



Opening School Property After Hours

A Primer on Liability

Some school districts are reluctant to open school property to the community after hours, concerned about the legal risks and the costs associated with injury or property damage. The good news is that the risk of liability is often exaggerated, and the legal system offers school districts many protections against lawsuits.

Concerns about the legal risks of opening school property to the community after hours are often exaggerated, and the legal system provides school districts with many protections against lawsuits. This fact sheet explains how state laws, insurance, and "joint use" agreements can help protect school districts from liability.

The Truth About Lawsuits

Research shows that liability risk is much less severe than many believe:

1. With the exception of car accidents and injuries covered by workers' compensation, most people who are injured through another's fault never file a lawsuit or bring a claim.²
2. The legal system does a reasonably good job of weeding out claims without merit, particularly high-value claims.³
3. Even when plaintiffs win at trial, they only rarely receive the full amount of the verdict.⁴
4. Media reporting on lawsuits is overwhelmingly weighted toward the unusual, very high value claim or verdict, ignoring the vast majority of cases in which plaintiffs recover only small amounts of money or the defendants win.⁵

State law governs injury claims against schools and other public agencies. Laws vary greatly from state to state, particularly as they relate to the special protections public schools and agencies have against lawsuits. This publication summarizes general principles regarding liability; for more detailed, state-specific information, visit www.nplan.org/nplan/products/liabilitysurvey. For information specific to your own situation, contact an attorney in your area.

Basic Principles

To understand concerns public agencies may have, it can be helpful to have a basic grasp of what's 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. In a tort lawsuit, a *plaintiff* (the person injured) brings a lawsuit against a *defendant* (the person or entity the plaintiff alleges is responsible for the harm). 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.

Five factors generally determine whether a defendant can be found liable in tort:

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 legally on their property.
2. **Breach:** The defendant must be *negligent*, having failed to use reasonable care toward the victim (in other words, the defendant *breached*—violated or broke—the duty of care). A school district that allows the public access to a dangerous condition on its property—for example, exposed electrical wires—would likely be found to have breached its duty.
3. **Causation:** The defendant's negligence must have been the cause of the injury to the plaintiff.
4. **Damage:** The victim must have suffered damage or harm as a result of the negligence.
5. **Defenses:** The defendant must have no *defense* or *immunity*—in other words, a legal reason why, under the circumstances, the defendant is not liable for the harm.

It is important to remember that all school districts face the risk of tort liability during the school day, when children, teachers, and other staff members are at school. In no state is the risk of tort liability greater for the use of school facilities after hours than it is during the school day. In some states, the risk after school is actually *lower* than it is during the school day.

Legal Protections for School Districts and Government Agencies

Sometimes a defendant can be *immune* from liability, even if that person or entity has caused harm. *Immunity* is a protection from tort liability given to a group of people or entities based on policy considerations broader than the individual situation. An entity with immunity cannot be made to pay damages for the tort.

“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 that 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.

Sovereign or Governmental Immunity

All states have some form of *sovereign* or *governmental* immunity—legal rules that limit the extent to which school districts and other public agencies can be found liable for harm. In some states, governmental immunity is established through court decisions (that is, *common law*); in other states, the legislature has passed a law (*statutory law*) creating governmental immunity. While all states offer some type of governmental immunity, the level of protection varies.

Recreational Use Immunity

Some states provide *recreational use* immunity, which applies to landowners who open their property to the public for recreational use. Immunity encourages those landowners to allow the public access to their land. These laws may protect both private and public landowners, including school districts and other public agencies. Recreational use statutes vary considerably among the states.

Why are government entities given immunity?

The basic purpose of governmental immunity is to protect governments and their employees from liability arising out of government operations.⁶ For example, California provides immunity for “hazardous recreational activity,” activity that takes place on a public entity's property and creates a substantial risk of injury to a participant or a spectator.⁷ According to the California Supreme Court: “The Legislature had in mind immunizing public entities from liability arising from injuries sustained by members of the public during voluntary unsupervised play on public land, in order to prevent public entities from having to close off their land to such use to limit liability.”⁸

Governmental immunity also serves to protect the public's funds. By limiting liability to specific areas, public entities can foresee and plan for the costs of any future liability.⁹

Limits on Damages

Some states offer school districts and other government agencies protection from large claims by limiting the amount of tort damages a defendant must pay. Many states have laws that limit the amount of damages that government agencies, in particular, can pay, while other states have laws that limit tort damages awards more generally.

In addition to *compensatory damages*—money awarded to offset the costs of the actual damage—plaintiffs are sometimes entitled to *punitive* or *exemplary damages*, which exceed the actual cost of the damage to punish defendants for blameworthy conduct and penalize the wrongdoer. In some states, plaintiffs are not entitled to punitive damages when suing government agencies.

Other Types of Protections

Prudent school districts may also protect themselves from paying the costs of damages awards through insurance and indemnity agreements.

Insurance

Insurance is a contract by which one party (the *insurer*) agrees to protect another party (the *insured*) against risk of loss, damage, or liability arising from some specified contingency. While state laws vary on whether and the type of insurance school districts may or must carry, most school districts insure themselves against liability. Insurance policies can protect schools from the costs of liability occurring during the school day or after school.

Indemnity

An *indemnity* clause is a provision in an agreement stating that one party agrees to be responsible for any liability the other party might incur. Many school districts enter into joint use agreements with a city, county, or other government agency to open school facilities for community use.¹⁰ A joint use agreement may include an indemnity clause that requires the other government agency to wholly or partially indemnify the school district for any potential liability under the agreement. Because opening school facilities for community use is substantially less expensive than requiring a city to construct new facilities, a city may find that indemnifying the district for any potential liability is a cost-effective strategy for expanding recreation opportunities.

Risk Management

Engaging in sound risk management practices is another way for districts to lessen their exposure to liability. Many school districts have formal risk management programs in place to analyze their exposure to risk and determine the best way to handle it. All districts can engage in risk management by complying with health and safety laws

designed to protect students, employees, and visitors at the school; ensuring that school buildings and grounds are maintained in a safe condition; and carefully supervising and protecting school grounds, facilities, and equipment.

Concerns about the legal risks of opening school property to the community after hours are often exaggerated, and state laws, insurance, and joint use agreements can offer districts many protections against lawsuits. For more information about the legal issues associated with opening schools to community use, visit NPLAN's joint use agreement resources at www.nplan.org.

The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of ChangeLab Solutions. ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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¹ The fact sheet is a summary of the more comprehensive materials prepared by Professor Tom Baker of the University of Pennsylvania Law School. More detailed information on tort law affecting after school recreational use of school facilities for each state is available at: www.nplan.org/nplan/products/liabilitysurvey.

² Hensler et al. Compensation for Accidental Injuries in the United States (1991); Carroll S and Abrahamse A. "The Frequency of Excess Auto Personal Injury Claims." *American Law and Economics Review*, 3(228): 2001.

³ See, e.g., Baker T. "Reconsidering the Harvard Medical Practice Study Conclusions about the Validity of Medical Malpractice Claims." *Journal of Law, Medicine & Ethics*, 33(501): 2005.

⁴ In this study, three-fourths of successful plaintiffs received less money than the juries awarded, most frequently because the award exceeded the defendant's insurance coverage. Legal caps on damage awards in death and punitive cases also result in a lesser payment. See, e.g., Hyman et al. "Do Defendants Pay What Juries Award? Post-verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003." *Journal of Empirical Legal Studies*, 4(3): 2007.

⁵ See Haltom and McCann, *supra* note 1.

⁶ 63 C.J.S. Municipal Corporations § 663 (West 2009).

⁷ Cal. Govt. Code § 831.7 (West 2009).

⁸ *Avila v. Citrus Community College District*, 38 Cal.4th 148, 159 (2006).

⁹ 63 C.J.S. Municipal Corporations § 663 (West 2009).

¹⁰ For more information on joint use agreements, see NPLAN's resources on joint use agreements, available at: www.nplan.org/childhood-obesity/products/nplan-joint-use-agreements.