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REPRESENTING INDIVIDUALS
AND BUSINESSES

VIA ELECTRONIC MAIL

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District

Re: COVID-19 and the 2020-2021 Fall/Winter School High School Sports Seasons

Dear School Administrator and Members of the District School Board:

Please be advised that this office represents a large group of parents of students who attend Illinois public high schools, and who are engaged in those schools' extra-curricular sports programs. Because of what we will show in this letter, we are requesting that all Illinois public high schools immediately resume their full 2020-2021 winter sports practices and games as scheduled on November 16, 2020 and fall 2020 sports practices and games, including football, on February 15th.

Without going into detail regarding the tortured history of how the State of Illinois has attempted to deal with the current COVID-19 pandemic, the following is relevant. On October 27, 2020, Illinois Governor. J.B. Pritzker issued new guidelines for high schools, which are voluntary and not legally binding, canceling winter sports and placing them on an indefinite hold "until we're through the thick of this pandemic." The Illinois Department of Public Health also reclassified basketball, hockey and wrestling as "higher risk," which permits no contact practices and training only - no regular games. On October 28, 2020, the Illinois High School Association board voted to defy the voluntary guidelines and allow basketball season to start as scheduled on November 16th.

We applaud IHSA's actions to stand up for high school students against unreasonable and harmful COVID-19 restrictions on October 28th. However, we are concerned **about misinformation about legal liability to high schools if sports are played in winter 2020 and in spring 2021. This letter is an attempt to correct irresponsible and inaccurate statements that have been made.**

When asked if IHSA member schools could refuse to follow the state's guidelines, Governor Pritzker warned the high schools that doing so would be "taking on legal liability" if they failed to abide by the guidelines. The Governor said that if a student got COVID-19 from engaging in school sports, the high schools could be liable and insurance would not cover any liability against the school. As a result, at least 300 high school surveyed said they do not plan to begin basketball season on November 16th and more than 212 schools are unsure. In response to this, we understand that the IHSA has just now reconsidered its previous position to allow winter sports.

On behalf of the high school students and their parents, we urge the IHSA and its member high schools to reconsider a course of action that involves **significantly less legal risk** than has been promulgated by Gov. Pritzker and the State of Illinois.

Governor Pritzker's warnings about liability to IHSA member high schools are harmful and erroneous. It is an attempt to force compliance with Illinois state guidelines that have no legal force, are based on unscientific metrics, and may be fueled by politics rather than what is best for Illinois high school students. In fact, Pritzker's own scientific advisors have warned him about the misuse of COVID-19 metrics. University of Chicago Associate Professor Sarah Cobey, a Princeton epidemiologist, mathematical ecologist, evolutionary biologist and data scientist who leads one of the teams advising the State of Illinois on the pandemic, has been highly critical of Pritzker, saying he is misusing "science." In several recent interviews, Professor Cobey stated, "I have been very critical of their [State of Illinois] use of this [positivity rate] metric and basically all the metrics they've put forth so far because they are not scientifically founded." This apparent misuse of the positivity rate brings Governor Pritzker's underlying basis for issuing any sports guidelines into serious question.

But worse than this, not only is the Governor's "science" flawed, his legal analysis is highly misleading. Based on current law, Illinois high schools have no serious risk of potential liability should they allow students to participate in football and other sports during the regular fall/winter sports season, even if such play could increase the risk of COVID-19 infections. It is a tough, near impossible legal burden to prove that a COVID-19 infection came from participation in a sport practice or regular game. Furthermore, schools are immune from liability under Illinois state statute. As a result, school liability will be covered, due to these statutes, by any existing insurance policies should schools be sued due to COVID-related concerns or allegations.

The statutes at issue are: the Tort Liability of Schools Act (745 ILCS 25) and the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10). Under these statutes, schools and their employees cannot be held liable for any negligent acts which result in injury to students. Further, punitive damages also cannot be assessed against the schools and their employees. These statutes make this clear. Under the law, schools or their employees can only be held liable for "willful and wanton" actions which cause injury to students. Willful and wanton conduct is defined as "a course of action which shows actual or deliberate intention to harm *or* which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others." *Cowan v. Insurance Co. of North America*, 22 Ill. App. 3d 883, 895 (1st Dist. 1974) Given that: (a) Governor Pritzker himself has publicly stated that medical professionals and scientists disagree as to whether or not COVID-19 can be transferred between healthy teenagers and (b) the IHSA and the high schools have been advised by medical professionals and have taken the recommended precautions, by definition, the schools and their employees cannot be held to be acting in a willful and wanton manner.

Furthermore, because of these above-mentioned immunity statutes, any insurance policy covering the high schools must cover any liability for willful and wanton acts. The purpose of insurance is to protect against the risk of liability when schools and employees take actions which have an element of risk. All high schools sports programs carry with them the risk that students

will be injured and, yes, such injuries have occurred. The risk of COVID-19 infections in the participation in sports may even be far less risky than a student being injured while playing football or basketball. Based on current data from the Centers for Disease Controls (CDC) and the Illinois Department of Public Health (IDPH), healthy children under 18 have a very low risk from COVID-19, when taking the entire under 18 population into account. The CDC says that children under the age of 18 account for less than 7 percent of US COVID-19 cases, and most of those have no symptoms. Even those showing symptoms have mild symptoms, the most common being fever and cough, according to a comprehensive National Academies of Medicine report from mid-July on setting priorities for reopening schools. Further the IDPH, CDPH and CDC say high school students are not generally subject to infection, and even if they do, the recovery rate is between 97 - 99.75%. The danger from injury from the sport itself is greater than from COVID-19. No willful or wanton behavior in allowing the children to play sports can be inferred from such figures.

This conclusion is further bolstered by the fact that the states neighboring Illinois are allowing their high school sports programs to proceed despite the COVID-19 pandemic. College and professional sports in Illinois are also being allowed to proceed. Acting in the same manner the governments and schools in neighboring states and colleges and professional sports teams in Illinois, also cannot be held to be willful or wanton conduct.

Finally, there is no greater evidence that there is no serious risk to young people playing sports from COVID-19 than the behavior of Governor Pritzker with his own children. The Governor allows his daughters to participate in sports, albeit outside of the State of Illinois where there are no restrictions in place. If there was a risk of injury to children, we assume that he would not allow his children to do this. While the billionaire governor can afford this luxury, the working parents of Illinois are no so blessed with inherited wealth, and do not have this option. Also, the fact that Governor Pritzker violated his own COVID-19 guidelines by attending a very large public gathering, without 6 feet social distancing, and failed to self-isolate after contact with potentially infected persons as recently as last week, do not lend credibility to his insistence that Illinois residents must take "extraordinary precautions" with regard to COVID-19. Governor Pritzker obviously does not include himself and his family in his oft repeated statement that "we are all in this together."

However, IHSA-member high schools **do have potential liability by not allowing students to participate in sports programs**. This would be liability under federal civil rights laws, such as 42 USC 1983, to which the immunities afforded by state law do not apply. Arbitrary capricious acts, and acts which violate the constitutional rights of students, by state actors such as schools and school employees can lead to liability. Such liability can arise because of actions which prevent students from participating in activities they have a right to participate in. Arbitrary, capricious, and unconstitutional actions preventing students from participating in certain activities while allowing them to participate in others, can form the basis for federal civil rights law suits. While

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this has not been a heavily litigated area of law in the context of a pandemic, it is a certainty an area that students and their parents who are injured by the cancellation of sports activities will seek redress in the courts for their injuries.

Physical and grave psychological harm has already occurred from the prior cancellation of high school sports activities. Among the parents and families we represent, we are aware of at least five (5) suicides connected to the cancellation of high school sports programs in the central and downstate Illinois regions. Many of our student athlete clients have lost or are losing opportunities for school scholarships, and college scouts are being prevented from recruiting students. Instead, students in neighboring states are receiving those valuable scholarships. Students who do not get sports scholarships will not be able to attend college, a loss which will affect their entire lives. In addition in these federal civil rights actions, high schools and their employees can be liable for intentional infliction of emotional distress suffered by the students, as well as punitive damages. The potential amount of these claims are immense, and should be taken into account by the IHSA and its member schools.

On behalf of our clients, we are requesting that the IHSA and its member schools immediately issue a statement that all 2020-2021 fall/winter high school sports programs, practices and games, will start as scheduled, including basketball, hockey, wrestling and football. We also request that the IHSA and its member schools announce that the fall sports scheduled for February 15, 2021 start on time and as scheduled.

Thank you for your immediate attention to this urgent matter.

Very truly yours

/s/ Laura Grochocki

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