletic trainer of any injuries that occur during practices or games. Additionally, the handbook contains a separate section dedicated to the proper handling of injured players. The procedures outlined in this section prohibit injured athletes from returning to practice or competition without first being cleared by the athletic trainer. The handbook does not include any policies or guidelines that specifically address concussions or other head injuries. The district also adopted OAA Orthopaedic Specialists' concussion policies, though deposition testimony shows that it is unclear if these policies were written out at the time of the athlete's incident. It is undisputed that one year after his incident, however, the district had a written concussion policy in place.

> *In so ruling, the court determined that the parents failed to provide sufficient evidence in support of their claim that the school district and employee/coach violated their son's Constitutional rights as well as protections afforded by the "state-created danger" theory of liability.*

Specifically, the plaintiffs claimed that the athlete's rights were violated as a result of the employee/coach's "exercise of authority in telling [the athlete] to continue participating in football practice after sustaining a hit and exhibiting signs of a concussion." They also claimed that "[the athlete's] rights were violated as a result of the district's practice of failing to medically clear student athletes, failing to enforce and enact proper concussion policies, and failing to train the coaches on a safety protocol for head injuries." On Feb. 1, 2016, the defendants moved for summary judgment, arguing that there is

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Q&A, *continued from page 07*

the world) is network-driven. I went back to Jim Talbert early my junior year, and he connected me with Richie Bancells, MS, LAT, ATC, the head AT for the Baltimore Orioles. Richie passed my information along to Brian Ebel, MBA, ATC, who was at the time the Orioles minor league athletic training coordinator. Brian placed me as an intern with their AA team. Two years later, he hired me for a position with the 1996 Gulf Coast League Orioles.

After the 1996 season, I moved to the Montreal Expos, who had a full-season position opening. I spent the 1997 to 2001 seasons with the Expos at the low A, high A, and AA levels in addition to working a season each in the Maryland Fall League and Arizona Fall League. There were a lot of great people who helped mentor me during my tenure with the Expos, and I grew a lot.

I started law school in the fall of 2001 and went back to baseball after my first and second year of law school. For 2002 and 2003, I worked for the Boston Red Sox, who assigned me to their short-season Class A affiliate in Lowell, Massachusetts.

Q. What were the challenges associated with transitioning from an AT to a lawyer?

Law school was a challenge! All kidding aside, the toughest thing was finding balance. My wife and I got married in 1999, two years before I started law school. Working as an AT involved long hours of hard work and required a strong work ethic. Law school was the same in that respect. My wife has always been very supportive of my career, the big change and the challenges that it brought. I often say that we both went through it as I could not have done it without her.

One big change involving going from a very active job to going back to school and being in a seat for countless hours per day. To this day, I don't sit for long. Rather than use the phone or send an email, I walk to someone's workspace to ask a question.

From a position perspective, I am lucky that I had a lot of great mentors in the business and legal world. During my third year

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JUDGE, *continued from page 08*

insufficient evidence in the record to establish a state-created danger claim against the employee/coach and a municipal liability claim against the district. The defendants also argued that even if there were sufficient evidence to establish a state-created danger claim, the employee/coach would be entitled to qualified immunity.

In its analysis, the court relied heavily on case law: "A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Hinterberger v. Iroquois Sch. Dist., 548 F. App'x 50, 52 (3d Cir. 2013) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011)). In determining whether a right has been clearly established, the court must define the right with the appropriate level of specificity. Sharp v. Johnson, 669 F.3d 144, 159 (3d Cir. 2012).

> *"the court noted that the district "cannot be held vicariously liable for the Constitutional violations committed" by its employees.*

"The viability of a state-created danger claim is well-settled. Hinterberger, 548 F. App'x at 52. However, no published opinion of the Third Circuit has found that a state-created danger arises when coaches fail to take certain precautions in athletic practice or in any analogous situation. Id. at 53. In Hinterberger v. Iroquois School District, a cheerleader suffered a severe closed head injury after attempting the 'twist down cradle,' a new stunt introduced by her coach at practice in a room without adequate matting. In analyzing whether the coach was entitled to qualified immunity, the Third Circuit explained that although district court opinions 'may be relevant to the determination of when a right was clearly established for qualified immunity analysis,' they 'do not establish the law of the circuit, and are not even binding on other district courts within the district.' Id. Noting that the district court below relied on district court opinions to find that a right was clearly established, the Third Circuit reversed, and concluded that those cases alone did not place the defendant coach on notice that her actions amounted to a constitutional violation. Id. at 53-54. The Third Circuit emphasized that cases from other courts of appeals also did not support the plaintiff's claim that her alleged constitutional right was clearly established, and cited to various cases that disagreed as to the applicability of the state-created danger doctrine in the context of schools. Id. at 54 (citing cases). See, e.g., Priester v. Lowndes Cty., 354 F.3d 414, 422 (5th Cir. 2004) (noting that the Fifth Circuit had not adopted a theory of state-created danger and otherwise found no liability for injury sustained to a student during football practice). Fully recognizing the tragic nature of the plaintiff's injury and 'the fact that more might have been done to prevent it,' the Third Circuit concluded that the alleged constitutional right was not clearly established at the time of her accident. Hinterberger, 548 F. App'x at 54. The critical portion of the Third Circuit's analysis in reversing the district court and concluding that the defendant coach was entitled to qualified immunity from suit is directly applicable here:

'The plaintiff does not cite, and we have not found, any precedential circuit court decisions finding a state-created danger in the context of a school athletic practice. We thus conclude that the plaintiff's alleged right was not clearly established at the time of her accident.'" Id.

The court administering the instant opinion found the analysis in Hinterberger "instructive." Further to that point, "because [the athlete's] alleged right was not clearly established at the time of his injury, [the employee/coach] is entitled to qualified immunity."

Turning to the school district, the court noted that the district "cannot be held vicariously liable for the Constitutional violations committed" by its employees. Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). "Rather, for liability to attach, the plaintiffs must show that the violation of their rights was caused by a policy, custom, or practice of the municipality. ... Here, the plaintiffs assert that the district is liable based both on municipal policies and customs that caused [the athlete's] injuries."

The court found no such policy or custom. "The evidence shows that shortly after [the athlete's] injuries in November 2011, the defendants began discussing how to address concussions and what protocols should be put in place."

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of law school, I was hired by the Angels to be their risk manager. I worked 30+ hours per week while finishing my degree. After graduation, I started working full-time with the club while studying for the bar exam. I was fortunate to pass the bar on my first attempt, and I started taking on more and more responsibility. Eventually, I had built a legal function in an organization that did not have one when I was hired. I am so grateful for people like Bill Stoneman and Molly Jolly of the Angels who gave me the first opportunity by hiring me, mentoring along the way, as well as countless other opportunities to learn and grow during my nine-year tenure with the Angels.

Q. How does being an AT help in your current role with the Bucs?

Having worked as an athletic trainer and lived the life on the team operations side of the business gives me a unique perspective. It allows me to relate to people in a multitude of roles and speak with credibility. It also helps me deal with matters involving injuries, medical information and health care in general. I keep more than a couple of my athletic training textbooks in my office, and I refer to them from time to time.

Q. You have maintained many connections to the athletic training profession even after becoming a lawyer. Why?

My view is that to this day, I am an athletic trainer first. I appreciate my background as an AT every day. While I am not practicing, I still maintain my athletic training certification and my NATA membership. It is very much a part of who I am, and I don't plan on dropping it.

The most effective people I know have and maintain relationships in a multitude of places. I keep in touch with a lot of ATs, lawyers and business people. My philosophy is: "Give more than you take. Be a fountain, not a drain." It takes effort to build and maintain relationships, and you have to give

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JUDGE, *continued from page 09*

Additionally, the court noted that the plaintiffs "have also failed to establish causation because even if the School District did have a concussion policy or protocol in place, it likely would not have had any effect on the situation because the plaintiffs have pointed to no evidence that [employee/coach] actually believed that [the athlete] was suffering from concussive symptoms. Accordingly, the plaintiffs have failed to adduce sufficient evidence for their municipal liability claim."

While holding for the defendants, the court was sympathetic to the football player and his parents.

"Unfortunately, the tragic story of [the athlete's] injury is not an anomaly," the court wrote. "In 2008, Ryne Dougherty, a high-school linebacker, sustained a concussion during football practice. Michael S. Schmidt, School Set to Discuss Concussion Guidelines, N.Y. Times, Oct. 22, 2008, at B17. After a normal CT scan and sitting out for the required period, he returned to the field, only to collapse and suffer a brain hemorrhage, resulting in his death. Examples of other young football players who have suffered serious injury after sustaining a concussion include Zackery Lystedt, a middle-school student who, in 2006, suffered permanent brain damage after sustaining a concussion and an additional hit in the same game, and Zachary Frith, a high-school freshman who, in 2005, also suffered permanent brain damage after sustaining a concussion during a football game and then staying in the game. I do not take these stories lightly. However, as a matter of law, I cannot side-step the well-established doctrines of qualified immunity and municipal liability. Although it can be said that the district and [the employee/coach] could have acted differently and done more to prevent [the athlete's] head injuries, I cannot say that their conduct rises to the level of constitutional violations that make them liable in a court of law."

RELATED RESOURCES

+ NATA Position Statement: Management of Sport Concussion
+ Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and Colleges
+ Concussion Care Requires Communication
+ Concussion Handout
+ Parents and the New Concussion Paradigm
+ Concussion: Differentiating from concern and paranoia
+ Concussion Baseline Testing: Preexisting Factors, Symptoms, and Neurocognitive Performance
+ Cervical Injury Assessments for Concussion Evaluation: A Review
+ Concussion-Like Symptoms in Child and Youth Athletes at Baseline: What Is "Typical"?
+ Epidemiologic Measures for Quantifying the Incidence of Concussion in National Collegiate Athletic Association Sports
+ "Playing Through It": Delayed Reporting and Removal From Athletic Activity After Concussion Predicts Prolonged Recovery
+ High Baseline Postconcussion Symptom Scores and Concussion Outcomes in Athletes
+ Examining Academic Support After Concussion for the Adolescent Student-Athlete: Perspectives of the Athletic Trainer
+ Age Differences in Recovery After Sport-Related Concussion: A Comparison of High School and Collegiate Athletes

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first and often. However, you never know when those relationships will be important for your career or the careers of others.

Since becoming a lawyer, I have developed relationships with a few other people who started as ATs and went to law school. There is a small, but growing group of us. The first was Ned Ehrlich, AT Ret., who worked as an AT for the Eagles and Dolphins and now works for the NFL Players Association. There is also Tammi Gaw, Esq., MS, ATC, who now works in the nonprofit world in DC and spent time as an executive with the World Police and Fire Games; Charles Gallagher, a litigator in St. Petersburg, Florida, Angela Lubach, JD, ATC, LAT, who is now associate general counsel for a retail company in Wisconsin, and recent addition Jim Hoch, ATC, who is working at a firm after spending several years as an athletic trainer with the Chargers and Dolphins. I am sure there are more, but this is the group I have gotten to know the most.

Q. What are some examples of how the AT profession and sports law have blended together?

Like being a lawyer, being an athletic trainer involves supporting others. Neither role has a position without others in the industry.

To be honest, my athletic training experience is not too different from my legal experience. The difference is just context. While working as an AT, I learned that one needs to treat the conditions that cause injuries rather than just the injury itself. It was a holistic approach to care. I try to take the same approach as a lawyer. A problem may arise, and you have to be ready to deal with it. However, it is important to realize what caused the problem and find ways to address the root causes.

Ultimately, the most effective professionals understand the big picture. I am a big fan of learning as much as possible about as much as possible. If you take the time to understand others and consider their perspective, needs and goals, it makes it easier to come up with an effective solution – and to build the consensus needed to implement it.

COLUMN

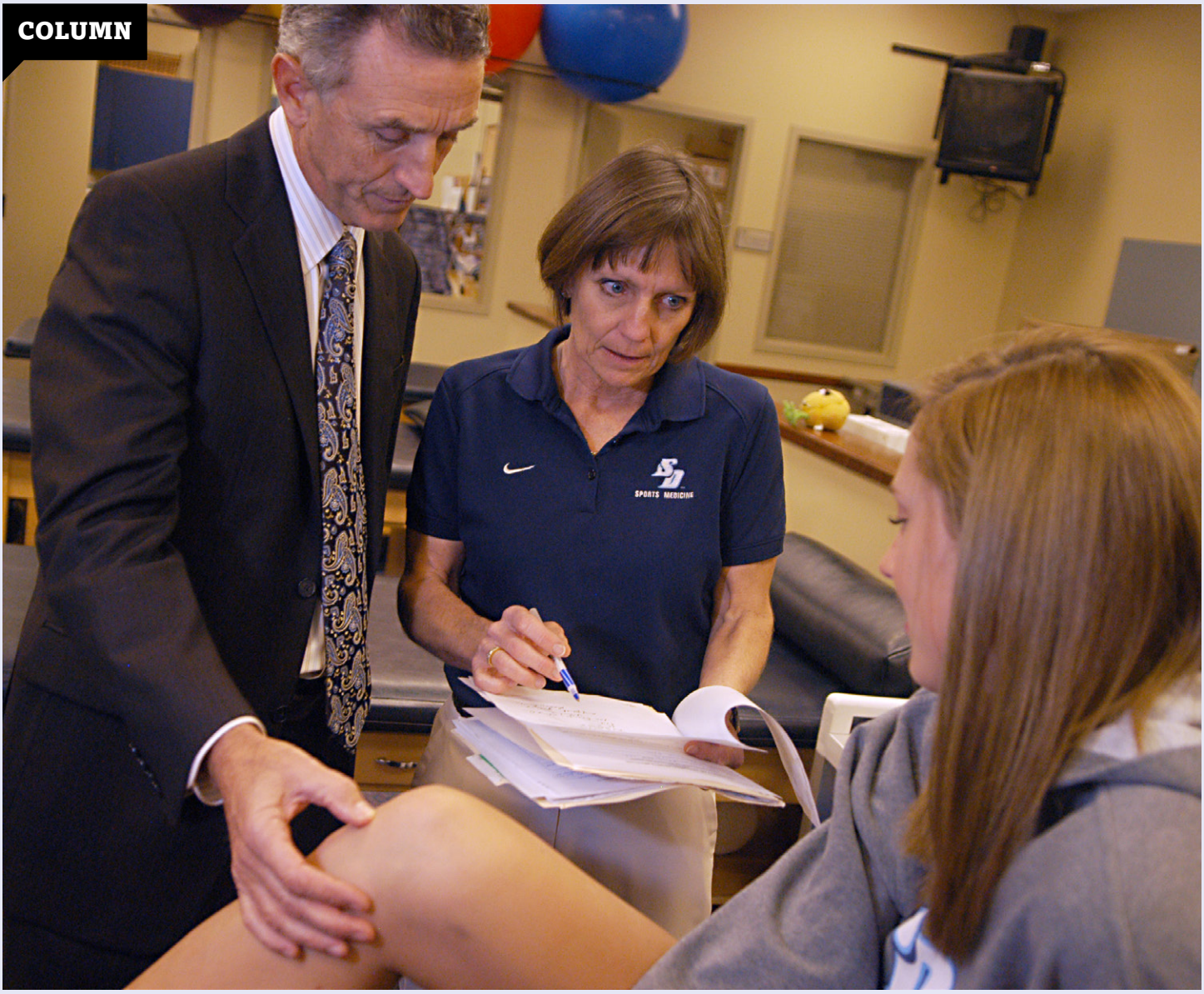

Photo by Renee Fernandes/NATA

NATA PROFESSIONAL RESPONSIBILITY COMMITTEE: ADHERING AND REVERING LEGAL, ETHICAL, AND REGULATORY PRACTICE STANDARDS

STANDING ORDERS: WHAT DO THEY MEAN, AND DO I NEED THEM?

BY JEFF G. KONIN, PHD, PT, ATC, FACSM, FNATA, AND TIMOTHY NEAL, MS, AT, ATC, CCISM

Jeff Konin

Timothy Neal

You are a practicing athletic trainer providing care for all conditions. Do you have standing orders or a written outline agreement with the physician that is directing you, giving you medical-legal authority to provide care for such things as return to play? If you do not have such an agreement, it is time to develop this standing order document in order to protect yourself, the physician directing you and ultimately the athletes and patients for whom you provide care.

Regardless of what state an athletic trainer practices in, he/she is legally regulated in a manner by which a "directing" physician (or other designee as noted by one's statute) provides operational guidelines. Many states provide a statutory definition of a standing order, as well as a written protocol that serves as a documented extension of a standing order. For those states that do not carry a standing order provision (and states without licensure), it is a prudent measure to still develop this document to clearly define the parameters of care from the directing physician. A standing order would minimize the legal risk of the athletic trainer. Below are three examples of state statutes that outline standing orders.

Connecticut statute Chapter 375a defines a standing order as follows:

Written protocols, recommendations and guidelines for treatment and care, furnished and signed by a health care provider specified under subdivision (1) of this section, to be followed in the practice of athletic training that may include, but not be

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limited to, (A) appropriate treatments for specific athletic injuries, (B) athletic injuries or other conditions requiring immediate referral to a licensed health care provider, and (C) appropriate conditions for the immediate referral to a licensed health care provider of injured athletes of a specified age or age group.

The state of Michigan Public Health Code Act 368 of 1978, part 179 for Athletic Training Practice Act outlines athletic training services and plan of care under the direction of a physician as follows:

The (athletic training) licensee shall establish a plan of care for the provision of the following athletic training services: 1). Clinical evaluation and assessment. Immediate care and treatment. Injury or illness. Rehabilitation and reconditioning. Risk management and injury prevention., 2). The athletic training services specified in subrule (1) of this rule shall be performed under the direction and supervision of either an allopathic physician or an osteopathic physician and surgeon who will be licensed (in the state of Michigan)., 3). As used in subrule (2) of this rule and section of the code, "direction" means either a written, electronic, or verbal order issued by a physician or authorized representative of a physician." (Michigan Public Health Code Act 368 of 1978, part 179, R 338.1365, Rule 65, subrules 1-3) Even in the event an occasional verbal order from a physician to an athletic trainer, that verbal order should be documented within the athlete/patient record.

Pennsylvania defines a *written protocol* as:

A written agreement or other document developed in conjunction with one or more supervising physicians, which identifies and is signed by the supervising physician and the certified athletic trainer and describes the manner and frequency in which the certified athletic trainer regularly communicates with the supervising physician and includes standard operating procedures, developed in agreement with the supervising physician and certified athletic trainer, that the certified athletic trainer follows when not directly supervised onsite by the supervising physician."

(49 PA Code: Chapter 18, Subchapter H, Section 18.502; and Chapter 25, Subchapter M, Section 25.702)

In 2014, Courson et al authored the *Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and Colleges* and identified the athletic trainer to be "an extension of the team physician, operating under standing orders and following written policies and procedures, to provide the best possible care for the athletes." Furthermore, they recommend that "clinical responsibilities of an athletic trainer must always be performed in a manner that is consistent with the written or verbal instructions of a physician or standing orders and clinical management protocols that have been approved by a program's designated medical director."

In 2014, NATA published a document for athletic trainers working in secondary schools outlining recommended standard procedures identical to that of Courson et al. Furthermore, it was stated that the team physician *"should be willing to communicate with the athletic trainer at any time and make athlete evaluation and follow-up care a priority."*

While this may seem to be common and expected practice, it is in fact not always the case. Recently, Williams et al found that 82.4 percent of athletic trainers employed in secondary school settings have a written concussion policy while only 67.3 percent have standing orders approved by their directing physician.

In reviewing these examples, it becomes evident that much, if not all, of what an athletic trainer does from a clinical perspective requires established written standing orders. When one is tasked to defend any clinical decision, it stands without merit absent a written standing order.

The following should be considered with respect to establishing appropriate written orders:

- Follow exactly what the state practice act requires.
- Include the names, credentials, and contact information for all parties involved (MDs, ATs, etc.).
- The athletic trainer should hold an athletic training license or state regulation from the state in which they are practicing.
- All parties should sign and date.
- Maintain a copy of active current licensure/regulation.
- Review and update minimally each year.
- Specify orders for different conditions, circumstances, etc.
- Assure proper and updated training in all areas designated to deliver.
- Clearly identify communication preferences and timelines.
- The standing orders should be shared and reviewed with risk management and general counsel.
- In conjunction with written standing orders, provide the state practice act and other relevant reference materials to the directing physician, administrators and general counsel for their records.

Detailed planning and preparation assist to foster comprehensive standing orders designed to provide an athletic trainer with optimal practice abilities that minimize associated legal risk. Common circumstances where standing orders are neglected to be established:

- Camps, especially those not affiliated with one's regular employer
- International travel
- Return-to-play decisions
- Over-the-counter medications
- Additional modes of care- ART, dry-needling, etc.
- Emergency action planning
- Wound care management
- Methods of communication between and amongst physician/athletic trainer, administrators, family members and guardians, media, etc.

It is a prudent measure for athletic trainers to collaborate with their directing physician to develop a standing order for the myriad of activities and models of care. Not only is it a wise decision to ensure quality care to athletes and patients, it is also important to have a standing order to be in state regulatory compliance. If you are currently providing medical care without a standing order, you are at risk for noncompliance and medical/legal liability. Consider developing your standing order with your physician as soon as possible.

Jeff G. Konin is professor and chair of the University of Rhode Island Physical Therapy Department and founding partner of The Rehberg Konin Group. Timothy Neal is the program director of athletic training education at Concordia University Ann Arbor.

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