

Critical Issues and Trends: Culture Change; Health Promoting Community Design

Schools as a Community Resource for Physical Activity: Legal Considerations for Decision Makers

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INTRODUCTION

Obesity in the United States has reached epidemic proportions. Of particular concern is the prevalence and rise of obesity among children. Since the 1970s, the percentage of obese children aged 6 to 11 years has tripled, and the percentage has doubled for preschool children and adolescents.¹ For adults, the prevalence of obesity and overweight is problematic as well.² Physical activity has been found to concurrently lessen the health risks of overweight and obesity and of associated diseases.³ For example, participation in physical activity has been shown to decrease the risk of certain chronic diseases, including heart disease, type 2 diabetes mellitus, high blood pressure, and colon cancer.⁴ Despite the health benefits of exercise and the health detriments associated with obesity and overweight, few Americans engage in the recommended 30 minutes of moderate physical activity most days of the week, with 40% of adults failing to participate in any regular physical activity.⁵ Changing the environments in which children and adults exercise and play is seen as a central component in improving opportunities for physical activity and in fighting the obesity epidemic.

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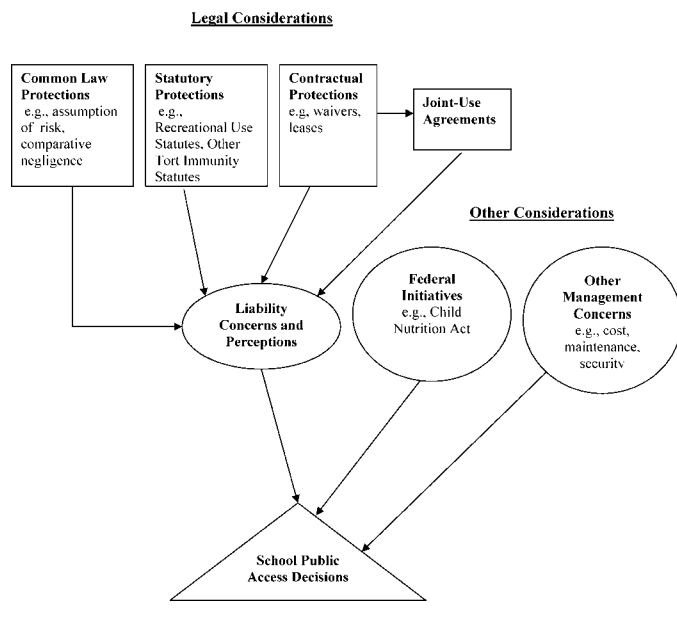
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The Centers for Disease Control and Prevention (CDC) recommend efforts and strategies to reduce physical inactivity and to increase activity levels.⁶ One strategy, as recommended by the Task Force on Community Preventive Services, is the creation or enhancement of access to places for physical activity.⁷ After a systematic review of the literature, the task force found that the creation and improvement of places to be physically active (e.g., building exercise facilities and providing access to existing nearby facilities) have the potential to increase by 25% the percentage of people who exercise at least 3 times a week.⁸ Sites with existing resources for physical activity are public elementary, middle, and high schools. Indoor and outdoor facilities on school grounds such as tracks, gymnasiums, fields, playgrounds, and courts provide opportunities for physical activity.

Various professional organizations and governmental agencies advocate the use of schools for community recreation and physical activity. The American Academy of Pediatrics, for example, advocates safe and accessible places for physical activity to occur within the community; this includes supporting the availability of school buildings and playgrounds after school hours.⁹ In addition, Active Living Leadership encourages schools to allow community residents to use school facilities for exercise and promotes the use of school facilities for community active living programming.¹⁰ Based on rigorous reviews of the scientific literature and on expert opinion, the CDC have developed recommendations and strategies for schools to promote opportunities for physical activity. One recommendation is that schools “provide community access, and encourage students and community members to use the school’s physical activity facilities outside of school hours.”¹¹

Given the critical importance of physical activity in health promotion and the recognition that schools provide an environment with resources for physical activity, it is the objective of this article to address issues relevant to the public access of schools for recreation and physical activity. Specifically, the article focuses on issues of liability. The article first provides a discussion and illustrations of the community use of schools for recreation and physical activity. Next, a discussion of relevant liability issues and protections as they relate to public access of school property is provided, including legal issues of common law, contract law, and

Figure 1
Factors Influencing Decisions To Allow Public Use of School Facilities for Recreation and Physical Activity



statutory protections. Last, the article addresses joint-use agreements as a mechanism for the use of schools as a community resource for physical activity, as well as policy initiatives mandated by federal legislation. Figure 1 shows a conceptual framework for the issues discussed herein.

COMMUNITY USE OF SCHOOLS

The idea of using indoor and outdoor facilities on school grounds for community recreational use after school hours is not new. The community school concept of providing recreation programs with opportunities for physical activity has been in existence at least since 1821, when a school in Salem, Massachusetts, opened its doors to public recreation use.¹² In 1898, New York City's board of education established the Division of Community Centers and Vacation Playgrounds by opening 18 community centers at schools throughout the city.¹³ Soon thereafter, the use of schools for social, recreational, and physical activity programming followed in other cities such as Rochester, New York; Milwaukee, Wisconsin; Los Angeles, California; and Flint, Michigan. Over time, legislation was passed in a number of states (e.g., California,¹⁴ Missouri,¹⁵ New York,¹⁶ and Texas¹⁷) to enable public schools to conduct community recreation programs, to work with municipal agencies in establishing programs, and to permit the use of school facilities by outside organizations. The community school concept made sense to professionals and to the public in that it helped avoid duplication of services by other tax-supported agencies.

In only a limited number of communities did schools take on the primary responsibility of sponsoring or cosponsoring public recreation programs.¹³ In most communities, the municipal agency provided the programs, staff, and

equipment, while the schools' role in the partnership was to provide access to their facilities.¹² This partnership between municipal recreation agencies and public schools flourished from 1950 through 1960, when the number of public recreation programs offered in school facilities more than doubled.¹³ Almost 17,000 school facilities throughout the United States were being used for some type of public recreation program or activity during this period.¹³

A number of factors were identified as contributing to this phenomenon. In the 1950s, there was extensive development of residential areas in communities, with little or no planning for recreational spaces or facilities.¹² With the development of residential areas, schools were being built to meet the demand of children in the residential areas. This development of schools caused taxpayers to resist any additional community expenditures, like recreational services, that appeared less than essential.¹⁸ Therefore, schools became the place not only to educate children during the day but also to serve the community at night.

Today, success stories of schools opened to community use for recreation and physical activity continue to provide good examples of arrangements between schools and communities. For example, in the New York Beacons Initiative, "schools serve as community centers for use by kids and local adults, and are open after school, and on evenings, and weekends. The schools offer a wide range of services during non-school hours, including sports and recreation. In Berkeley, California, all school grounds, including playgrounds, are open to the public during non-school hours."¹⁹ In Denver, Colorado, the Learning Landscape Alliance connects communities with schools through the creative design of school playground facilities in urban environments.²⁰ In North Carolina, the Community Schools and Recreation Program of Pitt County has kept open the doors of local public school facilities to community residents via the county public school system to provide access to gymnasiums, tennis courts, and fields for soccer, baseball, softball, and other types of recreational activities.²¹ For the past 15 years in Pennsylvania, the Seneca Valley School District has opened the hallways of its schools to walkers from early November through late March.²²

LIABILITY CONCERNS AND PERCEPTIONS

Although the community use of schools is successful in many communities today, there are real and perceived constraints to allowing public access to school property for physical activity. For example, concerns about funding, cleanup, security, supervision, and maintenance are perceived as constraints to community use of school facilities outside of regular school hours.¹⁹ In addition, liability concerns regarding the provision of access to public school grounds is likely a domain influencing access decisions. Research in the nonprofit sector indicates that volunteers and nonprofit organizations have a fear of liability, with the potential to limit needed services.²³ It has been noted that the perception of liability risk might be more important than reality in deterring volunteers from engaging in nonprofit work.²⁴ In the same way, perceptions of liability risk might be a factor influencing decisions made by schools regarding

Table 1
Legal Terms Described

Term	Description
Tort	A civil wrong that results in injury and gives rise to a claim for monetary damages.
Liability	A legal obligation, or responsibility, that one party (e.g., a defendant) owes to another party (e.g., a plaintiff).
Immunity	Partial or complete protection from liability.
Negligence	An unintentional tort that results in personal injury.
Invitee	Often considered a person who is invited onto another's property with the consent of the landowner and who pays a fee.
Licensee	Often considered an invited guest, or one who enters the property of another without paying a fee.
Common law	The rules of action derived from judicial decisions.

community access. The public access literature indicates that for landowners, both public (e.g., municipal parks) and private (e.g., lessors of land for hunting and fishing), the fear of a lawsuit arising from injuries to recreational users of their property is a primary concern.²⁵ Even when statutory protections exist and free access is granted, liability concerns remain a barrier to public access.²⁶ Furthermore, public access findings indicate that landowners often use the threat of liability as a justification to restrict public access to their property.²⁷ It is believed that a lack of knowledge about accident rates, liability issues, or protections offered through legislation contributes to this perception.²⁸ In reference to schools, a finding of the California Health Impact Assessment is that employers and site managers, including school personnel, often cite liability concerns as a reason for not opening up facilities to the public for recreational physical activity when those facilities are otherwise not in use.²⁹

In the school setting, administrators are faced with the dilemma of weighing the benefits of providing access to school facilities (e.g., community health benefits associated with physical activity) against the corresponding risk of liability should someone be injured while on school grounds. As such, the perception of liability risk is central to the decision-making process. For many years, researchers have directed their focus toward determining factors underlying perceptions.³⁰ One of the driving forces behind risk perception research is to provide policy makers and decision makers with the information needed to assess risks and to develop new risk management strategies.³⁰ In the context of public access to schools, given the health benefits schools can provide for children and adults, risk perception research is lacking and is urgently needed, as well as the potential implications of risk perception on decision making. The outcomes of this research would not only provide an understanding of risk perceptions to more effectively convince policy makers of the need for protections provided by state laws, but they would also serve as a channel for disseminating educational information to school administrators regarding existing legal protections, potentially easing their liability concerns.

LEGAL CONSIDERATIONS

Because the literature indicates that the threat or fear of liability might serve as a justification to restrict public access,

it is important to have an understanding of liability issues and legal protections as they relate to public access of school property.^{27,28} The duties owed by schools to the public are governed by common-law tort rules. Torts are often governed by state law, and the state's interpretation of these laws determines the outcome of a case. Within the broad category of torts, negligence represents the most likely type of lawsuit a school might face when someone is injured on school property. Negligent conduct can be defined as that which falls below the standard established by law for the protection of others against an unreasonable risk of harm. Table 1 gives general definitions of legal terms and concepts.

To pursue a negligence cause of action, one must prove the existence of four elements. The first element, duty, is defined as a special relationship established inherently, voluntarily, or statutorily between a service provider and a participant. Schools typically owe a duty of providing a reasonably safe environment and of keeping students from an unreasonable risk of harm during school hours. Conversely, for unsupervised activities outside of school hours, the primary duty a school would owe to the public would be a duty to provide reasonably safe facilities and equipment. The legal obligation, or duty, of the school might further be influenced by the legal category under which a user of school facilities might fall. In general, the law recognizes the following three categories of users: invitees, licensees, and trespassers. Depending on circumstances and jurisdiction, invitees are afforded the greatest legal protection, followed by licensees and trespassers. If the goal of a school is to provide access to school property for free and in the absence of structured or supervised activities, the visiting public would likely fall under the category of licensee. A licensee is generally thought of as a guest and one who does not benefit the landowner economically.³¹ Depending on the jurisdiction, the responsibility of the school to a licensee might be (1) to remove or warn of any hidden dangers that are known to the school personnel; (2) to keep the property, facilities, and equipment in reasonably safe repair; and (3) to protect visitors from reasonably foreseeable dangers.³²

The second element, the act causing damage, or breach of duty, may be a commission (something one did) or an omission (something one did not do but should have done). Failing to provide supervision for young children in a gymnastics activity³³ is an example of omission, while removing the rope dividing the deep end of a pool from the

shallow end before swim class³⁴ serves as an example of commission.

The third element to be proved is that there is a connection between the injury and the breach of duty. Causation serves as the crucial link between the act and the damages.

Damages, the fourth element, are simply the injury received. To pursue a negligence claim, the plaintiff must show that some physical, emotional, or economic harm resulted from the act.

Legal Protections in Common Law and Contract

The allocation of risk to other parties is a primary defense mechanism for defendants of negligence claims. Defenses to negligence claims emanate from the following three sources of law: common law, contract law, and statutory law.³⁵ Based on previous court decisions, legal theories are developed that are then relied on by the court in subsequent decisions, eventually becoming common law. Assumption of risk is one such legal theory that falls under the common-law category. Under this theory, some jurisdictions hold that a plaintiff may not recover for damages if he or she was injured as a result of a risk inherent to the activity and voluntarily exposed himself or herself "to a known and appreciated danger."³⁵ A case example is *Sprunger vs. East Noble School Corporation*.³⁶ In this case, the plaintiff was a parent spectator at a high school baseball game and was sitting in the stands near a warm-up area when a doughnut-shaped weight flew off the bat of a player taking practice swings. The weight hit the plaintiff, injuring him. The plaintiff sued but was denied recovery because the court held that he had assumed the risk of injury by voluntarily sitting in an unprotected area and by having an appreciation for the risk of injury from flying objects at baseball games (a risk inherent at baseball games).

Defenses based in contract law involve binding agreements between parties, usually the service provider and the participant. Waivers, informed consent forms, facility lease, and equipment rental agreements can act as potential legal protections in contract law to negligence claims. Although there are many different types of contracts related to recreational sport and physical activities, a common type is a waiver. A well-written waiver signed by an adult, releasing a school from liability for ordinary negligence while the adult participates in a sport activity on school property, can in many states be sufficient to protect a school from liability for a negligence claim.³⁷ Courts have held that the person signing the waiver must be of legal age for the contract (waiver) to be legally enforceable. This would make a waiver signed by a minor unenforceable. However, in a number of states, a school might be afforded protection by a waiver if a parent or legal guardian signs on behalf of a minor.

Statutory Protections

Defenses to negligence in statutory law encompass those acts created and established by a legislative body at the state or federal level. State legislatures have enacted tort claim acts to provide limited immunity and protections from liability for public, private, and nonprofit entities. These include caps on damages for negligence claims, as well as tort immunity statutes such as recreational user statutes that require a higher level of negligence for liability to be found.

Recreational user statutes are legislative acts established in all states for the purpose of protecting landowners from liability if they permit the public to use their property at no cost for recreational activities.³⁸ Since the inception of recreational user statutes in the mid 1960s, the statutes have been interpreted in a variety of ways at the state level and have evolved to protect private and public landowners. This evolution and broad interpretation has led to the practice of school districts seeking protection from negligence under a recreational user statute for activities occurring outside of regular school hours for which no fee is charged.

Case law illustrates the application of a recreational user statute to school districts. In *Ambrose vs. Buhl Joint School District No. 412*,³⁹ the plaintiff child attended with his parents a Pee Wee League baseball game held on school property during the summer months. Bored with watching the game, the plaintiff and his friends began playing an informal baseball game on an adjacent diamond. The backstop on the diamond where the boys were playing was not permanently affixed to the ground, and when one of the boys climbed on top of it, the backstop fell onto the plaintiff, breaking his leg. The court ruled in favor of the school district, which had presented the recreational user statute as its defense. In addition, in *Anderson vs. Independent School District No. 891*,⁴⁰ the plaintiff broke his arm when he lost control during a youth basketball game and hit an unpadded block wall in the gymnasium owned by the school district. The court ruled in favor of the defendant school district on several grounds, including that the condition of the unpadded wall was not hidden, the plaintiff had played in the gymnasium before being injured, and the school district was protected by the recreational user statute because the plaintiff was engaged in a recreational activity.

In another case, *Bubb vs. Springfield School District 186 et al.*,⁴¹ a child sustained injuries after falling from her bike on school property after school. The child rode off one of the school's sidewalks and fell when her front tire landed on a grassy playground surface, approximately 4 inches below the sidewalk. The sidewalk was also used by students for games of "four square." Although the child stated that she had often played four square and ridden her bike on this particular sidewalk, a lawsuit was brought against the school district alleging negligence. The school district asserted immunity based on the applicable tort immunity act (recreational user statute). The court addressed the language contained within the statute, specifically as to what factors should be used to identify whether a property is protected under the statute. The court held that the statute provided immunity based on the recreational character of the property (e.g., whether the property was intended or permitted to be used for recreational purposes, regardless of the primary purpose of the property). The court held that the sidewalk was intended to be used by students and by the public for recreation and that recreation was encouraged. Therefore, the school district was protected from liability under the statute.

Recreational user statutes will often not shield school districts or municipalities from negligence in cases in which activities are structured, participation is not voluntary, or activities are not considered recreational. For example, in

Table 2
Common Legal Protections Described

Protection	Description
Assumption of risk	A legal protection available to defendants (depending on the jurisdiction) when three general elements are met: (1) the risk entered into is inherent to the activity, (2) the plaintiff voluntarily consented to participate in the activity, and (3) the plaintiff had actual or imputed knowledge, understanding, or appreciation of the risks involved in the activity.
Comparative negligence	A defense to negligence whereby some degree of fault and subsequent monetary damages are shifted away from the defendant. In a pure comparative negligence jurisdiction, the defendant is only liable for the proportion of fault attributed to himself or herself.
Waiver	A contract, often also termed a release, which forms an agreement designed to protect a potential defendant from liability.
Tort immunity statutes	Laws created by legislatures most commonly designed to protect public and private entities from liability.

Jackson vs. Unified School District 259,⁴² a student at a middle school was participating in a mandatory physical education class. During class, one of the students asked the instructor if students could use a large wooden springboard to catapult them into the air so that they could dunk a basketball. The plaintiff attempted this act but lost control in mid air and fell to the floor, resulting in a compound fracture of his right arm. The court ruled that the defendant school district was liable for negligence because the class was required and was not considered a recreational activity. A second case is also instructive as to the potential parameters to which recreational user statutes might apply. In *Lucero vs. Albuquerque Public Schools*,⁴³ the plaintiff tripped and fell while walking from her truck to the spectator area of the school ball field, where she had been watching her son's Little League baseball game. The defendant school district moved for summary judgment, contending that the state's recreational user statute controlled the outcome of the case, because the school district allowed the Little League association to use the fields free of charge. However, the court ruled that the recreational user statute did not apply to organized team sports, but rather to outdoor recreational activities, of which organized team sports were not a part, leaving the defendant liable for the plaintiff's damages. Table 2 lists common legal protections that are often available in common law, in contract law, and by statute.

JOINT AND SHARED USE

Although negligence is a concern for school districts' making their facilities available for public use, there are a variety of legal protections that are available. The joint and shared use of school facilities is a mechanism with legal and policy implications by which a school can make opportunities for recreation and physical activity available to the community. Schools will sometimes make agreements with non-school groups to share school facilities for any number of purposes, including recreation and physical activity. The instrument by which the shared use of facilities is carried out is known as a joint-use agreement, or a formal contractual agreement guiding the shared use by two or more entities of facilities, land, utilities, or other common elements. For example, a joint-use agreement would make school recreational sites available to community groups after school hours and would make city recreational facilities (i.e.,

courts, sport fields, etc.) available to school children during school hours. Therefore, a joint-use agreement would be formed among a school, municipal park, and community group to encourage and promote the physical activity and recreation needs of the community. Advantages of a joint-use agreement may include limitations on liability derived from exculpatory language in the agreement, cost sharing, and access to recreational sites and opportunities for physical activity.

The foundations for joint-use agreements are often based in state legislation. Some states have enacted laws that encourage, support, or authorize school districts to enter agreements supporting the joint use of school facilities.⁴⁴ For example, North Carolina has legislation in their Community Schools Act encouraging "greater community involvement in the public schools and greater community use of public school facilities,"⁴⁵ while Iowa and Arizona have legislation allowing public agencies (i.e., public schools) to enter into joint-use and cooperative agreements with public and private entities.⁴⁶ Furthermore, to encourage community use of public school facilities, North Carolina has adopted legislation allowing a school board to enter into an agreement with non-school groups, shielding the respective board from any liability if injury or death is incurred by a third party while that third party is on school property participating in the activity agreed to by contract.⁴⁷ The statute provides that "local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property pursuant to such agreements."⁴⁷

The immunity provisions of this statute were first addressed in *Plemmons vs. Gastonia*,⁴⁸ in which a minor child was seriously injured after falling 8 feet from a school gymnasium's bleachers. At the time of the incident, the gymnasium was leased to the City of Gastonia for an event. The defendant relied on the immunity provided by the statute. The court agreed and held that the clear and unambiguous language of the statute rendered the school board immune from liability, despite common-law rules of negligence.

However, the provision of state legislation does not provide blanket immunity, as illustrated in *Seipp vs. Wake County Board of Education*.⁴⁹ In this case, the school's Parent-Teacher Association group had organized a haunted house on the grounds of the Lacy Elementary School, from which the association would sell tickets and use the proceeds to bolster their operating budget. A participant was injured while attending the haunted house. The school board encouraged the use of school facilities by the community and had implemented rules and regulations for their use. Before operating the haunted house, the association received permission through an oral agreement with the principal of the school. The association was required but failed to submit the proper and necessary paperwork in the form of a facility use application. The facility use application had to be approved by the school principal and be processed and approved by the school board's community schools office. Because the application was neither filed nor approved, the court found the school board liable.

FEDERAL INITIATIVES

Federal legislation providing for the development of school wellness policies indirectly supports the shared use of school property by the public.⁵⁰ The 2004 Child Nutrition Act required all schools participating in the National School Lunch Program to have a local wellness policy in place by July 1, 2006.⁵⁰ Although the overarching goal of the legislation is to promote student health and to reduce childhood obesity, a by-product of the legislation affects the physical activity of children and adults in the community. The wellness policy referred to in the legislation includes goals for nutrition education, physical activity, and other school-based activities designed to promote student wellness in a manner deemed appropriate by the local educational agency.⁵⁰ Each school district chooses the goals that they wish to implement and how they should be implemented, leaving key decision making to local boards and administrators. In addition, each school district must develop a plan for measuring the effectiveness of their wellness policy, including participation by parents, students, school board members, and district employees.⁵¹

In response to this legislation, wellness policies have been drafted, some of which provide for community-based recreation and physical activity during non-school hours. For example, the National Alliance for Nutrition and Activity has drafted a model policy that states in part that "School spaces and facilities should be available to students, staff, and community members before, during, and after the school day, on weekends, and during school vacations. These spaces and facilities also should be available to community agencies and organizations offering physical activity and nutrition programs."⁵² Furthermore, the National Association of State Boards of Education drafted a wellness policy that reads in part that "Schools shall work with recreation agencies and other community organizations to coordinate and enhance opportunities available to students and staff for physical activity during their out-of-school time. Schools are encouraged to negotiate mutually acceptable, fiscally responsible arrangements with community agencies and

organizations to keep school- or district-owned facilities open for use by students, staff, and community members during non-school hours and vacations."⁵³

CONCLUSIONS

The benefits of opening schools to members of the community for the purpose of recreation and physical activity are clear and well supported. Despite the benefits, there exist real and perceived barriers to allowing public access and use of school facilities for physical activity. If school administrators use a falsely perceived threat of liability as a justification to restrict public access to their facilities, then education regarding liability issues becomes vital. To make fully informed public access decisions, it is important for school administrators to have a conceptual understanding of common law and of statutory protections from liability.

To summarize the legal considerations, school decision makers should first be aware of the law in their jurisdiction as it relates to duties owed licensees vs. invitees. If the school chooses to open its doors to members of the community at no cost, a lesser standard of care may apply. Second, it is important to be aware of common-law defenses to negligence that shift the responsibility for injury to the plaintiff (i.e., assumption of risk). Third, protections afforded by contractual defenses in the form of waivers, leases, or other agreements should be considered. Fourth, the nature and scope of state tort immunity legislation such as recreational user statutes should be determined, as this might afford some protection from liability for activities occurring on school property outside of regular school hours. Fifth, legislation that protects schools from liability when they enter into joint-use agreements with third parties is available in certain states and should be ascertained. Sixth, the availability and scope of appropriate insurance coverage should be understood.

A thorough understanding of relevant liability issues and protections is of value in making decisions about whether school property should be made accessible to community members. For policy makers, the importance of physical activity as a component of good health provides ample justification to encourage and to promote laws and policies that support the community use of schools for physical activity. Finally, because there is a dearth of research on risk perception, particularly as it affects the decisions of school administrators to allow public access to school property, efforts for more research in this area should be undertaken and supported. The health and wellness of our communities may be counting on it.

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