

Time to Act: Correcting the Inadequacy of Youth Concussion Legislation Through a Federal Act

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TIME TO ACT: CORRECTING THE INADEQUACY OF YOUTH CONCUSSION LEGISLATION THROUGH A FEDERAL ACT

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I. INTRODUCTION

Zackery Lystedt’s life is a cautionary tale that has been told many

times.¹ Zackery, like hundreds of thousands of children across the United States, was competing in youth sports when he suffered an injury.² However, this injury was not like most. At thirteen years of age Zackery's life was changed forever.³

While playing youth football in Washington in 2006 Zackery made a tackle and sustained a concussion.⁴ Despite the fact that an injury time-out was taken to examine Zackery, no one recognized that Zackery had suffered a concussion and he went back into the game a few plays later.⁵ As Zackery walked off the field with his father after the game he collapsed.⁶ Zackery was airlifted to the hospital where he spent the next ninety-three days due to severe brain swelling and a blood clot.⁷ Zackery's injuries left him in a coma for two months, required him to be on a feeding tube for nearly twenty months, forced him to relearn how to talk, and left him unable to walk.⁸

Unfortunately, with the proper training on identification and management of concussions, Zackery's sad tale likely could have been avoided. Zackery's story and stories like his have led to regulations requiring concussion protocols in youth sports in every state.⁹ The current state of concussion protections in youth athletics is drastically improved in comparison to those in place when Zackery played. However, concussions in sports are inevitable. Although an increased focus on concussions in youth sports has improved understandings, the prevalence of concussions in youth sports, the health and safety dangers they pose, and the legal liability they create are still relative

1. See *Implementing Return to Play: Learning from the Experiences of Early Implementers*, CTRS FOR DISEASE CONTROL & PREV., https://www.cdc.gov/headsup/pdfs/policy/rtp_implementation-a.pdf [<https://perma.cc/ZG7L-2P8Z>] (last visited April 24, 2017).

2. *9 Years Later, Zackery Lystedt Law Still Protects Young Athletes*, DAILYHEALTHWIRE, <http://www.trihealth.com/dailyhealthwire/orthopedics/9-years-later-zackery-lystedt-law-still-protects-young-athletes/> [<https://perma.cc/88D4-G7YX>] (last visited April 24, 2017).

3. *Id.*

4. Tim Booth, *5 Years After Injury, Zack Lystedt to Graduate*, WASH. TIMES (June 8, 2011), <http://p.washingtontimes.com/news/2011/jun/8/5-years-after-injury-zack-lystedt-to-graduate/> [<https://perma.cc/KR4X-PYK9>].

5. *9 Years Later, Zackery Lystedt Law Still Protects Young Athletes*, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*; Booth, *supra* note 4.

9. See discussion *infra* Section IV.A.

unknowns. Despite remaining unknowns, a greater understanding of the long-term effects of concussions and the increased dangers in head impacts in youth athletics in recent years has resulted in lawsuits against the youth coaches, schools, and state athletic associations for athlete injuries suffered as a result of repetitive head trauma and concussions.¹⁰

This Comment focuses on the need for federal legislation to address the dangers head impacts and resulting concussions create in youth athletics. Section II discusses a short history of concussions in sports. Section III reviews recent litigation for head related injuries in youth athletes. Section IV examines the current state-by-state patchwork regulatory framework for concussion management in youth sports. Section V discusses federal legislation on concussions in youth sports, including past failed legislation and the need to enact a more comprehensive federal legislative regulatory scheme. Finally, Section VI purposes what new federal legislation should entail to adequately protect youth athletes from the dangers of head impact.

II. CONCUSSIONS IN SPORTS

A. Traumatic Brain Injury (TBI) and Concussions

Traumatic brain injuries (TBI) are not unique to sports. The Centers for Disease Control and Prevention (CDC) has declared TBIs in the United States to be a “serious public health problem,” occurring over 2.5 million times yearly and often contributing to death or permanent disability.¹¹ A TBI occurs “when an external mechanical force causes brain dysfunction.”¹² A TBI is graded as either severe, moderate, or mild.¹³ A “concussion” typically occurs when there is a mild TBI and,

10. Section II of this Comment details the current understanding of youth head trauma and concussions in sports that has developed over the past few years. See discussion *infra* Section II. Section III of this Comment provides several examples of recent litigation against numerous actors in youth sports. These examples are not exhaustive, but rather illustrative the recent trend in increased litigation for youth sports injuries, particularly those associated with head trauma. See discussion *infra* Section III.

11. *Basic Information About Traumatic Brain Injury and Concussion*, CTRS. FOR DISEASE CONTROL & PREV., <http://www.cdc.gov/traumaticbraininjury/basics.html> [https://perma.cc/LH7C-C3FM] (last updated Jan. 22, 2016).

12. *Traumatic Brain Injury*, MAYO CLINIC (May 15, 2014), <http://www.mayoclinic.org/diseases-conditions/traumatic-brain-injury/basics/definition/con-20029302> [https://perma.cc/9TEE-MU87].

13. Jamshid Ghajar, *Traumatic Brain Injury*, 356 LANCET 923, 923 (2000).

not surprisingly, is the most common type of TBI.¹⁴ A concussion in itself is generally not life threatening.¹⁵ However, this does not mean that concussions do not pose serious health risks.

A concussion can manifest itself in physical symptoms, including amnesia, headache, blurry vision, nausea, vomiting, dizziness, and sensitivity to light.¹⁶ Frequently, a concussion will change sleeping patterns, make it difficult to concentrate, and affect the ability to acquire new information.¹⁷ Concussions can also have emotional and psychological impacts, including changes in mood that results in irritability, sadness, and nervousness.¹⁸ Even more concerning, these symptoms can persist for weeks, months, or even years.¹⁹ Surprisingly, these concussion related symptoms account for the least dangerous aspects of concussions.

B. *Second Impact Syndrome*

One of the greatest dangers a concussion presents is the possibility of a second concussion occurring before the first concussion heals.²⁰ "Second-impact syndrome" occurs when a second TBI, typically a concussion, occurs before the symptoms of an initial concussion have cleared.²¹ Frequently the second blow is minor, so minor that it may be difficult to initially recognize that it ever occurred at all.²² But what happens next is far from minor. Within minutes the brain begins to swell dangerously.²³ The recipient of this blow will likely collapse, go

14. See *What is a Concussion?*, *Heads Up*, CTRS. FOR DISEASE CONTROL & PREV., http://www.cdc.gov/headsup/basics/concussion_what.html [https://perma.cc/7EZU-MWW7] (last updated Feb. 16, 2015).

15. *Id.*

16. *What are the Signs and Symptoms of Concussion?*, CTRS. FOR DISEASE CONTROL & PREV., http://www.cdc.gov/concussion/signs_symptoms.html [https://perma.cc/9VGM-FUFQ] (last updated Jan. 22, 2016).

17. *Id.*

18. *Id.*

19. Concussion symptoms that persist over time are classified as post-concussion syndrome. For most concussions, post-concussion syndrome will persist between seven days and three months. *Post-Concussion Syndrome*, MAYO CLINIC (Aug. 19, 2014), <http://www.mayoclinic.org/diseases-conditions/post-concussion-syndrome/basics/definition/con-20032705> [https://perma.cc/7E3V-TBUU].

20. See Robert C. Cantu, *Second-Impact Syndrome*, 17 *CLINICS IN SPORTS MED.* 37, 37-38 (1998).

21. *Id.* at 38.

22. *Id.*

23. See Anne Phelan Bowen, *Second Impact Syndrome: A Rare, Catastrophic, Preventable*

into a semi-comatose state with rapidly dilating pupils, lose eye movement, and begin experiencing respiratory failure.²⁴ As the brain swells a loss of blood flow can occur, which may cause death.²⁵

The frequency of second-impact syndrome in the United States is still unclear.²⁶ Research has shown that as the ability to identify incidents of second-impact syndrome has improved, more accurate estimates on the prevalence of second-impact syndrome have been made.²⁷

In comparison to the number of concussions that occur every year²⁸ second-impact syndrome is rare.²⁹ However, as Zackery Lystedt's injuries show, the effects are devastating. It has been estimated that the mortality rate for second-impact syndrome is 50% and the rate of disability is almost 100%.³⁰ Once second-impact syndrome occurs, there is little, if any, corrective actions that can be taken.³¹

C. Long-term Effects and CTE

Recovery from a concussion is dependent on the brain's ability to heal. However, like any injury, complete recovery is not always guaranteed. An isolated TBI can pose substantial long-term dangers, even if treated properly.³² Loss of memory and reasoning ability; reduced sensation to touch, taste, and smell; impaired communication skills; and the onset of depression, anxiety, personality changes, and aggres-

Complication of Concussion in Young Athletes, 29 J. EMERGENCY NURSING 287, 288 (2003).

24. Cantu, *supra* note 20, at 38.

25. Bowen, *supra* note 23, at 288-89.

26. Tareg Bey & Brian Ostick, *Second Impact Syndrome*, 10 W. J. EMERGENCY MED. 6 (2009).

27. See Cantu, *supra* note 20, at 42.

28. *Basic Information About Traumatic Brain Injury and Concussion*, *supra* note 11.

29. Cantu, *supra* note 20, at 42.

30. Ryan McLaughlin, *Warning! Children's Brains in Danger: Legislative Approaches to Creating Uniform Return-To-Play Standards for Concussions in Youth Athletics*, 22 IND. INT'L & COMP. L. REV. 131, 137 (2012).

31. The morbidity rate of nearly 100% demonstrates that once SIS occurs there will be severe damage. This is not to say that the damage caused by SIS cannot be reduced by immediate treatment, but rather that no matter how swift treatment occurs an occurrence of SIS will ultimately result in, at the least, some damage to the brain. See Cantu, *supra* note 20, at 42.

32. See generally D.A. Hovda et al., *Concussive Brain Injury Produces a State of Vulnerability for Intracranial Pressure Perturbation in the Absence of Morphological Damage*, in INTRACRANIAL PRESSURE VIII 469, 469 (C.J.J. Avezaat et al. eds., 1993).

sion are all potential long term effects of a TBI or concussion.³³ Moreover, “Alzheimer’s disease, Parkinson’s disease, and other brain disorders” resulting from a concussion may become more prevalent with age.³⁴ Alzheimer’s, a form of incurable dementia³⁵ that “slowly destroys memory and thinking skills and, eventually, the ability to carry out the simplest tasks[,]”³⁶ has been found as a common potential long-term danger of concussions.³⁷

Over the past decade a cognitive disorder associated with repetitive concussions, chronic traumatic encephalopathy (CTE), has increasingly become a concern.³⁸ CTE is generally defined as a progressive degenerative disease of the brain as a result of repetitive brain trauma.³⁹ CTE occurs when microscopic deposits of tau protein begin to kill nerve cells in the brain.⁴⁰ Even minor-impact head injuries, if repetitive, can result in CTE.⁴¹ Once CTE develops it can “produce[] clinical symptoms of disordered cognition, memory loss and executive dysfunction, depression, apathy, disinhibition, and irritability, as well as parkinsonian signs.”⁴²

33. *What are the Potential Effects of TBI?*, CTRS. FOR DISEASE CONTROL & PREV., <http://www.cdc.gov/TraumaticBrainInjury/outcomes.html> [https://perma.cc/3687-BR88] (last updated May 23, 2016).

34. *Id.*

35. *Alzheimer’s Disease Fact Sheet*, NAT’L INST. AGING, <https://www.nia.nih.gov/alzheimers/publication/alzheimers-disease-fact-sheet> [https://perma.cc/4ANB-YAWS] (last updated Aug. 18, 2016).

36. *Id.*

37. See generally Alan Schwarz, *Concussions Tied to Depression in Ex-N.F.L. Players*, N.Y. TIMES (May 31, 2007), http://www.nytimes.com/2007/05/31/sports/football/31concussions.html?pagewanted=all&_r=0 [https://perma.cc/CE3Y-KCN5].

38. In 2005, Dr. Bennet I. Omalu and his colleagues released a study on CTE in the National Football League that sparked a nationwide inquiry of the long-term effects of concussions, particularly in sports. See Bennet I. Omalu, et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128 (2005). However, CTE was previously known as early as the in 1920s. The condition was initially known as dementia pugilistica and was associated with former boxers. *What is CTE?*, BOS. U. CTE CTR., <http://www.bu.edu/cste/file/about/what-is-cte/> [https://perma.cc/7TQS-P5AB] (last visited April 24, 2017).

39. *Id.*

40. Brandon E. Gavett et al., *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sports-Related Concussive and Subconcussive Head Trauma*, 30 J. CLINICAL SPORTS MED. 179, 181 (2011).

41. *Id.*

42. *Id.* at 185.

CTE has most recently been linked to former National Football League (NFL) players. A rash of suicides in former NFL players who were subsequently diagnosed with CTE has forced the NFL, and even the nation, to reevaluate concussions in sports.⁴³ Unfortunately, the preliminary research on CTE in sports has proved extremely worrisome. A recent study found that 96% of deceased former NFL football players showed signs of CTE.⁴⁴ Even more concerning is that the same study found that 79% of all football players tested who played at any level, including some who did not play professionally or collegiately, showed signs of the disease.⁴⁵ Unfortunately, a full understanding on the dangers of concussions and how they can be prevented is still far from complete. However, as research continues, one picture becomes clear: concussions in sports pose serious dangers and if not properly addressed can have devastating short- and long-term effects.

43. See generally Jim Avila, Lauren Pearle, & Russell Goldman, *Junior Seau Diagnosed with Disease Caused by Hits to Head: Exclusive*, ABC NEWS (Jan. 10, 2013), <http://abcnews.go.com/US/junior-seau-diagnosed-brain-disease-caused-hits-head/story?id=18171785> [<https://perma.cc/92LG-5LB9>]; Dan Graziano, *Tyler Sash CTE Level 'Had Advanced to Stage Rarely Seen' at Age 27*, ESPN (Jan. 27, 2016), http://espn.go.com/nfl/story/_/id/14655379/tyler-sash-former-new-york-giants-safety-had-high-level-cte [<https://perma.cc/P5U5-T7K8>]; Adrian Robinson Jr. *Had Brain Disease CTE, Autopsy Shows*, ESPN (Oct. 14, 2015), http://espn.go.com/nfl/story/_/id/13886586/autopsy-shows-ex-nfl-player-adrian-robinson-jr-killed-april-had-brain-injury [<https://perma.cc/VV5N-5FR7>]. The NFL claims that it is undergoing a "cultural change" on reporting concussions and that more active sideline trainers and independent neurologists led to a reported 58% rise in concussions between 2015 and 2014. Ron Katz, *Concussions Rise 58% . . . And NFL Pats Itself on the Back*, FORBES (Jan. 30, 2016), <http://www.forbes.com/sites/rkatz/2016/01/30/concussions-rise-58-and-nfl-pats-itself-on-the-back/#4dceffe37392>.

44. See Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, PBS (Sept. 18, 2015), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/new-87-deceased-nfl-players-test-positive-for-brain-disease/> [<https://perma.cc/4A8Z-XCBF>]. It should be noted that the study was conducted on only deceased individuals whose families agreed to testing. Accordingly, it is likely that those tested were more likely to have signs of CTE than if the study was conducted on the general population. *Id.*

45. *Id.* Currently CTE can only be diagnosed post-mortem, making it impossible to obtain a completely accurate diagnosis in a living individual even through the use of brain scan and other testing methods. See Nate Scott, *Researchers Find Evidence of CTE in 96% of Deceased NFL Players They Tested*, USA TODAY (Sept. 18, 2015), <http://ftw.usatoday.com/2015/09/researchers-find-evidence-of-cte-in-96-of-deceased-nfl-players-they-tested> [<https://perma.cc/M93A-LFNE>].

D. Susceptibility of Youth Athletes

The brain of an adolescent may differ from that of an adult more than any other human organ.⁴⁶ Physiologically, a developing brain has a different “water content, degree of myelination, blood volume, blood-brain barrier, cerebral metabolic rate of glucose, . . . number of synapses [which are directly tied to overall neural function] . . . and skull suture.”⁴⁷ Moreover, because a young brain is still developing, it recovers more slowly and more irregularly than an adult brain.⁴⁸ These physiological differences can lead to drastically different effects of a concussion. “[A] single concussive impact on a young brain may cause cerebral swelling, which can lead to brainstem herniation and death[,]” where it would not in an adult brain.⁴⁹

The physiological differences between an adult and adolescent are obvious, but the neuropsychological differences between an adult and young brain are even more critical. The brain of an adolescent is cognitively maturing and may be more vulnerable to a TBI.⁵⁰ Further, the continual cognitive development of the young brain results in difficulties in determining a baseline of neurocognitive functionality, and, accordingly, a diagnosis of a concussion.⁵¹

Furthermore, signs of a concussion or TBI in a young brain may be more difficult to recognize because a youth’s brain tolerates biomechanical forces differently.⁵² This means that a greater impact is re-

46. See Kevin M. Guskiewicz & Tamara C. Valovich McLeod, *Pediatric Sports-Related Concussion*, 3 AM. ACAD. PHYS. MED. & REHABILITATION 353, 357 (2011). Physically, a child’s brain differs from an adult brain in water content, degree of myelination (the level of axonal insulation in the central nervous system), blood volume, blood-brain barrier, cerebral metabolic rate of glucose, blood flow, number of synapses, and geometry and elasticity of the skull’s sutures. *Id.* Additionally, a child’s brain is still physically developing. *Id.*

47. *Id.*

48. See Daniel W. Shrey et al., *The Pathophysiology of Concussions in Youth*, 22 PHYSICAL MED. & REHABILITATION CLINICS N. AM. 577 (2011). The slower and more irregular development in a young brain can be attributed to more limited compensatory abilities and biological factors. See *id.*

49. Andrew J. Kane, Note, *An Incomplete Pass: Inadequacies in Ohio’s Youth Concussion Legislation and the Ongoing Risk for Players*, 28 J.L. & HEALTH 201, 212 (2015).

50. See William B. Barr & Michael McCrea, *Sensitivity and Specificity of Standardized Neurocognitive Testing Immediately Following Sports Concussion*, 7 J. INT’L NEUROPSYCHOL. SOC’Y 693, 693–95 (2001).

51. P. McCrory et al., *Can We Manage Sport Related Concussion in Children the Same as in Adults?*, 38 BRIT. J. SPORTS MED. 516, 516 (2004).

52. See ROBERT GRAHAM ET AL., SPORTS-RELATED CONCUSSIONS IN YOUTH: IMPROVING THE SCIENCE, CHANGING THE CULTURE 59–66 (2014).

quired for recognition, sometimes “two to three fold greater impact force is required to produce clinical symptoms in children compared to adults.”⁵³ Thus, it may be more difficult to detect concussions in adolescents that may actually be more dangerous, particularly to cognitive development, than those posed to an adult’s brain.⁵⁴

E. Sports Related Concussions

Concussions in sports are common. The general physical nature of sports creates a risk for a potential TBI or concussion. Estimates of between 1.6 and 3.8 million sports-related TBIs occur in the United States each year.⁵⁵ For young adults, sports are second only to motor vehicle accidents as the leading cause of concussions.⁵⁶ The majority of concussions in sports occur in contact sports.⁵⁷ Contact sports are commonly identified as sports in which athletes purposely hit other athletes or inanimate objects.⁵⁸ However, even sports that are deemed “non-contact” are subject to the risks of a concussion.⁵⁹

53. McCrory et al., *supra* note 51, at 516. “This is due to a combination of factors, including an age dependent physiological response to mechanical stress, the differing geometry of the skull and brain, and the constitutive structural properties of the head.” *Id.*

54. *See id.*

55. Jean A. Langlois & Marlena M. Wald, *The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview*, 21 J. HEAD TRAUMA REHABILITATION 375, 376 (2006).

56. Luke M. Gessel et al., *Concussions Among United States High School and Collegiate Athletes*, 42 J. ATHLETIC TRAINING 495, 495 (2007).

57. Demonstrating that the highest rate of concussions per athlete-exposes occur in wrestling, football, men’s ice hockey, women’s field hockey, and women’s soccer. 2014–15 NCAA SPORTS MED. HANDBOOK 1, 57 (25th ed. 2014), <http://www.ncaapublications.com/productdownloads/MD15.pdf> [<https://perma.cc/GB4N-N698>]. “In the USA the majority of head injuries are observed in American football (incidence: 0.7–9.4 concussions per 1000 player hours), ice hockey (incidence: 1.5–6.0 per 1000 player hours), and soccer (incidence: 0.4–0.7 per 1000 player hours).” Michael Makdissi, *Sports Related Concussion: Management in General Practice*, 39 AUSTL. FAM. PHYSICIAN 12, 12 (2010) (footnotes omitted).

58. 2014–15 NCAA SPORTS MED. HANDBOOK, *supra* note 57, at 62.

59. Jennifer M. Hootman et al., *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. ATHLETIC TRAINING 311 (2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1941297/pdf/i1062-6050-42-2-311.pdf> [<https://perma.cc/4X2E-H7HB>]. Contact sports can generally be characterized as a sport involving physical contact between persons. *See, e.g., Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 23, 315 Wis. 2d 350, 760 N.W.2d 156 (holding that cheerleading involves “physical contact” and is covered by state statute providing immunity for contact sports participants). A few examples of non-contact sports include volleyball, gymnastics, and tennis. Patrick Dale, *Examples of Non-Contact Sports*, LIVESTRONG.COM (last updated July 16, 2013), <http://www.livestrong.com/article/1005858-examples-noncontact-sports/>

Concussions in sports are both the most visible and most widely discussed in professional sports.⁶⁰ However, for every single observed concussion at the professional level “there are tens of thousands of injuries at the high school level and below.”⁶¹ One study estimated that over just a three-year period, high school athletes suffered over 400,000 concussions.⁶² Although these numbers are staggering, they are only modest estimates. The invisible nature of concussions⁶³ and the reluctance of athletes, particularly high school athletes, to self-report concussions makes it extremely difficult to determine an accurate estimate of the prevalence of concussions in youth sports.⁶⁴

The largest single contributor of concussions in youth athletics is football.⁶⁵ With over three million adolescent football players annually in the United States, football poses a significant danger.⁶⁶ Adolescent football players “sustain an astonishingly high number of head impacts each season.”⁶⁷ Recent studies have concluded that in high school football alone an estimated 43,200 to 67,200 concussions occur annually.⁶⁸ This number will continue to rise as concussion awareness

[<https://perma.cc/GX3W-HSVE>].

60. See, e.g., Breslow, *supra* note 44.

61. Susan Manko, *UPMC Conference to Discuss Newest Scientific Knowledge Forcing Doctors to Re-Think How to Safely Manage Concussions in Athletes of All Levels*, MED. NEWS TODAY (July 23, 2008), <http://www.medicalnewstoday.com/releases/115817.php> [<https://perma.cc/LPS2-RFYG>].

62. Makdissi, *supra* note 57, at 12.

63. “[A] concussion is an ‘invisible injury’. This means there are no crutches, swelling, stiches, or other visual signs of the injury . . . This makes it very difficult for a casual observer to identify the athlete as injured.” G.A. Bloom et al., *Sport Psychology and Concussion: New Impacts to Explore*, 38 BRIT. J. SPORTS MED. 519, 519–20 (2004).

64. See Johna K. Register-Mihalik et al., *Knowledge, Attitude, and Concussion-Reporting Behaviors Among High School Athletes: A Preliminary Study*, 48 J. ATHLETIC TRAINING 645 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3784366/> [<https://perma.cc/A5VT-YDRK>]. A survey of found that more than 88% of all concussions go unrecognized. J. Scott Delaney et al., *Recognition and Characteristics of Concussions in the Emergency Department Population*, 29 J. EMERGENCY MED. 189, 189–97 (2005).

65. Steven P. Broglio et al., *Cumulative Head Impact Burden in High School Football*, 28 J. NEUROTRAUMA 2069, 2076 (2011).

66. An estimated three million youth athletes play football every year. *Legal Issues Relating to Football Head Injuries (Part I & II): Hearings Before the H. Comm. On the Judiciary*, 111th Cong. 82 (2009–10) (statement of Merrill Hoge, retired NFL player). The National Federation of State High School Associations (NFHS) estimates that there are over one million high school football players annually. Daniel H. Daneshvar et al., *The Epidemiology of Sport-Related Concussion*, 30 J. CLINICAL SPORTS MED. 1, 2–3 (2011).

67. Brogilio, *supra* note 65.

68. Steven P. Broglio et al., *Head Impacts During High School Football: A Biomechanical*

and the need for accurate reporting continue to become more prevalent.⁶⁹

III. LITIGATION OF CONCUSSIONS IN YOUTH SPORTS

Litigation involving youth sports injuries and youth sports organizations is on the rise nationwide, particularly in the field of concussions and concussion liability. Although few lawsuits have been successful, many are still in the process of litigation and pose significant risks to youth sports organizations.

A. State Entities

On December 1, 2014, Daniel Bukal brought a class action lawsuit on behalf of those similarly situated against the Illinois High School Association (IHSA), the first concussion related lawsuit against a state high school athletic association.⁷⁰ Bukal claims that he suffered multiple concussions in football games and practices of which he still suffers from migraines and lightheadedness.⁷¹ The complaint alleges that current Illinois law fails to mandate specific guidelines or rules for managing student-athlete concussions, but rather makes the IHSA “solely responsible for promulgating the rules that would minimize the risk of concussions in Illinois’ student-athletes.”⁷² However, according to the complaint, the IHSA continues to systematically fail to manage concussion risks.⁷³ In order to remedy the IHSA’s deficiencies, the com-

Assessment, 44 J. ATHLETIC TRAINING 342, 342 (2009).

69. See Andrew E. Lincoln et al., *Trends in Concussion Incidence in High School Sports: A Prospective 11-Year Study*, 39 AM. J. SPORTS MED. 958 (2011).

70. Class Action Complaint at 2, Bukal v. Ill. High Sch. Ass’n, No. 3:2014-CH-19131, (Ill. Cir. Ct. filed Dec. 1, 2014).

71. *Id.* at 6. Daniel Bukal was removed from as the plaintiff for undisclosed reasons and replaced by Alex Pierscionek, a former Illinois high school football player who alleges he still suffers from the affects of a concussion suffered during a football practice that led to his hospitalization. Ben Strauss, *Concussion Lawsuits Rankle School Groups*, N.Y. TIMES (May 20, 2015), http://www.nytimes.com/2015/05/21/sports/football/concussion-lawsuits-rankle-school-groups.html?_r=0 [<https://perma.cc/3K74-BRCF>].

72. Class Action Complaint, *supra* note 70, at 3.

73. *Id.* The complaint specifically alleges that the IHSA has failed and continues to fail: (1) to mandate the removal of athletes who show signs of a concussion; (2) implement pre-season and regular season baseline testing for detecting and managing concussions; (3) fails to track and report concussion data that will enable the IHSA to adopt best practices to prevent concussions in the future; (4) require medical professions at football contests; (5) to make medical professionals available by on-call for football practices; (6) to mandate concussion education and training for athletic trainers; and (7) to take measures for educating

plaint seeks on behalf of the class the following remedies: (1) concussion protocols for youth athletes at both practices and games; (2) pre-season baseline testing; (3) a program for concussion tracking and reporting; (4) requirement of a medical professional at IHSA football games; (5) requirement for a medical professional to be on-call for football practices; (6) implementation of an education and training program for athletic trainers; (7) system-wide guidelines for the screening and detection of head injuries; and (8) implementation of a program to educate teachers and other school officials on concussions and their identification.⁷⁴ The plaintiffs also seek medical monitoring costs for members of the class.⁷⁵

IHSA director Marty Hickman has said that if the lawsuit is successful some schools will lose football programs as they will not be able to afford on call doctors, concussion screening software, and other changes sought in the suit.⁷⁶ Hickman asserts that the suit is a misguided effort that threatens high school football and that the IHSA and its member schools have been actively improving concussion protocols and management and doing everything in their power to make the game safer for its athletes.⁷⁷ Hickman has advocated for granting the IHSA immunity in its efforts to implement concussion protocol, but these immunities have yet to be recognized.⁷⁸ The IHSA and Hickman have made it clear that this lawsuit poses major risks to the association and Illinois high school football.⁷⁹ Litigation over the matter is ongoing,⁸⁰ but it has already prompted the Illinois legislature to make

teachers and other school personnel on how to implement concussion recommendations from doctors of concussed athletes and make appropriate accommodations. *Id.* at 4.

74. *Id.*

75. *Id.* at 4-5.

76. John Keilman, *Concussion Suit Could Spell End of Football at Some High Schools: IHSA*, CHI. TRIB. (Dec. 5, 2014), <http://www.chicagotribune.com/sports/highschool/ct-ihsa-concussion-response-met-20141205-story.html> [<https://perma.cc/2T2S-HD4V>].

77. *Id.*

78. *Id.*

79. *See id.*

80. On April 10, 2015, the IHSA filed a motion to dismiss with the court. The motion sought to dismiss with prejudice based on two possible defenses: (1) the statute of limitations bars the plaintiff's claims and (2) plaintiff's express assumption of risk bars the action. Illinois High School Association's Section 2-619 Motion to Dismiss, *Bukal v. Ill. High Sch. Ass'n*, No. 2013-CH-19131, 2015 WL 2185905 (Ill. Cir. Ct. April 10, 2015). Both parties have made several subsequent motions and several continuances have been granted. Docket, *Bukal v. Ill. High Sch. Ass'n*, No. 2013-CH-19131, 2015 WL 2185905 (current date Sept. 20, 2015). On October 27, 2015, the motion to dismiss was granted. *Pierscionek v. Ill. High Sch.*

changes to its current youth concussion laws.⁸¹

The suit against the IHSA is representative of many similar suits. A former high school football player in California brought suit against the La Holla School district claiming the coach refused to take him out of a game after suffering a concussion, resulting in second-impact syndrome.⁸² The complaint alleges that the district's negligent failure to implement proper return-to-play protocols lead to "traumatic and catastrophic brain injuries."⁸³ Although many of these suits are still in the lengthy litigation process, one recent suit resulted in a jury verdict of one million dollars against an Iowa school district.⁸⁴ This suit could be the first of many successful concussion related lawsuits against schools, districts, state athletic associations, coaches, and teachers.

B. Private Schools

Private schools have also been subject to lawsuits resulting from head impacts in sports. A former student athlete recently filed suit against a private high school alleging that a coach encouraged multiple head-to-head collisions during a football practice.⁸⁵ Allowing multiple hits to the head in a practice is against California law.⁸⁶ Unlike many other states, the California statute explicitly includes "private schools," allowing for the plaintiffs to go forward with the suit against the school, coach, principal, and other student athletes for violating California concussion law.⁸⁷ The plaintiff is also seeking compensation for emotional distress claiming that the school promoted a "bully culture" in sports.⁸⁸

Ass'n, No. 14-CH-19131, 2015 WL 6550826 (Ill. Cir. Ct. Oct. 27, 2015).

81. 105 ILL. COMP. STAT. 5/22-80 (2015).

82. Andie Adams, *Ex-High School Football Player Sues School District Over Concussion*, NBC 7 SAN DIEGO (Oct. 13, 2015), <http://www.nbcsandiego.com/news/local/Ex-High-School-Football-Player-Sues-District-Over-Concussion-332592262.html> [<https://perma.cc/9NR9-AGTE>].

83. *Id.*

84. John Naughton, *Iowa Schools Brace for Impact of Concussion Lawsuits*, USA TODAY (June 1, 2015), <http://usatodayhss.com/2015/iowa-schools-brace-for-impact-of-concussion-lawsuits> [<https://perma.cc/5UZW-CPVD>].

85. *Mission Prep Football Lawsuit Moving Forward*, CALCOASTNEWS.COM (Aug. 13, 2015), <http://calcoastnews.com/2015/08/mission-prep-football-lawsuit-moving-forward/> [<https://perma.cc/7W3A-22U4>].

86. CAL. EDUC. CODE § 49475 (West 2015).

87. *Id.*

88. *Mission Prep Football Lawsuit Moving Forward*, *supra* note 85.

C. National Federation of High School Associations

In 2013, a father of a high school football player brought suit against the National Collegiate Athletic Association (NCAA) and the National Federation of State High School Associations (NFHS).⁸⁹ The suit seeks class certification of all current high school athletes.⁹⁰ The complaint alleges that both the NCAA and NFHS have failed to provide adequate concussion protocols for high school football players.⁹¹ The suit is seeking injunctive relief to force the NCAA and NFHS to provide high schools with concussion risk and standard of care information, as well as the certification of concussion management plans for preventable risks of head injuries.⁹² The suit also seeks insurance coverage for uninsured players.⁹³ The suit, however, is facing a major threat of being ruled moot after the Mississippi legislature adopted a new statute to protect against youth sports head injuries.⁹⁴

D. Youth Sports Organizations

Schools are not the only youth sports organizations in danger of costly concussion-related lawsuits. Recently, a lawsuit was filed in federal court in Wisconsin against Pop Warner, the largest youth football league in the country, seeking five million dollars in damages.⁹⁵ The suit, which is brought on behalf of the mother of Joseph Chernach, claims Joseph killed himself in 2012 at age 25 as a result of head trauma caused by participation in Pop Warner football.⁹⁶ The complaint

89. *Jobe v. NCAA et al.*, No. 3:2013-cv-00799 (S.D. Miss. filed Dec. 23, 2013).

90. *Id.* See Jon Solomon, *Football Concussion Lawsuits Reach High School: Mississippi Suit Goes After NCAA and NFHS*, AL.COM (Dec. 27, 2013), http://www.al.com/sports/index.ssf/2013/12/football_concussion_lawsuits_r.html [<https://perma.cc/5SXM-5DW5>].

91. *Id.*

92. *Id.*

93. *Id.*

94. MISS. CODE ANN. § 37-24-9 (West 2011); Jon Solomon, *NCAA and NFHS: High School Football Concussion Case Should End Due to New Mississippi Law*, AL.COM (April 3, 2014), http://www.al.com/sports/index.ssf/2014/04/ncaa_and_nfhs_1st_major_high_s.html [<https://perma.cc/ET2T-3MAD>].

95. Complaint at 26, *Pyka et al. v. Pop Warner Little Scholars, Inc. et al.*, No. 3:15-cv-00057 (W.D. Wis. filed Feb. 5, 2015).

96. *Id.* An autopsy performed after Chernach's death revealed signs of CTE which may have led to his suicide. Ken Belson, *Family Sues Pop Warner Over Suicide of Player Who Had Brain Disease*, N.Y. TIMES (Feb. 5, 2015), http://www.nytimes.com/2015/02/06/sports/family-of-player-with-cte-who-killed-himself-sues-pop-warner.html?_r=0 [<https://perma.cc/NNF5-7AR6>].

alleges that Pop Warner “knew or should have known that tackle football was dangerous for children and exposed children to head injuries, including Dementia Pugilistica,” a variant of CTE that has been shown to cause neurological problems with participants in contact sports, particularly football.⁹⁷ The complaint alleges that Pop Warner failed to train coaches properly, follow concussion protocols, limit contact in practice, and did not provide the safest helmets or instruct players how to properly wear their helmets.⁹⁸ The suit claims this conduct “was deliberate, an actual disregard of the plaintiff’s right to safety, health, or life, and sufficiently aggravated to warrant punishment by punitive damages.”⁹⁹ If successful, this lawsuit could drastically change the landscape of youth football, and youth sports more generally, in this country.

Although football is currently the background for most youth concussion lawsuits, it is not the only youth sport subject to such suits. In 2014 a class action lawsuit was filed against the U.S. Youth Soccer Association, Inc., and several other defendants.¹⁰⁰ The class complaint of seven soccer players, including four minors, asserted claims of negligence, breach of voluntary undertaking claims, and medical monitoring claims against the defendants.¹⁰¹ The plaintiffs alleged that the defendants failed to adopt “proper rules for protecting players under 17 from head injuries.”¹⁰² As a result, the plaintiffs sought injunctive relief to compel defendants to adopt and enforce rules that would reduce the risk of preventable injuries resulting from concussions and repeti-

97. Complaint at 20, *Pyka et al. v. Pop Warner Little Scholars, Inc. et al*, No. 3:15-cv-00057 (W.D. Wis. filed Feb. 5, 2015). A recent study of deaths of former National Football League players shows that 96% of deceased players in the past decade tested positively for CTE. Breslow, *supra* note 44.

98. Complaint at 22–23, *Pyka et al. v. Pop Warner Little Scholars, Inc. et al*, No. 3:15-cv-00057 (W.D. Wis. filed Feb. 5, 2015).

99. *Id.*

100. The named defendants in the case were Federation Internationale de Football Association (FIFA), The United States Soccer Federation, Inc., U.S. Youth Soccer Association, Inc., American Youth Soccer Organization, National Association of Competitive Soccer, Inc. d/b/a/ US Club Soccer, and California Youth Soccer Association. Class Action Complaint, *Mehr v. Fed’n Internationale de Football Ass’n*, No. 14-cv-3879 (N.D. Cal. filed Aug. 27, 2014).

101. *Id.* One of the plaintiffs in the case, a minor from Illinois, was suing the Young Sportsman’s Soccer League, a member of the Illinois Youth Soccer Association, which is member of the United States Youth Soccer Association (USYSA). *Id.*

102. *Id.* at 117.

tive heading.¹⁰³ The plaintiffs also sought medical monitoring costs.¹⁰⁴ However, these claims were ultimately unsuccessful. The court granted defendants' motion to dismiss for lack of personal jurisdiction and failure to state a claim,¹⁰⁵ criticizing the plaintiffs for both the lack of a coherent class of plaintiffs and inadequate evidence.¹⁰⁶ The plaintiffs stated that they would amend and re-plead some of their claims; however, as of today the plaintiffs have yet to do so.¹⁰⁷

These lawsuits illustrate the rise of litigation involving youth sports injuries. Specifically, these lawsuits focus on the impact of concussions in youth sports on athletes, both immediate and long term. The lawsuits that appear to be making the most progress are those that seek injunctive relief of some sort rather than solely monetary relief.¹⁰⁸ Courts may be more sympathetic for those plaintiffs seeking change rather than monetary recovery against nonprofit or quasi-governmental organizations. As research on the effects of youth injuries continues to increase, and the general public becomes more aware of the potential risks of youth sports, lawsuits based on youth injuries will likely continue to become more frequent and more publicized.

IV. CURRENT REGULATORY SCHEME: STATE PATCHWORK

Over the past seven years remarkable strides have been made across the country to protect youth athletes from the potential dangers of head trauma and concussions. Rarely do all states legislate as swiftly and uniformly as they have in drafting and implementing youth concussion protection laws.¹⁰⁹ However, there remains substantial

103. *Id.*

104. *Id.*

105. *Mehr v. Fed'n Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1070–71 (N.D. Cal. 2015). The court's dismissal for failure to state a claim was dismissed with leave to amend. *Id.*

106. *Id.*; *FIFA dismissed in U.S. Lawsuit Over Concussion Protocol*, ESPN FC (July 17, 2015), <http://www.espnfc.us/united-states/story/2526510/fifa-dismissed-in-us-lawsuit-over-concussion-protocol> [<https://perma.cc/Z3FG-XHUG>].

107. *Mehr*, 115 F. Supp. 3d at 1070–71; *FIFA dismissed in U.S. Lawsuit Over Concussion Protocol*, *supra* note 106.

108. Solomon, *supra* note 90. See *Bukal v. Ill. High Sch. Ass'n*, No. 3:2014-CH-19131 (Ill. Cir. Ct. 2014).

109. Philip Bump, *The 113th Congress is Historically Good at Not Passing Bills*, WASH. POST (July 9, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/> [<https://perma.cc/TLF8-SPPT>].

room for improvement. Many states have failed to require injury monitoring beyond the first return-to-play decision after a concussion, neglected to provide real incentives for enforcing concussion legislation or ensure compliance, or provided inadequate means of funding for the sweeping changes the new laws demand.¹¹⁰ Although state youth concussion laws have been a remarkable effort to protect athletes, without substantial changes it is unlikely they will amount to more than lofty ideals.

A. Prevalence of State Concussion Laws

In May 2009, the state of Washington passed Lystedt Law.¹¹¹ The law was in reaction to the tragic story of Zackery Lystedt. In response to Zackery's story, the Washington legislature passed the first "return to play" concussion legislation, requiring that any student athlete displaying concussion symptoms be removed from the game and not allowed back to play until cleared by a medical professional.¹¹²

Since then, all fifty states have enacted some form of youth concussion "return-to-play" legislation to protect youth athletes from the dangers of concussions.¹¹³ Most states follow the Lystedt Law as a baseline. That is, most states require that any student athlete showing the symptoms of a concussion be removed from play and prevented from returning to play until cleared by some medical professional.¹¹⁴ Most states require the clearance be from a health care professional, typically with concussion and head trauma training.¹¹⁵ Additionally, most states require that some type of educational information be provided to legal guardians about concussions prior to a student athlete's participation in sports.¹¹⁶ Essentially, the Lystedt Law can be broken down into three major components: removal, medical clearance for re-

110. Kerri McGowan Lowrey, *State Laws Addressing Youth Sports-Related Traumatic Brain Injury and the Future of Concussion Law and Policy*, 10 J. BUS. & TECH. L. 61, 66-69 (2015).

111. Joe Frollo, *Three Years Later, Lystedt Law Protects Young Athletes in 34 states and D.C.*, USA FOOTBALL (Mar. 10, 2012), <https://web.usafootball.com/news/featured-articles/three-years-later-lystedt-law-protects-young-athletes-34-states-and-dc> [<https://perma.cc/62ZA-6GPA>].

112. WASH. REV. CODE ANN. § 28A.600.190 (West 2009).

113. *Perspectives*, ADLER GIERSCH, (Spring 2014), <http://www.adlergiersch.com/wp-content/uploads/2014/06/Perspectives-Spring-2014.pdf> [<https://perma.cc/K8YL-VAJK>] (last visited April 24, 2017).

114. *Id.*

115. *Id.* See, e.g., WIS. STAT. § 118.293 (2013).

116. *What is a Concussion?*, *supra* note 14.

turn-to-play, and education.¹¹⁷ However, states vary on whether those three components must be followed.

The move from a complete devoid of governmental oversight to some form legislation protecting youth athletes from concussion in all fifty states in less than seven years is remarkable. However, not all state legislation is made equal. In their haste, states have inadvertently created a national patchwork of laws that vary drastically, despite identical goals. Some states provide comprehensive, forceful guidelines in protecting youth athletes.¹¹⁸ Other state legislation appears to have good intentions, but actually weakens protections for youth athletes in an effort to shield the state.¹¹⁹ This state-by-state patchwork has become increasingly inconsistent. Twenty-two states have made changes to their initial concussion legislation.¹²⁰ As individual states continue to change state statutes, the departure from the original Lystedt Law continues and the disparity between states in their concussion laws widens.

There remains substantial room for improvement. A great deal of the legislation fails to provide effective protocols on how concussions should be monitored or tracked after an incident, and particularly after an athlete has been medically cleared.¹²¹ Some states, like Michigan, require that interscholastic athletic associations establish some concussion protocols.¹²² However, there is little guidance as to the structure of the protocols and even less oversight of associations in the implementation and enforcement of the protocols.¹²³ Even more concerning, some of the legislation passed to protect youth athletes undermines its

117. See WASH. REV. CODE ANN. § 28A.600.190 (West 2009) (labeling the law the “Lystedt Law”).

118. See discussion *infra* Section IV.B.

119. For example, Ohio absolves actors of all liability unless the conduct is “willful or wanton misconduct.” OHIO REV. CODE ANN. § 3313.539(G)(2) (West 2014). Wisconsin absolves coaches, administrators, and others from negligence liability. WIS. STAT. § 118.293 (2013). Pennsylvania makes anyone who complies with the concussion statute immune for civil liability. 24 PA. CONS. STAT. ANN. § 5323(j) (West 2012).

120. Kerri McGowan Lowrey, *Summary Matrix of State Laws Addressing Concussions in Youth Sports*, NETWORK PUB. HEALTH L. (Mar. 31, 2016), https://www.networkforphl.org/_asset/7xwh09/Sports-Concussion-Table.pdf [<https://perma.cc/69AX-KQ87>].

121. See, e.g., MISS. CODE ANN. § 37-24-5 (West 2011); WIS. STAT. § 118.293 (2013); WYO. STAT. ANN. § 21-3-110(3) (West 2014).

122. MICH. COMP. LAWS ANN. § 333.1956(4)(a) (West 2011).

123. See *id.*

exact purpose by providing immunity to coaches, administrators, and others.

B. State Statutes That Improve on Lystedt Law

Although practically every state bases its youth concussion laws on Lystedt Law, some states have taken the safety of youth athletes to heart and enacted legislation that is more comprehensive and effective than the initial Lystedt Law. For example, Rhode Island's concussion legislation, enacted just two years after Lystedt Law in 2011, made substantial improvements to the Lystedt Law framework.¹²⁴ One unique aspect of the Rhode Island law is that it requires that the CDC material on concussion be used when implementing concussion education programs and also made available to all coaches, volunteers and parents in a localized, easy-to-access website.¹²⁵ The statute requires all coaches, volunteers involved in athletics, and school nurses to complete concussion and traumatic head injury training courses and annual refreshers.¹²⁶ Understanding that a concussion in a student athlete affects the "student" as much as the "athlete," the statute strongly encourages teachers and teachers' aids to complete the same training and annual refresher courses required of those involved in youth athletics.¹²⁷ Additionally, the Rhode Island statute encourages all students to perform baseline neurological testing, an essential component to an effective concussion management and protection program.¹²⁸ Last, to avoid potential issues of having eighteen-year-old high school athletes not covered by a statute that applies to "youth" athletes, the Rhode Island law clarifies that it applies to "all program participants who are age nineteen (19) and younger."¹²⁹

California, like Rhode Island, has taken steps to improve its youth concussion laws beyond those of Lystedt Law. California does not require baseline testing or that concussion information be made easily accessible to all.¹³⁰ However, recognizing the dangers of only protecting those in public schools, the California law expands its application

124. 16 R.I. GEN. LAWS ANN. § 91-3(b)-(c) (West 2015).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* § 91-4 (West).

130. CAL. EDUC. CODE § 49475(a) (West 2015).

to charter schools and private schools that offer athletic programs.¹³¹ It ensures parents and student-athlete understand the risks by requiring a concussion and head injury informational packets be signed by parents and athletes on a yearly basis.¹³² The statute also improves on standard concussion protocols by requiring return-to-play protocols by “no less than seven days in duration,”¹³³ further reducing the dangers of second-impact syndrome or multiple concussion in a short period of time. California even amended its concussion laws in 2014 to limit full-contact sport practices to twice per week and not to exceed ninety minutes in one day.¹³⁴ Lastly, the statute takes a strong step to improving its current framework by urging that the California Interscholastic Federation work with the American Academy of Pediatrics and the American Medical Society Medicine to develop and adopt rules and protocols to better protect youth athletes from the dangers of concussions.¹³⁵

Other states have made improvements of their own as well. In 2011 the Colorado legislature took a step to protect youth athletes from the dangers of second-impact syndrome by requiring that educational courses cover not only the dangers of a concussion, but the dangers of multiple concussions.¹³⁶ Colorado expanded its laws’ scope beyond those of California, requiring that private clubs, public recreation facilities, and athletic leagues sponsoring youth athletic activities comply with the requirements of its concussion laws.¹³⁷ Pennsylvania has even gone as far as to provide for statutory penalties for a coach who does not comply with the statutory “return to play” requirements.¹³⁸ Connecticut imposes educational requirements for student athletes and their parents or guardians regarding concussions.¹³⁹ Demonstrating a strong understating of where youth concussions pose the greatest risk, Connecticut also requires that football coaches undergo the best practical training on dealing with football specific concussions.¹⁴⁰ However,

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* § 35179.5 (West).

135. *Id.*

136. COLO. REV. STAT. ANN. § 25-43-103(2)(a)(III) (West 2012).

137. *Id.* § (1)(b) (West).

138. 24 PA. CONS. STAT. ANN. § 5323(f) (West 2012).

139. CONN. GEN. STAT. ANN. § 10-149b(d) (West 2015).

140. *Id.* § 10-149b(a)(1) (West).

not all states have acted to improve on Lystedt Law.

C. *Inadequate State Statutes on Concussions*

While some states have acted to improve on the Lystedt Law framework, others states have failed to adequately protect youth athletes from the dangers of concussions. Wyoming's youth concussion laws fall short of even the base guideline set by Lystedt Law.¹⁴¹ The Wyoming statute on concussions fails to require removal from play when there is a suspicion that an athlete has sustained a concussion.¹⁴² This egregious failure presents the single most dangerous scenario of youth athletics and concussions—creating an environment where a player can remain in play despite demonstrating symptoms of a concussion. This very real scenario has previously resulted in numerous deaths.¹⁴³ The Wyoming statute does not require participation in concussion education programs by those involved in youth athletics or that signed informed consent documents explaining the dangers of concussion be provided to parents and youth athletes.¹⁴⁴ Moreover, the few protections that the statute does create only apply to public schools, leaving youth recreational sports and private schools out of the legislation entirely.¹⁴⁵

Other states have enacted legislation that appear to be far better than those of Wyoming, but create problems in application. The Wisconsin legislature took all the right steps in adopting youth concussion legislation.¹⁴⁶ Wisconsin statutes require signed informed consent sheets, education for coaches, parents, and student athletes on concussions, and the removal of a possibly concussed athlete and adherence to proper return-to-play protocols.¹⁴⁷ The statute even expands to private schools and recreational activities.¹⁴⁸ However, included at the end of the enacted statute are two provisions that undermine the entire

141. WYO. STAT. ANN. § 21-3-110(a)(xxxii) (West 2014).

142. *Id.*

143. See, e.g., Kelly McEvers et al., *Deaths Persist in Youth and Student Football Despite Safety Efforts*, NPR, <http://www.npr.org/sections/health-shots/2015/11/25/457374128/deaths-persist-in-youth-and-student-football-despite-safety-efforts> [https://perma.cc/Z4AJ-T9JH] (last updated Dec. 1, 2015).

144. WYO. STAT. ANN. § 21-3-110(3) (West 2014).

145. *Id.*

146. See WIS. STAT. § 118.293 (2013).

147. *Id.*

148. *Id.*

legislation.¹⁴⁹ The provisions provide civil liability immunity to any coach, official involved in athletics, or volunteer from any injury resulting from a failure to remove a potentially concussed athlete from play unless gross negligence or willful or wanton misconduct can be proven.¹⁵⁰ Essentially, the statute insulates persons who act unreasonably towards a youth athlete, even if the result is an unnecessarily injured athlete. Instead, a person can only be liable if they intentionally failed to remove an athlete they knew showed signs of a concussion and was at risk of further injury.¹⁵¹

Mississippi was the last state to adopt youth concussion legislation, and only did so as of July 2014.¹⁵² Despite the fact that Mississippi had the best opportunity to evaluate concussion legislation around the country and pick and choose the best practices to protect youth athletes, Mississippi's laws fall short in several areas. The legislation fails to require, or even encourage, training and education of coaches, volunteers, school nurses, or teachers on concussion identification or management.¹⁵³ Further, the legislation maintains a relatively narrow and ambiguous scope, applying only to school athletic events sanctioned by the Mississippi High School Association or the Mississippi Association of Independent Schools, or substantially similar activities.¹⁵⁴

D. Inadequacy Created by Differing State Laws

The ambiguities and the variations in state concussion laws demonstrate the need for a more comprehensive and uniform system to protect youth athletes. State laws are often ambiguous as to their scope in whether they apply to only those under the age of eighteen, or in their application to private schools and recreational youth activities. Although most states require an educational component, states vary drastically in who is required to have educational training on concussions, who is responsible for developing it, and who is responsible for ensuring compliance with state educational requirements. Moreover, the decision on who is responsible for ensuring possibly con-

149. *Id.* § 118.293(5)(a)–(b).

150. *Id.*

151. *Strenke v. Hogner*, 2005 WI 25, ¶¶ 13–16, 279 Wis. 2d 52, 694 N.W.2d 296.

152. MISS. CODE ANN. § 37-24-1-37-24-9 (West 2014).

153. *See id.*

154. *Id.* § 37-24-3 (West 2014).

cussed athletes are removed from competition varies between states, with many failing to even identify a person or persons. The liability for failure to remove a possibly concuss athlete also differ substantially between states. Further, there is no clear consensus on what medical clearance is required before an athlete may return-to-play. This creates a dangerous situation where one state may believe it has proper medical clearance requirements, when it actually does not, but because there is no clear consensus there is no reason to alter the flawed legislation. Without a uniform system these inadequacies between the states may lead to substantial injuries in youth athletes that could have been avoided.

V. FEDERAL LEGISLATION

A. *Failed Federal Legislation*

The United States Congress has been presented with proposed federal legislation to regulate the issue of youth concussions in an attempt to provide uniformity across the states. The first proposed legislation was the Concussion Treatment and Care Tools Act of 2010 (ConTACT Act).¹⁵⁵ The ConTACT Act proposed that the Secretary of Health establish within two years “concussion management guidelines that address the prevention, identification, treatment, and management of concussions.”¹⁵⁶ The Secretary of Health was to hold a conference with medical, athletic, and education stakeholders to aid in the establishment of the guidelines.¹⁵⁷ Most importantly, the federal legislation proposed that the Secretary of Health and Human Services would be able to make grants to states for the purposes of encouraging the collection of information on concussion incidence and prevalence, ensuring compliance with the established guidelines, and providing funding for pre-season baseline and post-injury concussion testing.¹⁵⁸ A state’s receipt of funds was contingent on complete compliance with the ConTACT Act.¹⁵⁹ The ConTACT passed the House but died in the Senate.¹⁶⁰

155. Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong. (2009).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

In 2011 a second attempt at federal legislation occurred with the "Protecting Student Athletes from Concussions Act."¹⁶¹ The Act used many of the best state practices for its framework.¹⁶² The Act required that each state's educational agency develop and implement a standard plan for concussion safety and management.¹⁶³ The standard plan included the education of students, parents, and school personnel about concussions, removal of possibly concussed athletes from play, and evaluation and approval by a medical professional before return-to-play.¹⁶⁴ Additionally, the Act required peer-reviewed scientific information on concussions be posted on school grounds and made publicly available via website.¹⁶⁵ The most important improvement from current state laws was the Act's requirement that if a youth athlete suffered a concussion that his or her parents or guardians be informed of the details of the injury and any actions taken to treat the injury.¹⁶⁶ However, the bill's ultimate demise was its funding source. The Act made eligibility to receive funds from the previously enacted Elementary and Secondary Education Act of 1985 contingent on adherence to the Act within six months of its enactment.¹⁶⁷ The bill failed to even pass the House.¹⁶⁸

The ConTACT Act was revised and reintroduced in the House of Representatives as the "Care Tools Act of 2013."¹⁶⁹ The revised Act begins by recognizing that recurrent brain injuries and second-impact syndrome are highly preventable, but that the long-term effects of concussions are not well understood.¹⁷⁰ The Act further recognizes a major pitfall of the current state legislative scheme: "many schools lack the resources to implement best practices in concussion diagnosis and management."¹⁷¹ The revised ConTACT Act improved on its prede-

161. Protecting Student Athletes from Concussions Act of 2011, H.R. 469, 112th Cong. (2011).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Concussion Treatment and Care Tools Act of 2013, H.R. 3113, 113th Cong. (2013).

170. *Id.*

171. *Id.*

cessor in several key aspects.¹⁷² The 2013 version included a requirement for pre-season baseline and post-injury neuropsychological testing for youth athletes.¹⁷³ Additionally, the Act required that schools be adequately staffed with medical professionals to ensure adequate implementation of its guidelines.¹⁷⁴ The Act expanded on its predecessors funding structure by placing a figure of \$5,000,000 to be apportioned to the states through grants to ensure compliance with the Act.¹⁷⁵ Like its predecessor, however, the Care Tools Act failed to pass through Congress.¹⁷⁶

B. Current Federal Legislation

Currently, a bill titled the “Concussion Awareness and Education Act of 2015” is in the House with the goal to develop a greater understanding of all aspects of youth concussions in sports.¹⁷⁷ Substantially curtailed in comparison to its predecessors, the Concussion Awareness Act focuses solely on obtaining, researching and disseminating information about the prevalence and dangers of youth concussions in sports.¹⁷⁸ A proposed Concussion Research Commission would be in charge of implementing the requirements of the Act.¹⁷⁹ However, like the youth concussion bills that came before it, the bill is very unlikely to be enacted in the current Congress.¹⁸⁰

C. Why Federal Legislation is Needed

The failure of federal legislation on youth concussions in a historically stagnant congress is not an indicator of the lack of need for federal legislation. Rather, the continual push for federal legislation evidences its need. Proper federal legislation can provide uniformity across the currently disjointed state-by-state system. A single resource, most likely the CDC, can be appointed the authority on concussion safety and management. This authority can continue research

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Concussion Awareness and Education Act of 2015, H.R. 1271, 114th Cong. (2015).

178. *Id.*

179. *Id.*

180. The current prognosis is that the bill has a 1% change of being enacted. *Id.*

on the developing understanding of youth concussions while ensuring that differing conceptions on best practices to protect youth athletes does not persist.

The continual changes and amendments to the current laws in individual states evidences the volatility of state legislation. Individual states continually change laws and amend statutes in an attempt to make the youth concussion laws as effective as possible. Federal legislation will ensure the best legal framework for protecting youth athletes by adopting the best practices from current state laws. Further, federal legislation can eliminate many of the ambiguities that exists in the current state-by-state system. Federal legislation can ensure that no youth athlete is left out from the protections of the law because they might not fall under the definition of "youth" or because they are in private school or participating in recreational sports not sponsored by a public school.

The current stream of litigation against schools, coaches, and states further demonstrates a need for federal standards on youth concussion protections. A federal system can insure that those subject to liability for injuries resulting from concussions have clear standards of what are, and what are not, acceptable and reasonable practices. Plaintiffs will no longer be able to argue that the state acted negligently in the enactment of inadequate concussion legislation by using more progressive and comprehensive state laws as a demonstration of what is a reasonable standard. At the same time, federal legislation can also ensure that individuals' rights to recovery are protected. Federal legislation can eliminate a state's ability, like Wisconsin has, to insulate those who put youth athletes at unnecessary risks.

One of the largest concerns with any concussion safety and management system is the ability to fund such system. One strong advantage federal legislation has over individual state laws is the possibility of federal grants to ensure funding for concussion safety and management programs.¹⁸¹ Federal grants can incentivize implementation and compliance with the standards set forth by the legislation in every state, ensuring that youth athletes are properly protected in every state. Moreover, with federal grants to supplement state funding, states are less likely to challenge the federal regulation.¹⁸² The use of

181. See Concussion Treatment and Care Tools Act of 2010, *supra* note 155.

182. *Id.*

grants may make the enactment of the bill more challenging. However, for the systems of federal legislation to work effectively grants are essential. Grants can help a school pay for baseline neurological testing, proper medical supervision at athletic events, and education for coaches and teachers on how to identify and manage a potential concussion.¹⁸³

Lastly, federal legislation can ensure uniform enforcement of concussion policies and protocols by requiring state compliance in order to receive funding. Currently, a state may have adequate concussion laws on the books, but no real incentive to enforce the laws against those who fail to comply. Rather, the enforcement mechanism is civil litigation.¹⁸⁴ This further perpetuates the current form of lawsuits against schools, coaches, and states agencies once an injury occurs, rather than adhering to the law in the first instance and likely preventing the injury altogether.

D. Barriers to Enactment of Federal Legislation

Proposed federal legislation will, like those bills that came before, face many challenges to its enactment. If previous attempts are any indication the Senate is not ready to enact such legislation at this time. However, the next congressional elections will change the make-up of the Senate and provide new faces that may show more support. Additionally, as the concerns of concussions, particularly at the youth level, continue to grow, elected officials will feel more pressure to act. This push for action also includes the myriad of concussion lawsuits that have been filed in the last few years.

Another potential roadblock is the significant compromise that is normally required for legislation to pass. This compromise can undermine the integrity of the bill by diluting it to ensure enactment. Possible areas where the bill could be compromised is in the grant-funding structure, the requirements for state compliance, or even who should be the authority in setting forth guidelines. Some compromise is likely inevitable in passing the legislation, but avoiding changes that subvert the intentions of the legislation is essential.

The largest barrier to enactment is funding. Previous proposed bills failed because of resistance to the funding structure and the

183. *Id.*

184. See discussion *supra* Section III.

source of the funds.¹⁸⁵ To avoid this pitfall the bill will need to have strong support for the funding structure. This support could include financial and public support from large professional sports organizations. For example, the NFL endorsed the ConTACT Act before it was grounded in the Senate.¹⁸⁶ After the recent negative scrutiny that has been placed on the NFL for concussions,¹⁸⁷ the NFL needs a way to better its image. The NFL also has a vested interest in youth football, which over the past several years has seen a downturn in participation due to concerns over concussions.¹⁸⁸ If youth participation continues to decline it is likely that the NFL's popularity will follow suit.¹⁸⁹ As other youth sports begin to identify greater incidents of concussions,¹⁹⁰ the corresponding professional leagues for those sports may be well served to follow the NFL's lead. Showing public support for federal legislation, and providing a donation to support it, may in fact be the push necessary to ensure enactment of federal legislation.

VI. WHAT PROPER FEDERAL LEGISLATION SHOULD ENTAIL

Federal legislation must improve on previous failed federal bills and current state laws on youth concussions. Such legislation should include a requirement that the appointed authority on youth concussions, likely the CDC, continue clinical research on the topic. The authority should also make information on concussions, including the dangers, signs, and symptoms, available to coaches, volunteers, and parents through an easy-to-access website. The legislation should require concussion education and training for coaches and volunteers in athletics and training for teachers and administrator on how to handle a student's return to the classroom after sustaining a concussion. The legislation should further require both coaches and teachers to take

185. McEvers et al., *supra* note 143.

186. *NFL Backs Push for Concussion Laws*, ESPN (Jan. 27, 2014), <http://espn.go.com/espn/print?id=10360481> [<https://perma.cc/S6AA-TLZS>].

187. *Id.*

188. Ken Belson, *As Worries Rise and Players Flee, a Missouri School Board Cuts Football*, N.Y. TIMES (Sept. 28, 2015), http://www.nytimes.com/2015/09/29/sports/football/As-Worries-Rise-and-Players-Flee-a-Missouri-School-Board-Cuts-Football.html?_r=0 [<https://perma.cc/TF2H-5J9U>].

189. *Id.*

190. See Charles Randazzo et al., *Basketball-Related Injuries in School-Aged Children and Adolescents in 1997-2007*, 126 PEDIATRICS 727 (2010); Nicholas A. Smith et al., *Soccer-Related Injuries Treated in Emergency Departments: 1990-2014*, 138 PEDIATRICS 1 (2016).

annual training refreshers. This education should not stop at just those employed by a school. Parents and youth athletes should be required to complete an educational course on concussions and sign a consent form that includes acknowledgement of the completion of the course.

Additionally, federal legislation should require neurological baseline testing for all youth athletes. The baseline testing should be completed by each athlete annually. If an athlete is suspected of sustaining a concussion, that athlete should be removed and not allowed to return for the day, regardless of a negative test result for a concussion. That athlete should be required to adhere to strict return-to-play protocols in-line with current medical understandings, including no return to play until cleared by a medical professional in connection with baseline testing. The legal guardian of the athlete must be informed of the injury and any medical treatment made. In addition to medical clearance, the return-to-play protocols should prohibit the athlete from returning to play until his or her legal guardians provide written consent. This restriction will protect coaches, schools, and others from potential liability by shifting the return-to-play decision to the informed, rightful decisions maker, the athlete's legal guardian.

The federal legislation should also expand on the scope of previous legislation to ensure that all youth athletes are protected. The legislation should define youth in a manner to include all athletes who are eighteen years of age or younger or enrolled in high school. Further, the legislation should apply to public and private schools, as well as recreational sports leagues that are comprised of youth athletes. The bill should also set forth strict liability standards to prevent a state from acting to undermine the legislation by insulating state actors from liability associated with negligence.

Lastly, the legislation must include grants to states to incentivize implementation of the federal legislation requirements and to ensure continual compliance. The grants will also ensure that trainers and other medical professional are present at all athletic events and to otherwise ensure compliance with the legislative guidelines. In addition, the grants will assist schools in implementing neurological baseline testing for athletes and return-to-play protocols. In order to obtain the annual grant allocations individual states will need to send an annual report detailing the steps taken to ensure compliance with the legislation.

VII. CONCLUSION

Many expect that further medical research into youth concussions will provide significant improvements in both prevention and treatment. In the meantime, state legislators may believe that current state laws on youth concussions are adequate and litigation of youth sports concussions can fill in the gaps where needed. This simply cannot be. Youth athletes and their families cannot wait for research to develop; the dangers of concussions are real and present. Litigation will never fully compensate a young athlete whose life can change, or even worse, end, with a single blow. Accordingly, a federal regulatory framework is needed to adequately protect the young athletes of the United States.

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