Joint Use Agreements

A Resource Guide for Public Health Professionals

ACTIVE TRANSPORTATION ALLIANCE

We CHOOSE Health

This project is part of the Illinois Department of Public Health's We Choose Health *initiative. Made possible with funding from the Centers for Disease Control and Prevention.*

Published 3/1/13

Joint Use Agreement Toolkit

ACTIVE TRANSPORTATION ALLIANCE

ACTIVE TRANSPORTATION ALLIANCE is a technical assistance provider for the We Choose Health initiative under the Illinois Department of Public Health, and one of the nation's foremost experts on biking, walking, and transit. We are a non-profit organization that advocates for transportation that encourages and promotes safety, physical activity, health, recreation, social interaction, equity, environmental stewardship, and resource conservation.

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Table of Contents

Introduction

A joint use agreement (JUA) is an arrangement between two or more entities that boosts opportunities for physical activity. It functions to increase access to environments, facilities, properties and/or programs where physical activity can occur. A JUA can serve the general public or specific groups, involve indoor or outdoor facilities, and be open to all or designated facilities. JUAs can also be formal or informal, although formal agreements provide protections for all parties. The establishment of joint use agreements is becoming a core strategy for public health professionals as they work to prevent obesity-related diseases through increased physical activity.

A typical joint use agreement usually includes a partnership with a school or school district (public or private), because schools often have facilities like gymnasiums, athletic fields and playgrounds that can serve public needs. And ideally, school facilities are situated centrally within communities, making them easy to access. But JUAs do not always involve a school, and some of the communities with the greatest need for increased physical activity are located in rural areas, miles from the nearest school facility. To better serve these communities, public health professionals must "think outside the school" when considering a JUA initiative. This guide has been created as a supplement to existing school-centric JUA resources in order to provide a broader range of solutions.

Many types of public and private facilities can be leveraged for community use to increase opportunities for physical activity. These can include YMCAs or YWCAs, non-profit organizations, places of worship, meeting halls, municipal buildings and even private businesses. Many different people and age groups can be served by JUAs, including children, senior citizens, people with disabilities, working parents and anyone else in a community.

How to Use This Guide

The sections of this guide are organized according to the steps used to create a standard joint use agreement. They are as follows:

1. Assess needs and resources.
2. Reach out to potential partners.
3. Formulate and plan a program.
4. Conduct a pilot and make adjustments.
5. Formalize a joint use agreement.

Each section contains a discussion of tasks and strategies as well as a list of tools and resources. Some of these tools are listed as links to articles and sections from other guides on joint use agreements. This guide also contains an FAQ for easy reference.

Section 1
Assess Needs and Resources

The objective of creating a joint use agreement is to increase opportunities for physical activity for community members. But before knowing what form these increased opportunities should take, public health professionals and supporters should first understand the needs they are trying to meet. Conducting a needs assessment of the service area can ensure that the initiative benefits the right population(s). For example, is it important that a JUA impacts the most people possible, or benefits specific sub-groups that are most in need? What are the most prevalent health conditions that need addressing? What are the current physical activity levels in the community? A thorough needs assessment can help maximize the efficiency and overall impact of your efforts down the road.

Assessing resources begins with data collection and analysis. Start by seeking out information about the availability, location and accessibility of physical activity programs and facilities. Survey the community with regard to the number of facilities and locations that are suitable for physical activity, as well as the number of organized programs that are available to the public. Where statistical data on health and activity in Illinois can be accessed via federal and state health agencies, the information about programs and facilities requires more community focus and field work.

To assist in these efforts, we recommend using our Joint Use Agreement Program and Facility Inventory. This tool is designed to help you catalog physical activity opportunities in your service area. It includes some assessment questions that may help you strategize your outreach to different targets. Some facilities that have limited potential one year may be helpful to know about in a following year. Similarly, successful programs may serve as good models for future efforts. This tool can maintain a running record of these programs. It is meant to be flexible, so additional categories can be added as needed. *(See the link listed below.)*

Resources for Section 1

JOINT USE AGREEMENT PROGRAM AND FACILITY INVENTORY

Prepared by Active Transportation Alliance

>> See Appendix, or download here: http://activetransportationpolicy.org/node/279

PLAYING SMART: MAXIMIZING THE POTENTIAL OF SCHOOL AND COMMUNITY PROPERTY THROUGH JOINT USE AGREEMENTS

Prepared by ChangeLab Solutions

>> Download here: http://activetransportationpolicy.org/node/280

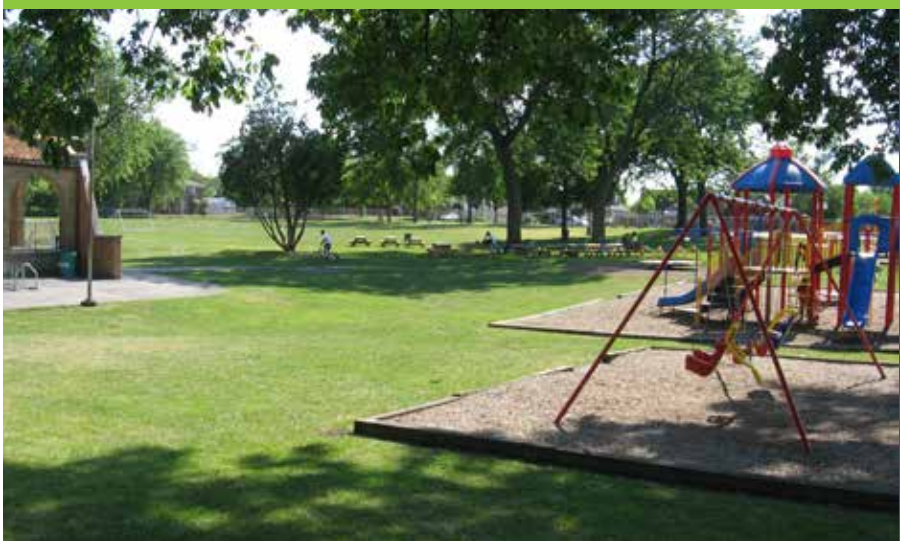
This publication was created by a foremost expert on joint use agreements. While it is school-focused, it can serve as a resource for non-school initiatives. Content relevant to needs assessment can be found on pages 15-17.

Section 2
Reach Out to Potential Partners

The next step is to start identifying potential partners. Many different groups and organizations may be interested in the benefits of joint use agreements. When reaching out to potential partners, promote the various benefits of engaging in a JUA:

- Increases opportunities for physical activity
- Facilitates new partnerships
- Promotes a sense of community collaboration and ownership
- Creates positive publicity and public exposure for partners

Many will also view a JUA as a valuable public relations opportunity. When a business or organization opens its doors to provide a service to the public, it spreads goodwill and builds closer ties with the surrounding community.



Key Points for Working with Different Partners

Schools

Advantages	Challenges
Schools typically have good spaces for physical activity, such as gymnasiums, playgrounds and athletic fields. Great way to solidify the role and importance of easily accessible community-centered schools. Teachers can be great partners for publicizing the program to parents. Coaches and PE teachers might be able to help facilitate a program on a volunteer basis, or for a discounted fee.	Any new programming would have to be coordinated around the existing school activities schedule. Schools, like all public agencies, are usually short on resources and may be apprehensive about new initiatives. Schools may have more stringent security standards than other facilities. Schools may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during weekends and evenings, and may add costs for staff time.

Municipal or County Governments

Advantages	Challenges
Local government buildings may have large community rooms that can be used for classes and programming. Government facilities are usually centrally located within communities and easily accessible to people with disabilities. Local governments likely have strong contacts with residents, the business community, and other organizations that could be potential partners.	Local governments may have a robust schedule of committee and board meetings in the evenings, which may limit room availability. Most public agencies are short on funds and resources and may be apprehensive about new initiatives. Municipal or County Governments may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during weekends and evenings, and may add costs for staff time.

Parks and Recreation Districts

Advantages	Challenges
Parks consist almost entirely of recreational facilities, both indoor and outdoor. Parks and recreation districts often have existing relationships with schools (such as after-school programming) that could serve as a starting place for additional JUA relationships.	Any new programming would have to be coordinated around the existing park activities schedule. Parks and recreation districts may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during weekends and evenings, and may add costs for staff time.

Faith Organizations

Advantages	Challenges
Many places of worship have large community spaces and recreation facilities that can be used for classes and programming. Many faith organizations use vans and buses to assist in getting their members to services. Partnering with a faith organization may result in good transportation solutions for people with disabilities and low-income populations. Faith organizations tend to have space available during daytime and evening hours, particularly during the work week.	Programs at facilities owned by faith organizations may be misconstrued as "religious activities." Some people who are not members of that faith organization may feel excluded or reluctant. Be sure to promote your initiative as a benefit for the entire community and not religious in nature. Faith organizations may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during off hours, and may add costs for staff time.

Private Clubs

Advantages	Challenges
Some private clubs (such as the Elks or Veterans of Foreign Wars) have large community spaces and recreation facilities that can be used for classes and programming. Some private organizations have a community service focus that aligns well with serving the general public.	Programs at private clubs may be misconstrued as supporting the mission of that club. People who are not members of the club may feel excluded or simply reluctant. Be sure to promote your initiative as a benefit for the entire community. Some private clubs may permit tobacco and alcohol use on the premises, creating an obvious conflict with public health initiatives. Be sure to find out what types of activities take place at any facility when building partnerships. Private Clubs may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during off hours, and may add costs for staff time.

Local Businesses

Advantages	Challenges
Local businesses may have large indoor or outdoor spaces that could be donated for joint use purposes. They may also donate staff time. Local businesses may be willing to sponsor or donate equipment (such as basketballs and jump ropes) in exchange for name recognition. Local businesses may be willing to donate raffle prizes, coupons or gift cards as a way to generate interest in your program. Many local businesses are also a good place to post announcements and promote programming.	If engaging more than one sponsor, be aware of potential conflicts between sponsors who are business competitors. Sponsorships from businesses can be subject to formal application processes. Businesses may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during off hours, and may add costs for staff time. Some businesses' activities may conflict with your health goals, such as sale of tobacco or unhealthy foods. Consider the nature of the business itself, and whether its products and services align with your program goals.

YMCAs and Other Non-profits

Advantages	Challenges
YMCA/YWCA facilities often consist of robust recreational facilities, both indoor and outdoor. Health-focused non-profits will likely be receptive to your goals. Non-profits may have valuable contacts to share and pointers for starting new initiatives. YMCAs may be able to send staff to facilitate programs at non-YMCA locations.	Organizations may be reluctant to support new programs that compete with their own programming, or to open their facilities to non-members. YMCAs and other non-profits may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during off hours, and may add costs for staff time.

Hospitals

Advantages	Challenges
Non-profit hospitals may be interested in partnering as a way to meet community benefit requirements. Hospitals will likely be receptive to your health goals.	Hospitals may require staff presence to ensure rules are followed or to open/close the facility. This may be a challenge during off hours, and may add costs for staff time.

Discussing Liability

Partners may be concerned about liability when establishing JUAs. These kinds of concerns are fairly common, and can often be easily addressed. While this guide is not a substitute for legal advice, it can help inform your discussions about these issues. A formalized joint use agreement is a legally binding document, and partners will likely want to consult risk management professionals before signing on. Property owners will want to protect themselves from liability for any possible injuries to program participants. Here are some key points to keep in mind when these concerns arise:

- The State of Illinois grants immunity to schools and other public entities that make their property available for public use. This means that they are very well protected from lawsuits brought by people who may have been injured on their property. (ChangeLab Solutions)

- Legal precedent in Illinois shows that private landowners are usually only liable for injuries to people on their land if they knew about the dangerous conditions that resulted in injury and failed to correct the conditions and/or warn people about the danger. (ChangeLab Solutions)

- Liability suits are settled in courts on a case-by-case basis. To be deemed liable for a person's injuries or property damage it must be proven that a property owner acted unreasonably and negligently in their basic responsibilities, or that they willfully and wantonly created a dangerous condition. (ChangeLab Solutions)

A good way to address property owners' concerns and come up with a solution is to ask questions about how they currently protect themselves.

- How do they currently protect themselves from lawsuits by people who might become injured while on their property? Would they be any less protected if they entered into a joint use agreement? Why?

- Could their concerns be addressed by simply posting a "Play at Your Own Risk" sign for unstructured programming?

- Could their concerns be addressed by having participants sign a waiver before participating in organized activities?

- If increased liability is unavoidable, would any other partners be willing to share responsibility in the event of an injury? If so, these responsibilities can be documented in the final JUA.

For a more in-depth understanding of liability laws in Illinois, please see the following resources from ChangeLab Solutions (formerly the National Policy & Legal Analysis Network).

1. Appendix: Liability Risks for After-Hours Use of Public School Property to Reduce Obesity: Illinois

   >> *Download here: http://activetransportationpolicy.org/node/281*

2. Available for download: Playing Smart: Maximizing the Potential of School and Community Property Through Joint Use Agreements, Chapter 5, p. 54

   >> *Download here: http://activetransportationpolicy.org/node/280*

NOTE: This resource guide is not a substitute for legal counsel.

Section 2 Resources

APPENDIX: LIABILITY RISKS FOR AFTER-HOURS USE OF PUBLIC SCHOOL PROPERTY TO REDUCE OBESITY: ILLINOIS

>> *Download here: http://activetransportationpolicy.org/node/281*

PLAYING SMART: MAXIMIZING THE POTENTIAL OF SCHOOL AND COMMUNITY PROPERTY THROUGH JOINT USE AGREEMENTS

Prepared by ChangeLab Solutions

Relevant sections:
Chapter 5: Liability p. 54
Chapter 6: Relationship Building p. 68
Working Through Conflicts p. 79

>> *Download here: http://activetransportationpolicy.org/node/280*

PROMOTING PHYSICAL ACTIVITY THROUGH JOINT USE AGREEMENTS: A GUIDE FOR NORTH CAROLINA SCHOOLS AND COMMUNITIES TO FORM JOINT USE AGREEMENTS

Prepared by the North Carolina Department of Public Instruction and Division of Public health

>> *Download here: http://activetransportationpolicy.org/node/282*

OBSTACLES REGARDING JOINT USE OF SCHOOL FACILITIES

Prepared by California Park and Recreation Society

>> *Download here: http://activetransportationpolicy.org/node/283*

INTERGOVERNMENTAL COOPERATION, THE PARK DISTRICT ADVANTAGE

A brief summary of one of Champaign, Illinois' long-term joint use partnerships, sustained since 1965.

>> *Download here: http://activetransportationpolicy.org/node/284*

Section 3
Formulate and Plan a Program

Joint use agreement programming is discussed in two categories: structured and unstructured.

STRUCTURED PROGRAMMING consists of classes, games and other activities that are supervised by a qualified adult (e.g., a coach or instructor) and takes place at specified times. Structured programming typically targets people of specific age groups, ability levels, and/or interests. Examples include intramural sports, fitness classes and even social dance. Structured programming can generate a competitive spirit and/or a sense of accomplishment and development as people typically focus on an activity and improve over time. These aspects may help draw people in for the long term.

UNSTRUCTURED PROGRAMMING consists of simply making a space (and sometimes equipment) available to community members. For example, a school may allow public access to its gymnasium for "open gym" in the evenings. Or a school may keep its playground unlocked on the weekends for local families to access. Unstructured programming can be simpler to get started because it doesn't require recruiting an instructor or facilitator. This approach can generate a more socially inclusive environment that supports families and people of all ages.

Whether selecting structured or unstructured programming (or a combination), be certain to ensure that the programming matches the participants. When determining the best type of programming, consider the specific needs of the people and populations that you wish to impact. Consider the following questions:

- Who lives in your service area? What are the demographics of community residents?
- Do the children at community schools have the space and equipment appropriate for their age groups?
- Are adults' opportunities for leisure time physical activity limited by their work schedules? Consider those working second and third shifts.
- Do local senior housing facilities offer enough social and physical activity programming? Do adequate transportation options exist to enable them to access proposed programs?
- Will people with disabilities have access to proposed programs or facilities?
- What kinds of programs would most interest the local community? Would an intramural soccer program be more popular than yoga classes?
- Are proposed programmatic activities culturally appropriate for people of different backgrounds?
- Is there an opportunity to offer child care for participating parents?

Tips for Targeting Specific Groups

Adults and Teens

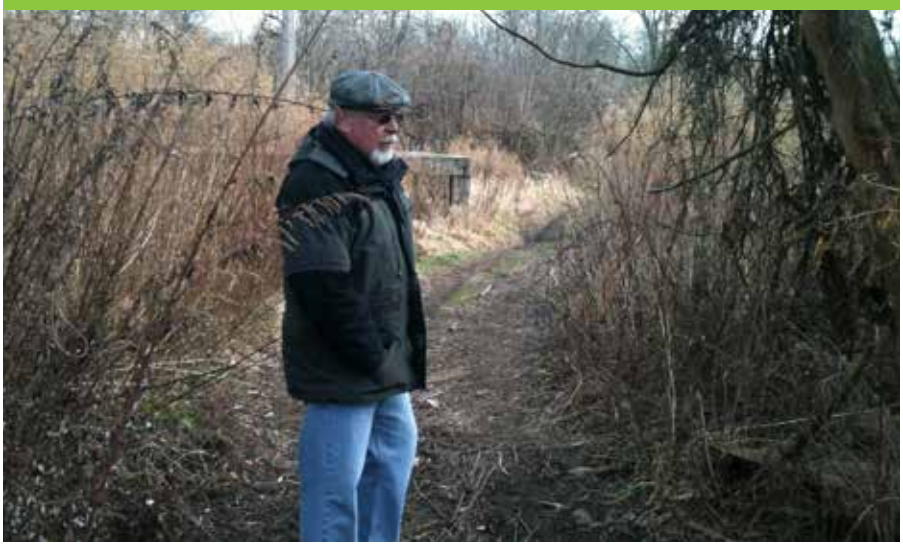
- Offer opportunities for programming on weekends and evenings. Consider scheduling more than one evening per week.
- Child-care costs and logistics can be a barrier for parents. Consider offering child-focused programming at the same time as adult programming if feasible.
- Weekday mornings may be a good time for stay-at-home parents with children in pre-school.

Children

- Structured afterschool programming can be helpful for parents who work during the day, especially if activities are taking place at the school and children don't need to travel to another location.

Seniors

- Daytime programming may generate the best turnout for retired seniors.
- Offer physical activity programming at varied levels of intensity.
- Accessibility for those with disabilities may be a prominent concern when targeting this age group.
- Transportation can be a challenge because people in this age group may face restrictions on their driving.
- When scheduling, be mindful that many who reside in assisted living facilities have structured mealtimes. They will need time for travel to and from activities between meals.



Roles and Responsibilities

The roles and responsibilities of the different parties involved are unique in every joint use agreement. In the start-up phase, the most important role is that of the public health professionals and supporters. Your role is to identify the opportunities and coordinate among the right people to make the initiative a success. Even though you may not own the property, teach a program, sponsor the equipment or unlock the doors, the joint use programming is still the product of your work and would not have happened if not for your efforts.

As a part of this, you'll need to facilitate the discussion between other partners in determining their roles and responsibilities as the program continues. We recommend using ChangeLab Solutions' *Checklist for Developing a Joint Use Agreement* (see resources listed below) to work through the details. The checklist is a comprehensive tool that walks users through a detailed set of steps for addressing all the operational considerations for joint use programming.

Here's a short list of operational responsibilities that will need to be addressed:

- Priority of Uses
- Scheduling
- Access and Security
- Materials and Equipment
- Supervision
- Custodial Services
- Toilet Facilities
- Parking
- Maintenance
- Inspection and Notification of Damage
- Restitution and Repair

Resources for Section 3

FIT FOR ALL AGES: REACHING NEW DEMOGRAPHICS THROUGH TARGETED FITNESS PROGRAMMING

Prepared by Recreation Management Magazine

Focus: Targeting different age groups

>> Download here: http://activetransportationpolicy.org/node/285

CHECKLIST FOR DEVELOPING A JOINT USE AGREEMENT

Prepared by ChangeLab Solutions

>> Download here: http://activetransportationpolicy.org/node/295

PLAYING SMART: MAXIMIZING THE POTENTIAL OF SCHOOL AND COMMUNITY PROPERTY THROUGH JOINT USE AGREEMENTS

Prepared by ChangeLab Solutions

Relevant section: Chapter 6. Building, Scheduling, and Maintenance, p. 72

>> Download here: http://activetransportationpolicy.org/node/280

Examples and Case Studies

The following are examples of program ideas that apply various types of facilities in diverse settings. While there is a recurring theme of school partnerships and renovations, it may be valuable to explore the different scenarios when formulating your own program ideas.

TAKING SHAPE – JOINT USE OF FACILITIES

Prepared by Shape Your World of North Carolina

Focus: Rural areas, community public walking trails

>> Download here: http://activetransportationpolicy.org/node/287

AGING IN PLACE: A STATE SURVEY OF LIVABILITY POLICIES AND PRACTICES

Prepared by National Conference of State Legislatures and the AARP Public Policy Institute

Focus: Rural areas, using school facilities to serve aging population, p. 15–18

>> Download here: http://activetransportationpolicy.org/node/286

WASHAKIE COUNTY JPB COMMUNITY GYM AND KITCHEN COMMUNITY FACILITIES PROJECT

Focus: Rural areas, multipurpose facility

>> Download here: http://activetransportationpolicy.org/node/288

U.S. EXAMPLES OF JOINT USE FACILITIES

Hosted by the Atlanta Regional Commission

Focus: Summary of many types of facilities and programs

>> Access online here: http://www.atlantaregional.com/local-government/implementation-assistance/schools--communities/opportunities-for-coordination/joint-use/u-s--examples-of-joint-use-facilities

PLAYING SMART: MAXIMIZING THE POTENTIAL OF SCHOOL AND COMMUNITY PROPERTY THROUGH JOINT USE AGREEMENTS

Prepared by ChangeLab Solutions

Relevant sections: Chapter 3 Case Studies
- Suburban playgrounds, p. 23
- Urban schoolyards, p. 20
- Classroom, gym, playground, p. 31
- Urban open space, p. 33

>> Download here: http://activetransportationpolicy.org/node/280

Section 4
Conduct a Pilot and Make Adjustments

Conducting a pilot is a good strategy for starting any new initiative, especially when it involves shared responsibilities among multiple entities. There may be unforeseen issues that don't reveal themselves until a program is actually getting started. Examples include operational concerns, scheduling conflicts, and low participation.

Key points for a successful pilot:

- Allow plenty of time for advance planning before your pilot starts. You may need several weeks to coordinate, recruit any volunteers and publicize the program before it launches. Allow at least a few months for the initial pilot.
- Consider the time of year when you will launch the program. Outdoor programs will likely have a better turnout in the spring, while there may be a greater demand for indoor programming in wintertime.
- Use any and all available outlets for publicizing your program. For tips, see the recorded presentations about communications and social media available from the Illinois Department of Public Health and the We Choose Health Action Institute (link provided under Resources for Section 4).
- Create a written summary of the program that lays out each party's roles and responsibilities. This summary can become the basis of a formalized joint use agreement document later on down the road.
- Plan regular check-ins with partners to discuss the successes and challenges of the program and to make sure that any issues are addressed. This should include creating a system for resolving conflicts.
- Keep a running record of program attendance to monitor changes in turnout throughout the pilot. This can be done with a participant sign-in sheet or a simple tally.
- Consider using a brief survey about how the program is working for participants, how they heard about it and how far they travel to access the facility.

When the determined time frame for your pilot is complete, meet with partners to discuss progress and the results of any evaluations to determine what, if any, changes would improve the initiative. If changes are significant (such as scheduled times for the activities), it is recommended to conduct a second pilot and compare results. You can pilot changes as many times as necessary until you get the right fit, and then consider formalizing the agreement.

Resources for Section 4

WE CHOOSE HEALTH ACTION INSTITUTE PRESENTATIONS

Provided by the Illinois Department of Public Health

Communication 1: Getting Noticed: Beyond the Press Release
Communication 2: Connecting with Your Community
and Building Awareness

>> *Download here: http://www.idph.state.il.us/wechoosehealth/ai_presentations.htm*

Section 5
Formalize the Agreement

Many people assume that a joint use agreement must always be formalized into a legally binding document. This is not true, and the assumption can intimidate supporters and potential partners. While a formalized agreement is the ultimate way to ensure a sustainable long-term program, a joint use agreement can be started on just a handshake. The objective of a joint use agreement is to create opportunities for physical activity; the best programs begin with discussion, ideas, collaboration and giving it a try.

As discussed in the previous section, a recommended strategy is to start with a pilot program before asking partners for a formal commitment. This can take some pressure off of apprehensive partners, and a pilot can reveal unforeseen needs (such as logistics and maintenance) that would need to be addressed in any formal agreement.

Drafting a Joint Use Agreement

Joint use agreements (JUA) are also referred to as memorandums of understanding (MOU), memorandums of agreement (MOA), or in some cases, public use agreements. By any name, they all serve one purpose, to establish and document the responsibilities of partners as they open facilities for public use.

A JUA may be as simple as a single page that lists names and addresses of partners, and the times that they will make facilities available. Alternatively, JUAs may also be very detailed, addressing specific operations issues, cost sharing agreements, and other procedural expectations. The content of the document will depend on the nature of the programming and the needs of the partners involved.

With more complex agreements, stakeholders may want to have their legal counsel involved in the development and review process before they sign on. Some may prefer to have their attorneys draft the document from start to finish. It may also be very helpful (and more cost effective) for partners to develop a working draft that legal counsel can review and format.

To assist in creating a draft, resources listed at the end of this section include extensive examples of joint use agreements that you can customize for your program. The majority of them deal with partnerships involving schools, but they cover a variety of facilities and types of programs and can serve as a starting point for any facilities-sharing scenario.

Resources for Section 5

PLAYING SMART: MAXIMIZING THE POTENTIAL OF SCHOOL AND COMMUNITY PROPERTY THROUGH JOINT USE AGREEMENTS

Prepared by ChangeLab Solutions

Appendix 1: Model Joint Use Agreements, p. 81

>> Download here: http://activetransportationpolicy.org/node/280

AGREEMENT BETWEEN THE CITY OF VAUGHAN, RECREATION AND CULTURE, AQUATIC SERVICES SECTION AND VAUGHAN AQUATIC CLUB

Provided by the Leisure Information Network

>> Download here: http://activetransportationpolicy.org/node/290

SAMPLE AGREEMENT AMONG LAND MANAGER, LANDOWNER, AND TRAIL ORGANIZATION

Provided by AmericanTrails.org

>> Download here: http://activetransportationpolicy.org/node/289

AGREEMENT BETWEEN UNIVERSAL SCHOOL AND AQSA SCHOOL FOR USE OF OUTDOOR RECREATIONAL FACILITIES

Provided by Active Transportation Alliance

>> Download here: http://activetransportationpolicy.org/node/292

INDEPENDENT SCHOOL DISTRICT NO. 625 AND YMCA OF GREATER SAINT PAUL

>> Download here: http://activetransportationpolicy.org/node/291

SAMPLE MEMORANDUM OF UNDERSTANDING FOR COUNTY HEALTH DEPARTMENT AND MUNICIPALITY

Provided by United Samaritans Medical Center Foundation

>> Download here: http://activetransportationpolicy.org/node/293

SAMPLE OHIO STATE SHARED USE EQUIPMENT FORM

Prepared by Ohio State University

>> Download here: http://activetransportationpolicy.org/node/294

Frequently Asked Questions

What is a joint use agreement?

A joint use agreement (JUA) is an arrangement between two or more entities that boosts opportunities for community members to engage in physical activity. It functions to increase access to environments, facilities, properties and/or programs where physical activity can occur.

What is the role of public health professionals and supporters in establishing a JUA?

Every situation will be unique, but the role of public health professionals and supporters is to identify potential facilities, formulate program ideas and coordinate among partners to make the initiative a success. Other activities may include convening meetings, drafting initial agreement documents, and following up with any additional resources to ensure ongoing success.

What types of facilities are suitable for JUAs?

Ultimately, any location with sufficient space for physical activity can support a joint use agreement. The best locations are those that are easily accessed by the public. *See Sections 3 and 4 in this guide for further considerations.*

How can public health professionals and supporters best prepare to address liability issues?

When discussing liability with partners, it's important to be informed about Illinois laws, common concerns and how to address them. *For more detail, see Section 2 on reaching out to potential partners.*

Does a JUA always need to be a formal written document, or can it be informal?

A joint use agreement does not always need to be formalized into a legally binding document. While a formalized agreement is the ultimate way to ensure a sustainable long-term program, a joint use agreement can be initiated with a simple handshake. *See Sections 4 and 5 on pilot programs and formalizing joint use agreements.*

What are some creative solutions for partners staffing a facility during program hours?

There are many potential solutions for staffing a facility during program hours. Some organizations are able to include JUA programs directly into existing staff schedules. Some businesses may be interested in donating staff time to JUA programs. When looking for instructors to facilitate specific programs, consider reaching out to physical education teachers in local schools. Also consider using volunteers; many high schools require students to complete a certain number of volunteer hours to meet graduation requirements. Retired seniors may also be interested in volunteer opportunities.

Who pays for operations, maintenance of facilities or special equipment needed?

Every joint use agreement is unique, and responsibility for any operating cost has to be determined by partners based on individual program needs. *See Section 3 for more resources.*

How is a joint use agreement different from a lease or rental contract?

A lease or rental agreement almost always comes with a fee. Typically, a joint use agreement is structured so that space will be donated or shared among partners in a way that serves their mutual benefit, as opposed to parties paying for rental space.

Appendix

Liability Risks for After-Hours Use of Public School Property to Reduce Obesity: Illinois

From ChangeLab Solutions, (formerly the National Policy & Legal Analysis Network)

>> Download here: http://activetransportationpolicy.org/node/281

nplan | NATIONAL POLICY & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY

Liability Risks for After-Hours Use of Public School Property to Reduce Obesity: Illinois

Michael Lettiero, Pierre Vachon, and Tom Baker

This memorandum summarizes Illinois law governing liability for after-hours recreational use of school facilities. It should be read with this project's overview memorandum, which can be found at www.nplan.org/nplan/products/liabilitysurvey. Our goal is to inform lawyers advising school districts considering whether to open school facilities (or keep facilities open) for recreational use as part of an effort to reduce childhood obesity.

This memorandum does not provide the kind of detailed analysis necessary to support the defense of a liability action. It is not a substitute for consultation with a lawyer. We urge school counsel to consult a knowledgeable tort defense lawyer with experience defending Alaska schools. If there are important cases, statutes, or analysis that we have overlooked, please inform us by sending an email to info@nplan.org.

* * *

For a negligence action in the state of Illinois, a plaintiff must prove three elements: (1) the existence of a legal duty, (2) a breach of that duty by the defendant, and (3) an injury caused by that breach.[1] For purposes of evaluating the legal rules that affect the liability risk involved in opening up schools to after-hours use, the crucial issues involve the duty of the school district.

Part A of this memorandum addresses the duty of the school system. Part B addresses issues relating to limits on damages. Part C addresses two risk management issues that involve additional legal questions: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district.

A. Public Schools, the Duty Element, and After-Hours Use

Absent special liability protection, school districts and other providers of recreational facilities have the legal duty to take *reasonable* precautions to prevent injury. What is reasonable is very context specific and depends on many things: most important, the nature of the harm, the difficulty of preventing it, and generally accepted standards in the management of recreational facilities.

As any lawyer who has tried to explain the concept of negligence to a layperson knows, the standard of reasonable care can seem frustratingly vague and imprecise. Yet it is the standard that generally governs liability risk for organizations and individuals in the United States. On the

[1] ILLINOIS LAW AND PRACTICE, *Negligence* § 1 (1998) [hereinafter ILL. LAW & PRAC., *Negligence*].

whole, it is a flexible standard that does a good job of balancing the competing interests of the providers and users of many kinds of services.

This section explains the ways that Illinois law limits the legal duty of school districts. Illinois law sometimes insulates school districts from liability, so that school districts that do not take reasonable precautions may still be able to avoid legal responsibility for any resulting injuries. Illinois law does this through governmental immunity, which is discussed in subsection 1. In our judgment, governmental immunity is likely to protect school districts against liability for injuries relating to recreational use in many circumstances. Subsection 2 discusses the liability and indemnification of school employees, a topic closely related to school districts' overall liability risk.

Subsection 3 discusses recreational user statutes, which sometimes also offer liability protection to school districts. In Illinois, however, the recreational user statute protects only hunting or recreational shooting, activities not likely to be included in an after-hours recreational program for children. Subsection 4 discusses two additional limited liability statutes that may apply to schools, the Baseball Facility Liability Act and the Hockey Facility Liability Act.

Subsection 5 discusses the impact of the Illinois courts' decision to retain the traditional distinctions among different categories of entrants on land. Subsection 6 concludes this part of the memorandum by comparing the legal duties that a school already faces for activity during the school day with the legal duties that the school would face if it permitted after-hours use of its facilities.

1. Limited Duty Due to Governmental Immunity

Two statutory schemes govern school liability in Illinois, the Tort Liability of Schools Act and the Local Government and Governmental Employees Tort Immunity Act. The Illinois Supreme Court abolished governmental immunity for schools in 1959,[2] and in response the Illinois legislature passed the Tort Liability of Schools Act.[3] This act initially limited public school district liability:

> The General Assembly finds and hereby enacts as the public policy of the State of Illinois that public schools in the exercise of purely governmental functions should be protected from excessive diversion of their funds for purposes not directly connected with their statutory functions, if there is liability imposed by any court, and that there should be a reasonable distribution among the members of the public at large of the burden of individual loss from injuries incurred as a result of negligence in the conduct of school district affairs. [4]

[2] ILLINOIS LAW AND PRACTICE, *Schools* § 124 (2004) (*citing* Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959)) [hereinafter ILL. LAW & PRAC., *Schools*].
[3] 745 ILL. COMP. STAT. ANN. 25/0.01 et seq. (West 2008).
[4] *Id.* 25/1.

Courts since then, however, have found portions of the act unconstitutional.[5] Despite the existence of the Tort Liability of Schools Act, today the Local Governmental and Governmental Employees Tort Immunity Act[6] comprehensively regulates the liability and immunity of school districts.[7]

The Local Governmental and Governmental Employees Tort Immunity Act is commonly referred to as the Tort Immunity Act.[8] The purpose of the Tort Immunity Act "is to protect local public entities and public employees from liability arising from the operation of government."[9] The Tort Immunity Act explicitly covers school districts.[10]

Examining a claim under the Tort Immunity Act, a court will initially determine if a duty exists and then determine if immunity as outlined by the act applies.[11] The act does not impose independent duties on public entities but "merely codifies those duties existing at common law, to which the subsequently delineated immunities apply."[12] "Unless an immunity provision applies, municipalities are liable in tort to the same extent as private parties."[13] The Tort Immunity Act has three pertinent, distinct sections that provide immunity: one section regarding immunity of public entities, one section regarding public employees, and one section regarding immunity for injuries occurring on public property.

Under the first section of the Tort Immunity Act regarding general immunities of a public entity, the only provision of immunity that would be applicable to school districts is that for the acts or omissions of their employees. "A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable."[14] The provision indirectly makes applicable to public entities the immunities provided for in the act for public employees. An Illinois court, for example, found that a park district was immune based on this provision for an injury that was caused by a volunteer camp at a summer camp.[15]

Under the second section of the Tort Immunity Act regarding the immunity of public employees, the most relevant provision to school districts would be discretionary act immunity. The Tort Immunity Act states that when a public employee serves in a position involving the determination of policy or exercise of discretion, the employee is not liable for any injury that may result from the exercise of discretion, even if such discretion is abused.[16] The Illinois Supreme Court has extended the reach of discretionary immunity and held that the "broad

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[5] The portions of the act regarding the limitation on damages and notice provisions have been declared unconstitutional. Cleary v. Catholic Diocese of Peoria, 312 N.E.2d 635 (Ill. 1974); Haymes v. Catholic Bishop of Chicago, 243 N.E.2d 203 (Ill. 1968).
[6] 745 ILL. COMP. STAT. ANN. 10/1-101 et seq.
[7] ILL. LAW & PRAC., *Schools*, *supra* note 2, at § 125.
[8] ILLINOIS JURISPRUDENCE, *Personal Injury and Torts* § 3:32 (2007) [hereinafter ILL. JUR.].
[9] 745 ILL. COMP. STAT. ANN. 10/1-101.1.
[10] *Id.* 10/1-206.
[11] ILL. JUR., *supra* note 8, at *Personal Inj* § 3:32.
[12] Murray v. Chicago Youth Ctr., 864 N.E.2d 176, 185 (Ill. 2007), *quoting* Barnett v. Zion Park Dist., 665 N.E.2d 808 (Ill. 1996).
[13] *Murray*, 864 N.E.2d at 185.
[14] 745 ILL. COMP. STAT. ANN. 10/2-109 (West 2008).
[15] Flores v. Palmer Mktg., Inc., 836 N.E.2d 792, 797 (Ill. App. Ct. 1st Dist. 2005).
[16] 745 ILL. COMP. STAT. ANN. 10/2-201.

discretionary immunity applies to [public] . . . entities."[17] The Illinois Supreme Court has also stated that this provision provides immunity for both negligent and willful and wanton conduct.[18]

The discretionary act immunity provision distinguishes between discretionary and ministerial acts. Ministerial acts are performed on a specific state of facts, in a prescribed manner, in obedience to legal authority, and without reference to discretion.[19] In contrast, discretionary acts are "particular [to] public office."[20] A court found that a teacher's acts were ministerial, for instance, when the employee did not follow a statute requiring the teacher to ensure that students wore eye protection; as a result, the school district was found able to be liable when a student suffered an eye injury.[21] By contrast, a court found that a decision not to provide safety equipment for rollerblading was a discretionary act, thereby protecting the school from liability.[22]

The final section of the Tort Immunity Act that focuses on the immunity for injuries that occur on public property has four possible relevant immunity provisions. A school district or school district employee who is supervising an activity on or using public property is not liable for injury, except if willful and wanton conduct in the supervision caused the injury.[23] Furthermore, a school district or employee is not liable for injury caused by the failure to supervise an activity on or using public property unless a duty to supervise has been imposed by statute, code, ordinance, or common law.[24] Courts have described supervision as "beyond passive oversight of an activity and includ[ing] direction, teaching, demonstration of techniques, and—to some degree—active participation in an activity while supervising it."[25] A court has held that when a supervisor surpasses the level of active participation and begins to compete one on one with a student, immunity no longer applies.[26]

The Tort Immunity Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."[27] "To establish willful and wanton conduct, the public entity must be informed of a dangerous condition, know that others had been injured because of that condition, or intentionally remove a safety feature or

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[17] Arteman v. Clinton Community Unit Sch. Dist. No. 15, 763 N.E.2d 756, 762-63 (Ill. 2002) (citing 745 ILL. COMP. STAT. ANN. 10/2-109); *see Murray*, 864 N.E.2d at 186 ("This section, together with section 2-109 (745 ILCS 10/2-109 (West 1992) ("a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable")), provides both public employees and the public employer with immunity against allegations that challenge discretionary policy determinations.").
[18] *Murray*, 864 N.E.2d at 186.
[19] ILL. LAW & PRAC., *Schools*, *supra* note 2, at § 129.
[20] *Arteman*, 763 N.E.2d at 763.
[21] Hill v. Galeburg Community Unit Sch. Dist. 205, 805 N.E.2d 299 (Ill. App. Ct. 3d Dist. 2004).
[22] *Arteman*, 763 N.E.2d at 764. The Illinois Supreme Court stated that under its view of the statute, a "school district would enjoy immunity if, for example, it provided its football players with leather helmets or, worse yet, no helmets at all." *Id.*
[23] 745 ILL. COMP. STAT. ANN. 10/3-108(a) (West 2008).
[24] *Id.* 10/3-108(b).
[25] Longfellow by Longfellow v. Corey, 675 N.E.2d 1386, 1389 (Ill. App. Ct. 4th Dist. 1997).
[26] *Id.* at 1390.
[27] 745 ILL. COMP. STAT. ANN. 10/1-210.

device from recreational property."[28] Courts have found willful and wanton conduct where a school board knew of injuries that had occurred on a tennis court and failed to respond to complaints about a defective condition,[29] and similarly, where a town was aware of injuries arising from a slide and did nothing to cure the defective condition.[30] Absent willful and wanton conduct, a school district is likely immune from supervision liability.

The second relevant immunity provision in the Tort Immunity Act under the public property section provides immunity to public entities for defective conditions on their property. A public entity has a duty to "exercise ordinary care to maintain its property in a reasonably safe condition" for the use of people that the entity intended and permitted to use the property "in a manner in which and at such times as it was reasonably foreseeable that it would be used."[31] Under the terms of this provision, a public entity can be liable for negligent maintenance but will be immune absent having actual or constructive notice of a dangerous condition a reasonable time before an injury so that it would have time to remedy the condition.[32] Courts have applied this provision to property located inside a school.[33]

The third relevant immunity provision in the Tort Immunity Act public property section is similar to a recreational user statute, which could limit the liability of a school district allowing recreational access to its grounds. A public entity or employee is not liable for injury due to any condition on public property where a public entity intends or permits property to be used for recreational purposes.[34] The act allows for liability under this provision only if an entity or employee is guilty of willful and wanton conduct that caused the injury.[35] The purpose of the provision is to encourage the development and maintenance of parks, playgrounds, and other recreation areas.[36]

Examples of types of property that fall under this act provision include but are "not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities."[37] The determination of application of immunity under this provision focuses on factors relating to the property itself, such as the nature of the property in the past and if the entity had previously encouraged recreational activities on the property.[38] Courts have stated that immunity does not depend on the type of activity taking place on the property when the injury occurred.[39] Recreation does not have to be the sole use of property for immunity to apply because courts have held that public property can have more than one use.[40] Specifically, in regards to school gyms, Illinois courts have stated that if the gym "was encouraged, intended, or permitted to be used for recess, extracurricular events, or other recreational, noncompulsory activities, then

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[28] Floyd ex rel. Floyd v. Rockford Park Dist., 823 N.E.2d 1004, 1010 (Ill. App. Ct. 2d Dist. 2005).
[29] Carter v. New Trier East High Sch., 650 N.E.2d 657 (Ill. App. Ct. 3d Dist. 1995).
[30] Scarano v. Town of Ela, 520 N.E.2d 62 (Ill. App. Ct. 2d Dist. 1988).
[31] 745 ILL. COMP. STAT. ANN. 10/3-102(a) (West 2008).
[32] *Id.* 10/3-102(b).
[33] Courson ex rel. Courson v. Danville Sch. Dist. No. 118, 775 N.E.2d 1022 (Ill. App. Ct. 4th Dist. 2002).
[34] 745 ILL. COMP. STAT. ANN. 10/3-106.
[35] *Id.* See the discussion of willful and wanton above.
[36] Batson v. Pinckneyville Elementary Sch. Dist. No. 50, 690 N.E.2d 1077, 1079 (Ill. App. Ct. 5th Dist. 1998).
[37] 745 ILL. COMP. STAT. ANN. 10/3-106 (West 2008).
[38] *Batson*, 690 N.E.2d at 1079.
[39] *Id.*
[40] Bubb v. Springfield Sch. Dist. 186, 657 N.E.2d 887, 893 (Ill. 1995).

section 3-106 [the immunity provision] would apply, provided that the recreational use was more than incidental."[41] Courts have found recreational immunity to bar claims against a school district for a child's injury on a sidewalk painted for a children's game[42] and for a mason's injury on a playground where he was making repairs.[43]

The fourth relevant immunity provision in the Tort Immunity Act public property section immunizes public entities and employees from hazardous recreational activities. A public entity and employees are immune from liability for injury to any person who participates in a hazardous recreational activity, any assistant to the participant, or any spectator.[44] The Tort Immunity Act defines a hazardous recreational activity as an activity that, when conducted on the property of a public entity, creates a substantial risk of injury, including activities such as body contact sports, trampolining, and tree climbing.[45] A public entity (or employee) can still be liable for the failure to warn of a dangerous condition that it has notice of which the participant cannot reasonably be expected to have notice of and for any willful or wanton conduct.[46] This section explicitly does not limit the liability of "an independent concessionaire, or any person or organization other than the local public entity or public employee, whether or not the person or organization has a contractual relationship with the public entity to use the public property."[47] A court recently found this immunity provision to apply to a school board, city youth center, and center instructor for a student injured during an extracurricular lunch period tumbling class.[48] A court has also explicitly held football to fall under this provision.[49] This provision would likely protect a school district depending on the nature of the activities the after-hours recreational program offered.

Illinois courts have carved out a common law special duty exception to the Tort Immunity Act. Local entities may be liable for acts or omissions where four factors are present when a person is injured:

> (1) the municipality must be uniquely aware of the particular danger or risk to which the plaintiff is exposed;
> (2) there must be allegations of specific acts or omissions on the part of the municipality;
> (3) the specific acts or omissions must be either affirmative or willful in nature; and
> (4) the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality.[50]

For unique awareness, courts have required knowledge of a specific danger to a specific

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[41] Ozuk v. River Grove Bd. of Educ., 666 N.E.2d 687, 690-91 (Ill. App. Ct. 1st Dist. 1996). The court further held that if a gym was used for compulsory physical education, then immunity would not apply. *Id.* at 691.
[42] *Bubb*, 657 N.E.2d 887.
[43] Hanover Ins. Co. v. Bd. of Educ. of Chicago, 608 N.E.2d 183 (Ill. App. Ct. 1st Dist. 1992).
[44] 745 ILL. COMP. STAT. ANN. 10/3-109(a) (West 2008).
[45] *Id.* 10/3-109(b).
[46] *Id.* 10/3-109(c).
[47] *Id.* 10/3-109(d).
[48] Murray v. Chicago Youth Ctr., 864 N.E.2d 176 (Ill. 2007).
[49] McGurk v. Lincolnway Community Sch. Dist. No. 210, 679 N.E.2d 71, 73 (Ill. App. Ct. 3d Dist. 1997).
[50] ILL. LAW & PRAC., *Schools*, *supra* note 2, at § 126.

plaintiff.[51] For example, a court has held that general knowledge that students may carry guns is not the degree of knowledge that is sufficient.[52] For direct and immediate control, a court has held that a student injured in a fight after school hours on school property was not under the direct and immediate control of a school district when a school security officer dispersed a group gathered outside the school after school hours and then went home after his work hours were over.[53] Furthermore, Illinois courts have stated that presence in school during school hours when required by law does not satisfy the element of direct and immediate control.[54] This exception appears to be so highly specific that it would not substantially enlarge any liability concerns of a school district opening a school for an after-hours recreational program.

The Tort Immunity Act is a comprehensive statutory scheme that appears to severely limit the possible liability of public entities. Under the act, a school district would likely be immune under a number of distinct provisions. A school district would likely be immune for discretionary acts, many issues regarding supervisions, for recreational activities, for hazardous recreational activities, and, absent notice, for maintenance issues. There are exceptions to the immunity provisions, such as liability for willful and wanton conduct, and one large exception, the common law special duty exception, but these would not subject a school district to a dramatic rise in liability.

2. Duties and Indemnification of Public School Employees

The Illinois School Code is a comprehensive regulation that seemingly touches on aspects regarding school districts.[55] It specifically provides obligations teachers must follow, such as a teacher's obligation to "maintain discipline in the schools, including school grounds which are owned or leased by the board and used for school purposes and activities."[56] It also provides that teachers "stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program, including all athletic and extracurricular programs."[57]

The Illinois Supreme Court has stated that the since the School Code confers the status of parent or guardian to educators over their students, therefore educators vicariously enjoy parental immunity.[58] The grant of immunity is for negligence in the supervision of school activities but not for willful and wanton misconduct relating to supervision.[59] Like the requirements for willful and wanton conduct set forth above in section A1, "a plaintiff must allege that the conduct of the teacher involved more than mere inadvertence, incompetence, unskillfulness, or failure to take precautions."[60] "In order to be willful and wanton, the act for which liability is sought to be imposed upon a board of education must be done intentionally or committed under

[51] Thames v. Bd. of Educ. of City of Chicago, 645 N.E.2d 445, 449-50 (Ill. App. Ct. 1st Dist. 1994).
[52] *Id.*
[53] Towner by Towner v. Bd. of Educ. of City of Chicago, 657 N.E.2d 28, 33 (Ill. App. Ct. 1st Dist. 1995).
[54] *Thames*, 645 N.E.2d at 451.
[55] 105 ILL. COMP. STAT. ANN. 5/1-1 et seq. (West 2008).
[56] *Id.* 5/24-24. There is a complementary code section for cities with inhabitants over 500,000. *Id.* 5/34-84a.
[57] *Id.*
[58] Henrich v. Liberty High Sch., 712 N.E.2d 298, 302 (Ill. 1998).
[59] Doe ex rel. Ortego-Prion v. Chicago Bd. of Educ., 791 N.E.2d 1283, 1288 (Ill. App. Ct. 1st Dist. 2003).
[60] ILL. LAW & PRAC., *Schools*, *supra* note 2, at § 128.

circumstances exhibiting a reckless disregard for the safety of others."[61]

In addition to vicarious parental immunity enjoyed by school employees, public employees, more generally, have two other immunities of note. The Tort Immunity Act grants a public employee discretionary act immunity[62] and immunity for supervision.[63]

Courts have interpreted the School Code to mandate indemnification and defense of school district employees.[64] The School Code states that "the school board has the powers enumerated"[65] "to indemnify and protect school districts, members of school boards, employees, [and] volunteer personnel" for negligence and resulting damages that have been committed within the scope of employment.[66] This includes "civil rights damage claims and suits, constitutional rights damage claims and suits and death and bodily injury and property damage claims and suits."[67] A similar School Code provision exists specifically for cities with over 500,000 inhabitants.[68]

Under the Tort Immunities Act, for any claim against an employee of a public entity based on injury arising from an act or omission done within the scope of employment, the public entity "may" elect to do one of more of the following: (1) appear and defend the claim, (2) indemnify the employee for court costs and/or attorneys' fees, (3) indemnify the employee for a judgment against him, or (4) indemnify the employee in a settlement.[69] The statute does not allow a public entity to indemnify an employee for any punitive or exemplary damages.[70]

In addition to the School Code and the Tort Immunity Act, superintendents of schools can rely on another Illinois statute for indemnity. Superintendents of schools may be indemnified and protected by a county for death and bodily injury claims arising from negligence committed in the performance of their duties.[71]

3. Limited Duty under Recreational User Statute

The Illinois legislature created the Recreational Use of Land and Water Areas Act to encourage landowners, including "the State of Illinois and its political subdivisions,"[72] to make their land

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[61] *Id.*
[62] 745 ILL. COMP. STAT. ANN. 10/2-201 (West 2008). For a discussion of discretionary immunity, see section A1 above.
[63] *Id.* 10/3-108(a). This immunity is derived from the same statute provision as school district immunity, discussed in section A1 above.
[64] Country Mut. Ins. Co. v. Teachers Ins. Co., 746 N.E.2d 725 (Ill. 2001) (holding "that section 10-20.20 imposes a duty on school districts to indemnify and defend their employees for damage claims due to negligence that occurs in the scope of employment").
[65] 105 ILL. COMP. STAT. ANN. 5/10-20.
[66] *Id.* 5/10-20.20.
[67] *Id.*
[68] *Id.* 5/34-18.1.
[69] 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2008).
[70] *Id.*
[71] 55 ILL. COMP. STAT. ANN. 5/5-1002.5.
[72] 745 ILL. COMP. STAT. ANN. 65/2(b).

available to the public, free of charge, for recreational or conservation purposes.[73] Under the act, an owner has no duty of care to keep the premises safe for entry or use by any entrant on the property for a recreational or conservation purpose, or to warn these entrants of natural or dangerous conditions.[74] Nor does the owner assure the property is safe, extend status of licensee or invitee or incur liability for injury caused by the act or omission of the entrant or other entrant or for injury occurring by natural or artificial condition on the property.[75]

The statute defines "recreational or conservation purpose" to mean "entry onto the land of another to conduct hunting or recreational shooting or a combination thereof, or any activity solely related to the aforesaid hunting or recreational shooting."[76] Since hunting and recreational shooting are not likely to be included in an after-hours recreational program for children, schools should not consider the state's recreational user act when analyzing their liability protection. However, school districts do find liability protection in the recreational use immunity provision found in the Tort Immunity Act discussed above in section A1.

4. Other Limits on Public School Duties

Illinois has two other limited liability statutes that could offer liability protection to a school running or sponsoring an after-hours recreational program. The Baseball Facility Liability Act[77] and Hockey Facility Liability Act[78] both define their respective sport's "facility" as one owned or operated by "elementary or secondary schools, colleges, or universities, . . . school district, [or] park district."[79] Both statutes limit the liability of an owner or operator of a baseball or hockey facility in the event of certain injuries.[80] Excluded from this liability protection, however, are injuries related to defective structures such as screens, backstops, or protective glass when the structures' defects result from the negligence of the owner or operator.[81] Also excluded are injuries caused by willful and wanton conduct.[82]

5. Limited Duty Due to the Historical Distinctions among Entrants on Land

Under the Premises Liability Act,[83] the distinction between licensee and invitee was abolished. Under that act, the duty owed to both licensees and invitees by the land possessor was to exercise reasonable care under the circumstances.[84] The Premises Liability Act was held unconstitutional in 1997,[85] and "today, Illinois Courts use the common law duty standard of premises liability" described in § 343 of the Restatement (Second) of Torts.[86] As one Illinois court noted,

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[73] *Id.* 65/1.
[74] *Id.* 65/3.
[75] *Id.* 65/4.
[76] *Id.* 65/2(c).
[77] *Id.* 38/1 et seq.
[78] *Id.* 52/1 et seq.
[79] *Id.* 38/5, 52/5.
[80] *Id.* 38/10, 52/10.
[81] *Id.*
[82] *Id.*
[83] Premises Liability Act, 740 ILL. COMP. STAT. ANN. 130/1 et seq. (West 2008).
[84] *Id.* 130/2.
[85] Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).
[86] Clifford v. Wharton Bus. Group, 817 N.E.2d 1207, 1214 n.3 (Ill. App. Ct. 1st Dist. 2004).

"[b]ecause the standard of care imposed under section 343 of the Restatement is identical to the standard of care imposed under the amended Premises Liability Act—that of 'reasonable care'—our analysis of plaintiff's argument is not affected."[87]

Under Restatement § 343, "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." [88]

The status of "trespasser" belongs to one who enters upon another's land for his own purposes without permission, invitation, or right.[89] A landowner does not owe a trespasser any duty except to refrain from willfully and wantonly injuring him.[90] A landowner is not required to manage her property in order to promote the safety of trespassers.[91]

There are certain exceptions to the trespasser doctrine that require a higher standard of care. One exception "imposes upon a landowner or occupier the duty to use ordinary care to avoid injury to a trespasser who has been discovered in a 'place of danger' on the premises."[92] Another exception, titled the frequent trespass exception, states that "a landowner is liable for injuries to a trespasser proximately caused by its failure to exercise reasonable care in the course of its activities, where the landowner knows, or should know, that trespassers habitually enter its land at a particular point or traverse an area of small size."[93] Finally, Illinois courts have "long recognized that a landowner must use ordinary care to avoid injury to the trespasser who has been discovered in a place of danger on the premises."[94]

A licensee is a person who enters the premises of another by express or implied consent to satisfy her own purposes on the premises.[95] A social guest or person entering the premises for "companionship, diversion, and enjoyment of hospitality" is also considered a licensee.[96] Under the common law, a possessor owes a licensee the duty not to injure the entrant either willfully or wantonly.[97] In addition, a possessor has a duty to warn a licensee of concealed defects known to the possessor.[98] Otherwise, courts have held that a licensee enters another's property at her own

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[87] Mazin v. Chicago White Sox, Ltd., 832 N.E.2d 827, 831 (Ill. App. Ct. 1st Dist. 2005).
[88] RESTATEMENT (SECOND) OF TORTS § 343 (1965).
[89] Lange v. Fisher Real Estate Dev. Corp., 832 N.E.2d 274, 277 (Ill. App. Ct. 1st Dist. 2005).
[90] *Id.*
[91] *Id.*
[92] Rhodes v. Ill. Cent. Gulf R.R., 665 N.E.2d 1260, 1268 (Ill. 1996). "A place of danger thus denotes a place which, by reason of a condition or activity on the premises, risks harm to anyone who is present, whether previously injured or not. It must be the condition or activity on the land that makes it a place of danger, not the mere presence of a person in an injured state." *Id.*
[93] Nelson v. N.E. Ill. Reg'l Commuter R.R. Corp., 845 N.E.2d 884, 888 (Ill. App. Ct. 5th Dist. 2006).
[94] Lee v. Chicago Transit Auth., 605 N.E.2d 493, 498 (Ill. 1992).
[95] ILL. LAW & PRAC., *Negligence*, *supra* note 1, at § 39.
[96] *Id.* at § 40.
[97] *Id.* at § 38.
[98] *Id.*

risk and takes the premises as she finds them.[99]

An invitee is a person who enters the premises of another who has mutual interest with the person entering the property.[100] A land possessor owes an invitee a duty of ordinary care to keep the property reasonably safe.[101] A land possessor is liable to an invitee for injury when the possessor knows of a dangerous condition, realizes the condition poses a risk to invitees, knows an invitee will not likely discover the danger, and fails to exercise reasonable care to protect the invitee from the danger.[102] This is in essence a duty to warn invitees of any danger that the land possessor knows of and the invitees are not aware of.[103] Additionally, "Illinois courts recognize an 'open and obvious' exception to the duty of care owed by possessors of land to invitees, as it is not foreseeable that an invitee will be injured when the condition is obvious or known."[104] A court has previously held that third parties who enter school premises at a school's invitation in connection with an affair sponsored by the school would likely hold the status of invitee.[105]

"Generally speaking, an owner or occupier of land owes no greater duty to small children than the duty owed to adults."[106] An exception to this general rule exists for injuries to trespassing children.[107] Illinois courts have stated that "customary rules of ordinary negligence govern the liability of owners and occupiers of land upon which a child is injured."[108] Illinois courts apply the *Kahn* doctrine, which states that "a duty will be imposed on landowners or persons in possession or control of premises for personal injuries suffered by a child on the premises if: (1) the landowner or other occupier of land knows or should know that children frequent the premises; and (2) if the cause of the child's injury was a dangerous condition on the premises."[109] Illinois court defines "dangerous condition" as "one which is likely to cause injury to the general class of children who, by reason of their immaturity, might be incapable of appreciating the risk involved."[110]

The *Kahn* doctrine does not appear to impose "a duty on owners or occupiers of land to remedy conditions involving obvious risks that children would be expected to appreciate and avoid."[111] A court subsequently has stated, however, that an owner is under a duty to remedy a dangerous condition of land when the owner knows that children frequent the property, a dangerous

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[99] *Id.*
[100] *Id.* at § 42.
[101] *Id.* at § 43.
[102] *Id.*
[103] *Id.* at § 45.
[104] Buerkett v. Ill. Power Co., 893 N.E.2d 702, 709 (Ill. App. Ct. 4th Dist. 2008).
[105] Borushek v. Kincaid, 397 N.E.2d 172 (Ill. App. Ct. 1st Dist. 1979).
[106] Harlin v. Sears Roebuck, 860 N.E.2d 479, 484 (Ill. App. Ct. 1st Dist. 2006).
[107] Perri v. Furama Rest. Inc., 781 N.E.2d 631, 635 (Ill. App. Ct. 1st Dist. 2002) (stating that an exception to the general rule exists when the *Kahn* doctrine is applicable).
[108] Mostafa v. City of Hickory Hills, 677 N.E.2d 1312, 1316 (Ill. App. Ct. 1st Dist. 1997) (*citing* Kahn v. James Burton Co., 126 N.E.2d 836, 841 (Ill. 1955)); ILL. LAW & PRAC., *Negligence*, *supra* note 1, at § 49. The *Kahn* court made this pronouncement because of problems with the application of the attractive nuisance doctrine, indicating that the application of the "rules of ordinary negligence" would apply only in similar situations.
[109] Nelson v. N.E. Ill. Reg'l Commuter R.R. Corp., 845 N.E.2d 884, 888 (Ill. App. Ct. 5th Dist. 2006).
[110] *Id.*
[111] *Id.*; *see Mostafa*, 677 N.E.2d at 1316 ("If the dangerous condition on the land poses an obvious risk of danger that children would be expected to appreciate and avoid, the owner is under no duty to remedy the condition").

condition is present on the property, the dangerous condition could injure children because due to their age they will not appreciate the risk, and the expense and inconvenience of correcting the dangerous condition is slight.[112] In essence, a possessor of land owes to children the duty to keep the premises reasonably safe and to warn of dangerous, nonobvious conditions.[113]

6. Duty during the School Day and After: A Comparison

When deciding whether to open up school facilities for recreational use, it is useful to evaluate how the legal risk arising out of opening the school grounds for recreational use compares to the legal risk arising out of the use of school grounds for programs that the school already runs.

Governmental immunity is a strong defense that protects the school for a multitude of acts equally during and after the school day. The slight difference may be with the supervisory immunity provided to teachers when *in loco parenti* of students. Yet, even if this did not apply after school hours, public employees are still immune for supervision issues under the Tort Immunity Act. Therefore, liability appears to generally remain the same in both instances.

B. Limits on Damages

1. Damages Limits under State Tort Immunity Act

A local public entity is not liable to pay punitive or exemplary damages for any action by an injured party or third party.[114] A public official is not liable to pay punitive or exemplary damages in any action that arose out of "an act or omission made by the public official while serving in an official executive, legislative, quasi-legislative or quasi-judicial capacity."[115] Public employees also are not liable to pay punitive or exemplary damages when injury occurs from a discretion act within the scope of employment.[116]

2. General Damages Limits for Tort Claims

The Illinois legislature has repeatedly enacted legislation limiting tort damages.[117] Based on limited research, it appears that the Illinois courts have declared all or most of the statutes constitutional.[118] However, Illinois uses the collateral source rule. "Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor."[119] "The

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[112] Harlin v. Sears Roebuck, 860 N.E.2d 479, 485 (Ill. App. Ct. 1st Dist. 2006).
[113] ILL. LAW & PRAC., *Negligence*, *supra* note 1, at § 50.
[114] "Notwithstanding any other provision of law, a local public entity is not liable to pay punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or a third party." 745 ILL. COMP. STAT. ANN. 10/2-102 (West 2008).
[115] 745 ILCS 10/2-102.
[116] *Id.* 10/2-213.
[117] *See, e.g.,* 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (recovery of noneconomic damages capped at $500,000); *id.* 5/2-1115.05 (limitations on punitive damages); *id.* 5/2-1115.2 (definitions of economic and noneconomic loss).
[118] *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).
[119] Arthur v. Catour, 833 N.E.2d 847, 851 (Ill. 2005).

collateral source rule protects collateral payments made to or benefits conferred on the plaintiff by denying the defendant any corresponding offset or credit."[120]

C. Selected Risk Management Issues

In this section we consider two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district. In brief, we conclude that Illinois courts would be unlikely to enforce liability waivers, and, from a liability standpoint, a third party would not enjoy an advantage over a school running an after-hours recreational program.

1. Liability Waivers

Express assumption of the risk applies when the plaintiff has explicitly consented, normally in writing, to relieving a defendant from liability. Illinois courts do not favor exculpatory agreements or contracts that release parties from liability, and courts will strictly construe the agreements against the party who benefits.[121] A liability waiver is valid only if "(1) it clearly spells out the intention of the parties; (2) there is nothing in the social relationship between the parties militating against enforcement; and (3) it is not against public policy."[122]

To be enforced, "an exculpatory agreement must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care."[123] The resulting injury "must only fall within the scope of possible dangers ordinarily accompanying the activity and, therefore, reasonably contemplated by the parties" to receive the protection of the exculpatory agreement.[124] Defendants are subject to liability if their actions are wanton, willful, or reckless.[125]

2. Providing Access through Third Parties

Illinois has a limited liability act that applies to volunteers of nonprofit sports organizations. The Sports Volunteer Immunity Act[126] provides that no person who, without compensation, provides services in sports programs shall be liable in civil damages for any acts or omissions in conducting or sponsoring sports programs.[127] Liability will arise when the conduct of such a

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[120] *Id.*
[121] ILL. JUR., *supra* note 8, at *Personal Inj* § 15.116.
[122] Chicago Steel Rule & Die Fabricators v. ADT Sec. Sys., 763 N.E.2d 839, 842 (Ill. App. Ct. 1st Dist. 2002).
[123] Evans v. Lima Lima Flight Team, Inc., 869 N.E.2d 195, 203 (Ill. App. Ct. 1st Dist. 2007).
[124] *Id.*; ILL. JUR., *supra* note 8, at *Personal Inj* § 15:116. *See* Larsen v. Vic Tanny Int'l, 474 N.E.2d 729 (Ill. App. Ct. 5th Dist. 1984) (holding that an exculpatory provision was not to be enforced in a health club contract because injuries resulting to the plaintiff from cleaning chemicals were not foreseeable when the plaintiff signed the contract).
[125] ILL. LAW & PRAC., *Negligence*, *supra* note 1, at § 123.
[126] 745 ILL. COMP. STAT. ANN. 80/1 et seq. (West 2008).
[127] *Id.* 80/1.

person falls "substantially below the standards generally practiced and accepted in like circumstances" or a person did or not did not do something he had a duty to do and knew that by the course of action a substantial risk of harm was created.[128] "Nothing in this Section is intended to bar any cause of action against a nonprofit association or change the liability of such an association which arises out of an act or omission of any person exempt from liability under this Act."[129]

Officers, directors, and board members of not-for-profit corporations have limited liability under the General Not for Profit Corporation Act of 1986.[130] Generally, any director or officer that serves a not-for-profit corporation, without compensation, shall not be liable, and no cause of action shall be brought against the officer or director "for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer" unless the act or omission involved willful or wanton conduct or the director earned more than $5000 per year for her services.[131] Finally, any person who provides services to a not-for-profit corporation, without compensation, shall not be liable "for damages resulting from an act or omission in rendering such services, unless the act or omission involved willful or wanton conduct."[132] However, nothing in the General Not for Profit Corporation Act of 1986 is intended to alter liability of the corporation for negligence of its officers, directors, or members.[133]

The Tort Immunity Act appears to provide volunteers of public entities with the same immunities as public employees. As noted in section A2 above, public employees have discretionary immunity. The Tort Immunity Act defines a public employee as "an employee of a local public entity."[134] Importantly, the Tort Immunity Act defines an employee as "a present or former officer, member of a board, commission or committee, agent, *volunteer*, servant or employee, whether or not compensated, but does not include an independent contractor."[135]

Also, when a school district leases its property to, or performs any function or service with or for, another public entity, the school district and public entity may agree on how to share liability for injury.[136] This agreement can provide for contribution or indemnification by any or all of the local public entities that are parties to it.[137]

These various liability limitations or immunities do not appear to protect the entity that provides the volunteers or the services. The provisions seem to protect only the volunteers, directors, and officers of the entities. In light of the broad immunities that public entities, employees, and volunteers have, a third party does not appear to have any comparative advantage to providing an after-hours recreational program.

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[128] *Id.*
[129] *Id.* 80/1(e).
[130] 805 ILL. COMP. STAT. ANN. 105/108.70.
[131] *Id.* 105/108.70(a), (b).
[132] *Id.* 105/108.70(c).
[133] *Id.* 105/108.70(e).
[134] 745 ILL. COMP. STAT. ANN. 10/1-207.
[135] *Id.* 10/1-202.
[136] *Id.* 10/7-101.
[137] *Id.* 10/7-102.

The liability risk of schools or third parties running or sponsoring after-hours recreational programs is an important question that will be addressed in future research on joint venture agreements for public schools.