

Liability

Liability fears can have a chilling effect on joint use partnerships. Some school districts are reluctant to open school property after hours because of concerns about the legal risks associated with injury or property damage.

The good news? These risks are often exaggerated, and there are many protections available to schools to help limit and manage the risks they do face.

Keep in mind that schools face liability risks all day long: there is always potential for property damage or injury to students, staff, or visitors. Schools already deal with these risks, and the measures they take to protect themselves during the school day – particularly in terms of risk prevention – help them after hours as well.

In this chapter we offer a very basic introduction to liability concepts, intended to help people who aren't lawyers talk about the appropriate role of liability concerns when it comes to expanding access to physical activity. (Liability laws vary greatly from state to state. For more detailed, state-specific information, see www.nplan.org/nplan/products/liabilitysurvey. For information specific to your own situation, contact an attorney in your area.⁸¹)

This chapter provides a summary of general liability concepts and the different kinds of protections that schools are granted under state law, as well as protections schools can put into place contractually to help limit

their liability exposure. We also offer some practical approaches to getting beyond the hurdle that liability can present.

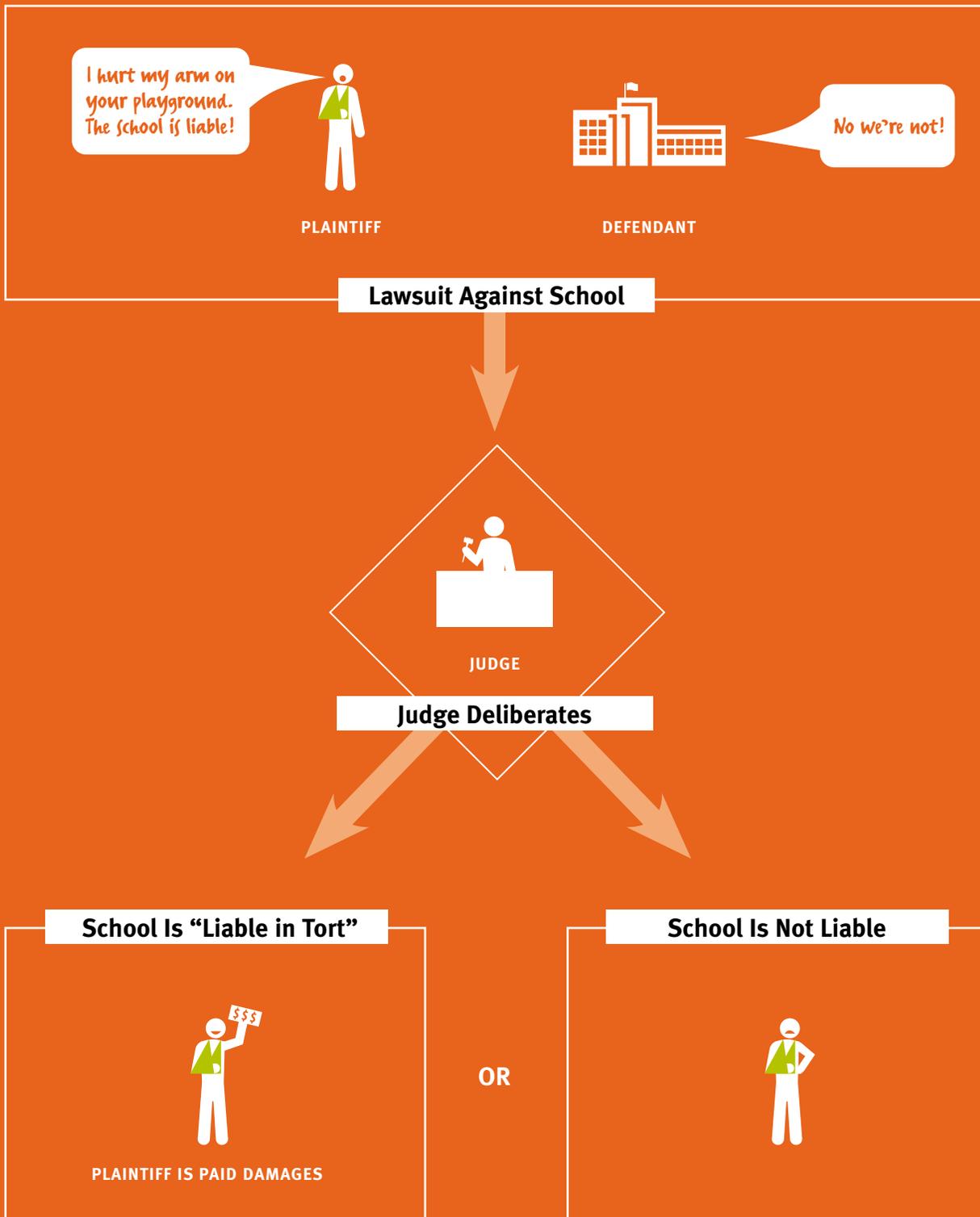
Basic Liability Principles

To understand the concerns schools and other public agencies may have, it is helpful to have a basic grasp of what is known as *negligence tort liability*. A school district or city may be concerned about being *liable*, or legally responsible, for a *tort* – the legal term for property damage or an injury or death.

When people talk about “being sued,” they are usually referring to being sued in tort. In a tort lawsuit, a *plaintiff* (the person injured) brings a lawsuit against a *defendant* (the person or entity the plaintiff believes is responsible for the injury). If the court finds the defendant “liable in tort,” the defendant must compensate the plaintiff for the injury or harm by paying *damages* (money) or changing the conditions that caused the harm. For children and others who are injured because of carelessness on the school's part, the legal system affords an opportunity to right a wrong.



The Tort Lawsuit Process



State law governs injury claims against school districts and other public agencies. Liability laws differ substantially among the states, particularly with regard to the legal protections that state laws afford public schools and other governmental agencies.

In what's known as a *negligence tort lawsuit* – negligence being a type of tort – a plaintiff alleges that a defendant had a responsibility to act with care, violated its responsibility in some way, and caused the plaintiff harm. Although tort law is made by each state, the basic elements of the tort of negligence are the same across all 50 states.

Consider this hypothetical scenario. One rainy day, Sherida Jones, a 12-year-old girl, is riding her bicycle to school while listening to music on her MP3 player. She rides through the school gates, bopping to the music. A small tree branch had fallen during the night, and Sherida doesn't see it. When her front wheel hits the branch, it sends her flying off her bicycle. She lands on the asphalt and breaks her arm. Her family sues the school.

For the school district – the defendant in the lawsuit – to be found “liable in tort” for an accident like this, five factors must be present:

1. Duty: The defendant must have a *duty* – a legal obligation to use care – toward the plaintiff. School districts generally have a legal duty to take reasonable precautions to prevent injuries to those who are legally on their property.

For Sherida (the plaintiff in this case), the school district likely had a legal duty to use care in making sure that the school premises were safe for students. The legal standard of care, how it is measured, and how it is applied to this particular situation would depend on the laws of the state where the accident happened.

2. Breach: The defendant must be *negligent*, having acted unreasonably in exercising its duty of care. In other words, the defendant must have *breached*, or violated, the duty it had to take reasonable precautions to prevent injuries to people who are legally on the property.

To determine whether the school district breached its duty to Sherida, a court would consider (1) the measures the school used to carry out its duty to take precautions to keep its grounds safe and (2) whether those measures were reasonable. What did the school do to prevent injuries on its property? Was there something the school could have done to prevent this accident? Sherida's parents might feel that the school should have cleaned up the schoolyard and removed the branch, because a fallen tree branch presents a hazard to children. But if the branch had fallen during a rainstorm the night before, it might not be reasonable for the school to have inspected within hours of the storm. If the case went to trial, both sides would present facts related to the accident to the court, which would likely include a jury. The jury, with the judge's guidance, would apply the law to the factual evidence presented to determine what constitutes reasonable care in this situation.

3. Causation: The defendant's negligent conduct must have been the *cause* of the plaintiff's injury.

In Sherida's case, there may be multiple causes. Did the school's failure to remove the branch cause the accident? The branch snagged Sherida's bike wheel and caused her to fall off her bike. But was Sherida distracted by listening to her MP3 player while riding her bike? If she had been more focused, would she have avoided the branch? Perhaps her inattention caused the injury. Again, if this case went to trial, the jury would weigh the evidence to determine



whether the school's failure to clean up the yard caused Sherida's accident.

4. Damage: The plaintiff must have suffered a quantifiable injury or *damage* because of the defendant's negligence. In other words, the plaintiff must have been harmed by the conduct or condition about which she is suing.

Here, Sherida fell off her bike and broke her arm. She was injured in the bike accident and likely had to pay to be treated, so she suffered damages.

5. Defenses: The defendant must have no *defense* or *immunity* – that is, a legal reason why the defendant is not liable for the harm. Many states' laws limit school districts' and public entities' liability by giving them immunity or other defenses against lawsuits. (There are also defenses from liability for individuals and private entities.)

If Sherida's bike accident happened in a state with strong legal protections for schools, the school might be immune from liability. This means that even if Sherida's case met all four of the requirements outlined above – the school owed her a duty, it breached its duty by acting negligently, and in so doing caused her to suffer damages – the school district could still be protected from having to compensate Sherida for her injuries. Immunity and other legal defenses will be explored further in the next section.

It is important to remember that most individuals, government agencies, and businesses in the United States face some risk of liability as they carry on their daily lives and business. Generally, the law requires people to conduct themselves with *ordinary* or *reasonable care* when acting – for example, using reasonable care not to injure other people when driving. In the school context, schools must use reasonable care when maintaining their property to prevent students, teachers, staff, and visitors from being injured. A school that leaves a gaping hole in the ground or allows the use of swings that are not securely attached is likely not exercising reasonable care.

Fortunately for advocates pursuing joint use agreements, the measures schools take to exercise reasonable care



Normal measures that schools take to prevent injuries during the school day serve the same purpose after hours. Taking these measures also makes it less likely that a school would be liable if an injury occurs.

during the school day – putting inspection and maintenance protocols in place, training teachers and staff, and following relevant health and safety regulations – serve the same purpose after hours. They decrease the likelihood of an injury – and increase the likelihood that in the event of such an injury, a court would find that the school exercised reasonable care and therefore was not liable.

Legal Protections

All states offer schools and other public entities some degree of legal protection from liability. The level of protection varies widely, both from state to state and according to the specific situation and activity at hand.

This section will introduce three kinds of legal rules that may limit schools' liability exposure: *governmental immunity*, *recreational user statutes*, and *limits on damages*. It is intended as an introduction to these legal concepts, not in any way a comprehensive guide to states' liability laws.⁸²

Governmental Immunity⁸³

Immunity is a global protection from tort liability that is given based on policy considerations broader than any individual situation. Good Samaritan laws are one example of immunity: most states protect citizens from liability if they attempt to help or rescue someone in imminent and serious danger, provided the attempt is not made recklessly. Legislatures want to encourage citizens to help others in an emergency, so they protect those Good Samaritans from liability.

All states have some form of governmental immunity that limits the extent to which public agencies – including school districts, public officials, and sometimes employees – can be found liable for harm they cause.⁸⁴ The idea behind governmental immunity is that it protects the public's funds, because any judgment against a public agency or school district is paid out of the public purse.⁸⁵ The argument on the other side is that governments and public agencies should be accountable for their actions in the same way private citizens are; if they act irresponsibly and cause harm, they should pay for that harm.

States balance these competing interests – the desire to insulate government agencies from liability while still holding them accountable for their actions – by recognizing some form of governmental immunity, but limiting the level of protection it affords and the range of situations in which it applies. As states strike this balance in different ways, the scope of governmental immunity varies widely from state to state.⁸⁶ In states such as Arizona⁸⁷ and Louisiana,⁸⁸ for example, governmental immunity is very narrow and offers little protection to school districts. Meanwhile, in states like Georgia,⁸⁹ Texas,⁹⁰ and California,⁹¹ governmental immunity is broad and protects schools and cities in most situations.

A Note on Immunity

When a school (or other defendant) in a lawsuit is immune, it cannot be made to pay monetary damages to the plaintiff in the lawsuit. A school can still be sued, however, and the school has to defend the lawsuit. The expense of having to defend against a lawsuit is one reason why, even with strong immunity, schools may still be reluctant to allow community use of facilities. If governmental immunity does not apply, a lawsuit against a school district proceeds according to the first four elements of negligence tort law, outlined in this chapter. Even if a school has no immunity, it may prevail in a lawsuit.

Most states fall somewhere in between these two ends of the spectrum in terms of the level of immunity afforded to public schools and government agencies⁹² Figuring out exactly when governmental immunity applies can be complicated, and it depends on the facts of a given situation, state law, and the court's interpretation. Schools and other governmental joint use partners should contact their attorney to figure out if they are protected in a given situation.

In Sherida Jones' case, if the school district were protected by immunity, the family could not get any compensation from the school. A slight change in the facts might alter our expectations about immunity. For example, what if it turned out that the branch that caused Sherida's bike accident came from a dead tree on the school grounds, and the school had repeatedly failed to respond to parents' complaints that the tree presented a hazard? If the school were protected by immunity even in that situation, a child injured by a branch from the dead tree would not be able to get compensation from the school. It's clear why state legislatures struggle to delineate the situations in which immunity should and should not apply.

Recreational User Statutes

Recreational user statutes are intended to encourage landowners to open their property for public use. If a state has a strong recreational user statute that applies to schools and to the activity at hand, it may shield a school from liability in the event that someone is injured during recreational use. This protection is sometimes structured as a form of immunity and sometimes as a limitation on the duty that the landowner owes to recreational users (the first element of the tort of negligence outlined earlier in this section).

Not all states have recreational user statutes. And in some states, like Hawaii, the courts have found that the statute is not applicable to school districts.⁹³ Several states (Arkansas,⁹⁴ Texas,⁹⁵ and Wisconsin,⁹⁶ to name a few) have recreational user statutes that are likely to provide schools with protections. Specifics vary by state, including the language in the statute regarding the type of land (e.g., rural, undeveloped), the definition of what kind of recreational activities are covered, and exceptions to the rule. Whether recreational user statutes are applicable to schools and can potentially limit schools' liability depends on several factors, including how the court interprets the statute and applies case law. Schools should contact their lawyer to figure out if they are protected by recreational use immunity.

If Sherida Jones' accident had taken place on a weekend, when she was riding her bike on school grounds for fun, the school might be protected under the state's recreational user statute. The school's attorney would figure out whether the state had such a statute and whether it applied in the situation at hand.

Employee Liability

Governmental immunity may not extend to all employees working for a school or other joint use partner. Employee liability is an issue distinct from governmental immunity, and an analysis of employee liability in this context is beyond the scope of this toolkit. Schools should consult with their attorney for more information.

Limits on Damages

Some states protect school districts and government agencies from large claims by limiting the amount of tort damages a defendant can be made to pay. These limits are usually imposed by statute. So, for example, if a child broke both his legs in an accident on school property and his family won a lawsuit against the school, the family’s attorney might show that he had \$400,000 in medical bills. If the state’s statute capped the school’s liability at \$75,000, the school could only be made to pay \$75,000.

Many states place caps on damages. North Dakota, in capping liability at \$250,000 per plaintiff,⁹⁷ presents a fairly typical example. In states like Nebraska, where the statute caps liability at \$1 million per person,⁹⁸ the high limits may not be very helpful as far as schools are concerned. But in other states, these caps may significantly ease schools’ liability exposure. Oklahoma, for example, has an extremely low damage limit of \$25,000 per claimant.⁹⁹

In addition to *compensatory damages* – money awarded to offset the costs of the actual damage – plaintiffs are sometimes entitled to *punitive damages*, which are intended to punish a defendant for egregious and blameworthy conduct. These are very rarely assessed;¹⁰⁰ and many states cap or prohibit punitive damage awards against school districts and other public agencies.

Other Protections

Joint use agreements represent a negotiation over how to share the costs and risks associated with increased use of facilities. Insurance, indemnity agreements, and risk management practices are all tools that joint use partners can use to allocate and manage these risks and costs. In this section and the next, we will use a hypothetical scenario (in “Paradise City”) to help illustrate how these protections work and how advocates and partners can use them in establishing a joint use agreement.

Paradise City is a densely populated, lower-income city in great need of recreational facilities. Paradise City High School, part of Paradise City School District, has a track, football field, and baseball field, although they are in poor condition due to wear and tear and badly need work. The swimming pool is inoperable due to lack of maintenance. Because the school district cannot afford to maintain its facilities and because it has concerns about liability, the school district has a policy of locking its gates to control unauthorized entry. But people often hop the fence to play pickup games on weekends. The weekend users do not have access to restrooms.

State Law to Limit Liability?

Recently, some states have sought to pass new legislation specifically giving school districts greater immunity around recreational use. Too often, however, these legislative efforts rely on broad, “one-size-fits-all” provisions that may not be in the best interests of a community. Expanding school district immunity through legislation can lead to unintended but significant drawbacks, including creating a disincentive for schools to properly maintain their facilities, increasing liability exposure for those who may be least able to manage it, and discouraging the use of school facilities by community members who lack the proper insurance. Before taking a position on legislation aimed at reducing or eliminating school district liability, it’s important to consider the existing legal landscape.

Meanwhile, the Paradise City Department of Parks and Recreation (Parks and Rec) is concerned about managing the demand for increased recreational facilities and programming. Parks and Rec just renovated the Plunge, a swim facility for the community. Aside from this, the City's parks have poor infrastructure and are a magnet for drug activity; families avoid them. Parks and Rec doesn't have the money for new construction or renovation, but it does have some funding set aside for facilities management.

Parks and Rec is interested in partnering with Fit to Play, a nonprofit that offers recreational programming for youth. Fit to Play has approached Parks and Rec for ideas, because while the nonprofit has the staff to run programs in Paradise City, it lacks both indoor and outdoor space.

The three groups – the school district, Parks and Rec, and Fit to Play – want to collaborate to find solutions for each of their respective deficits and bring new recreational opportunities to Paradise City, where 37 percent of youth are overweight or obese.

Insurance, indemnity, and risk management practices are tools that can help the partners in Paradise City reach an agreement that works for everyone.

Insurance

Insurance is a contract by which one party (the *insurer*) agrees to protect another party (the *insured*) against the risk of loss, damage, or liability arising from some specified contingency, such as a lawsuit. The insured pays a premium to the insurer, who in return agrees to cover the cost in the event that the contingency occurs.

While state laws vary on the type of insurance school districts may or must carry, most school districts insure themselves against liability. Insurance policies can protect schools during the school day or after school and also can protect employees of the school from liability.

Most school districts have a risk manager (or someone filling that function) who will know about the school's insurance. Advocates should figure out who that person is in the district and ask him or her whether the school's insurance covers after-hours use or can be extended to do so. If the school wishes to engage in joint use with another organization – a city, a nonprofit, or a public agency – the partner may have insurance as well. In that case, the parties can decide whose insurance coverage is best positioned to cover the costs, such as property damage or an injury, associated with the proposed joint use activities. If a party makes a claim under its insurance policy, its premiums may go up.

Covering Partners

Nonprofits or other joint use partners can sometimes be added as an *additional insured* on a school's (or other primary party's) insurance. This is sometimes called being endorsed onto the insurance agreement or buying a *rider* to the insurance agreement. The school district's risk manager should know whether this is an option and can find out what it would cost.

In Paradise City, the three groups – the school district, Parks and Rec, and Fit to Play – should begin by assessing their insurance coverage, asking these questions:

- ▶ Do the parties have insurance? (Follow-up questions about the school district’s insurance might include whether it has its own policy, is self-insured, or is part of a risk pool. A school administrator should know or be able to find out this information; the school’s risk manager would also have this information.)
- ▶ Does the insurance cover the types of activities the parties want to sponsor?
- ▶ Would there be an increase in cost to extend coverage, and if so, by how much?

With this information in hand, the parties want to determine who is best equipped to assume responsibility for the risks associated with after-school use of Paradise High and/or the Plunge facilities.

Depending on the additional cost, the school district might agree to take on the risk of joint use at Paradise High under its insurance. Or Fit to Play might carry its own insurance that would cover the programs it wants to run on school property. A large nonprofit such as the YMCA would likely have its own insurance, while a small nonprofit might not. If it’s uninsured, Fit to Play could try to purchase a rider on the school’s or the city’s insurance.

Another possibility is that Parks and Rec could decide to operate Paradise High’s facilities as a public park and cover the proposed activities under its insurance.¹⁰¹ If Parks and Rec wants to allow the school district the reciprocal use of the Plunge, the same questions would be asked: Which party’s insurance will cover this, and which party wants to assume the responsibility of filing a claim if someone is injured?

Indemnity

An *indemnity* clause is a provision in an agreement between two parties stating that one party agrees to be responsible for any liability the other party might incur.¹⁰² While insurance should cover a claim that arises within the scope of the insurance policy, having insurance does not mean that the school (and/or partner) cannot be named in a lawsuit. Indemnification is an additional protection that can cover costs outside the insurance policy.

Because expanding access to existing school facilities is substantially less expensive than building and maintaining new facilities, a city may find that indemnifying the school district for any potential liability is a cost-effective strategy for increasing local opportunities for exercise and play. In Paradise City, for example, Parks and Rec might agree to take on the risk of liability associated with the use of Paradise High after school hours. The parties would then include an indemnification clause in the joint use agreement, in which Parks and Rec agrees to indemnify the school district.



Risk Management

Engaging in sound risk management practices is another way for school districts to mitigate liability concerns. All districts can engage in risk management by complying with health and safety laws designed to protect students, employees, and visitors; by ensuring that school buildings and grounds are maintained in a safe condition; and by carefully supervising and protecting school grounds, facilities, and equipment. Properly training and supervising employees is also a risk management strategy.

Many school districts have formal risk management programs in place to analyze and mitigate their exposure to risk. These precautions are helpful in minimizing the risk involved with use both after school hours and during the school day.

It's important for everyone involved to agree about who will be responsible for what functions (costs, staffing, maintenance, and so on), and who will pay for each of these functions. In Paradise City, for example, parties could start by inspecting the proposed facilities together to document and establish a common understanding of the baseline condition of the facilities. If community members are going to be using Paradise High's fields, the fields need to be kept safe, and maintenance must be regularly scheduled. If the school district is better situated to maintain the fields itself with its personnel, Parks and Rec can agree to fund the maintenance.

Establishing a communication protocol is also critical for addressing issues as they come up. For instance, in Paradise City, if Fit to Play staff notice a dangerous condition on the property while they are operating an after-school program, they need to know whom to notify at the school. Each party can designate a contact person, and the parties can agree to meet quarterly to discuss issues that have surfaced. The school district's risk manager can be a resource for information and suggestions.

Overcoming the Liability Hurdle

In working to make joint use a reality, advocates should approach the situation from a cost-benefit perspective. There are costs and risks associated with everything schools do. When a school puts kids on a bus and sends them to an away basketball game, there are direct costs associated with that (transportation, staffing) and risks (damage to school property or injury to students). But schools take on these activities because they have determined that the benefits to the children – building team spirit and camaraderie among students, teaching sports etiquette – outweigh the risks. Similarly, creating opportunities for exercise can increase students' ability to focus, participate, and perform in school, and can generally improve the community's health.

If schools have an opportunity to engage in joint use with cities or other organizational partners, they can negotiate for whatever contributions they want in exchange for access to their facilities. A school may want reciprocal access to city facilities; it may want help financing the renovation or maintenance of its own facilities. Joint use can make these benefits possible.

Whatever particular arrangement they're pursuing, advocates can build their case by presenting data on the benefits of joint use,¹⁰³ understanding the school's (or others') opposition (if there is any), and recommending solutions to mitigate the school's concerns. Here are some suggested steps and talking points:

1 Gather information on the benefits joint use can bring to the community.

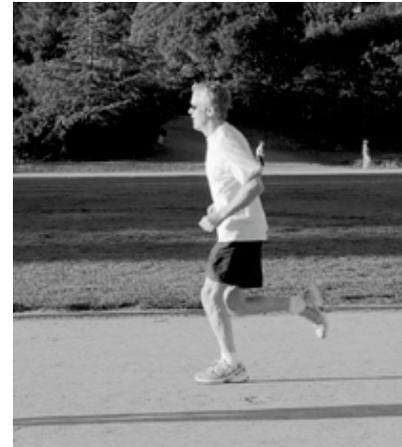
- ▶ Assess community and school/district needs. (See checklist on page 15.)

2 Understand the school's position.

- ▶ If there is a pushback from the school, try to identify the reason.
- ▶ If the school is comfortable allowing third parties, such as nonprofits, to run recreational programs on school grounds but is uncomfortable unlocking the gates to the general public, what is the concern with direct public access? If it's property damage or vandalism, see proposed solutions below.
- ▶ If the concern is liability, find out the underlying reasons. Has the school been sued in the past? If so, what changes did the school make? If not, what is the basis for concern? If the school is not forthcoming with this information, try to find a champion in the school community – a school principal, a school board member, even a member of the PTA – and have that person get this information on your behalf.
- ▶ Be willing to use NPLAN's (or other available) resources to navigate liability concerns: www.nplan.org/childhood-obesity/products/nplan-joint-use-agreements.

3 Recommend solutions to mitigate concerns.

- ▶ Does the school's insurance cover recreational activity outside of school hours? If not, how much would it cost to expand coverage to do so? What if another party is willing to pay that cost? What if another party is willing to take on responsibility for liability? What if another party is willing to indemnify the school in the event of a lawsuit?
- ▶ Has anyone spoken with the school's attorney to see whether the state has legal protections that limit the school's liability exposure?



- ▶ If the concern is vandalism or destruction of school property, is the school open to a pilot program? A pilot program designed to allay concerns about vandalism might work like this:
 - Consult a property checklist when the gates are opened and when they're locked.
 - Inventory the property to make sure no damage has occurred.
 - Document the inspection and sign the documentation.

In this way, record and track any incidents for a period of time to see if vandalism in fact increases when the community has greater access to the grounds. Many advocates have noted the reverse – that when a facility becomes a community resource, the incidence of vandalism actually goes down. This is because more people are present on the property, and community members start to take responsibility for what becomes a communal resource.¹⁰⁴

A Final Note

It's important to remember that concerns about the legal risks of opening up school property after hours are often exaggerated. Joint use agreements can help schools and other partners manage actual costs and risks – and state laws, risk management practices, and contractual protections incorporated into joint use agreements all lower the likelihood of a lawsuit and cushion its impact in the event one is filed.

For more information about opening school grounds for community use, see NPLAN's joint use agreement resources at www.nplan.org/childhood-obesity/products/nplan-joint-use-agreements. Lawyers and others interested in a more in-depth technical analysis of liability laws across the United States can consult the 50-state survey available at www.nplan.org/nplan/products/liabilitysurvey. The information provided here is intended to give readers a sense of relevant concepts; it is not offered as legal advice or guidance. For more information on local laws or for legal advice, consult a lawyer in your home state.¹⁰⁵

