

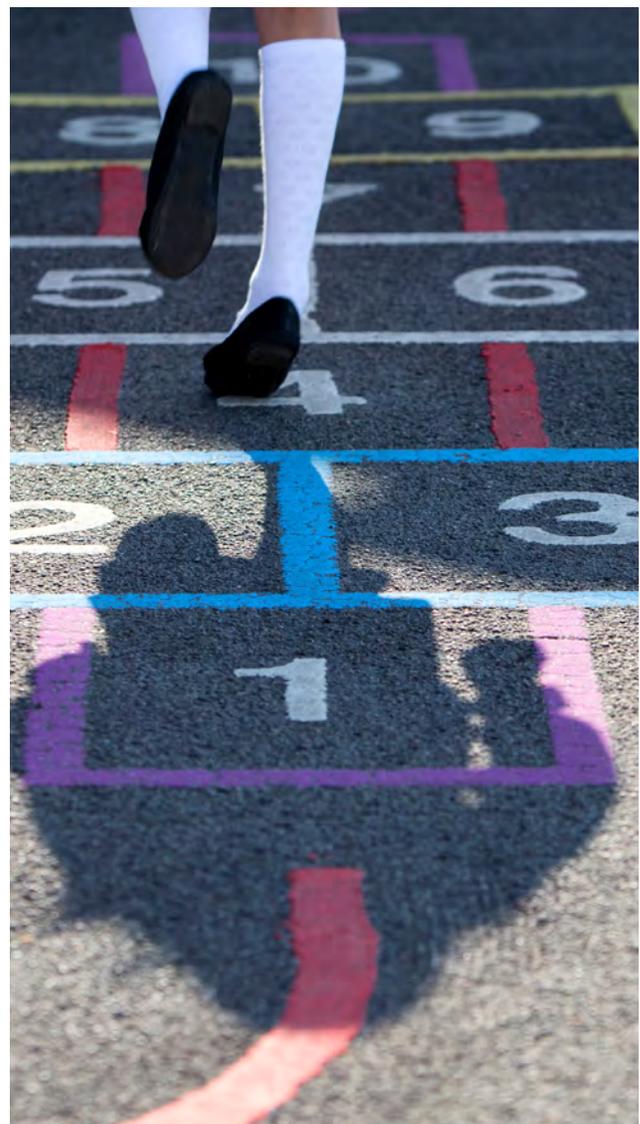


# SCHOOL COMMUNITY USE LIABILITY IN KANSAS



Developing partnerships with schools for the use of school property is a good way to provide the community with safe, affordable, and convenient places to be physically active.

Schools' recreational and exercise facilities are generally accessible to all individuals, and are not heavily-used for school purposes during many hours in the early morning, late afternoon and evening, as well as throughout the summer. These unique aspects of school facilities make them ideal for providing opportunities for community physical activity and recreation. As schools consider allowing community use of their recreational facilities, risk management is an important step in the decision making process. This resource discusses strategies that are being used to promote community recreational use of school property and the many legal and policy tools that are available to help schools and communities minimize risks associated with this type of use.



## Community Use of School Property

Community use of school property generally refers to the community's recreational use of a school's outdoor playgrounds, tracks, and fields. However, community recreational use can also be associated with indoor gyms, pools, or other recreational equipment and often includes both formal and informal sports. In addition to recreational use, community use of school property can include the shared use of school kitchens and the joint development of new school facilities to promote community goals and facilitate joint use of the school's property.

### Community Use Agreements

Kansas law allows local governments to contract with one another for cooperative services and to jointly exercise powers to meet the needs of the local community.<sup>1</sup> Kansas law also authorizes a school board to make school facilities available for community purposes if it wishes to do so. If a school board chooses to open its facilities to the community, the board is allowed to establish rules and regulations governing their use.<sup>2</sup> These agreements are a useful tool, and can be used to outline risk management and liability issues.

Three types of agreements are often entered into for community use of school facilities: memorandums of understanding, interlocal cooperation agreements, and community use agreements. These agreements are often referred to interchangeably and may sometimes be referred to as cooperation agreements or recreational agreements. Although these agreements have specific definitions, "community use agreement" will be used in this resource to refer to all types of agreements generally.

#### **DEFINITION: Memorandum of Understanding**

An informal written statement outlining the preliminary understanding of the parties who plan to enter into a contract or another type of agreement.<sup>3</sup>

#### **DEFINITION: Interlocal Agreement**

A formal contract between two or more cities, counties, or townships for the purpose of performing any governmental service or activity.<sup>4</sup>

### **DEFINITION: Community Use Agreement**

A written agreement between an entity or individual and the school that outlines the terms and conditions for the use of the school's property. This can include a formal contract or a brief form completed by the user and approved by the school district representative. In Kansas, school districts use a variety of these types of written agreements.

## **Liability Concerns as a Barrier to Community Use of School Property**

Concerns about liability have become a common barrier to schools allowing communities to use school property for recreational use. Liability is defined as a legal responsibility for another person's injury or damages.<sup>5</sup> When a school is considering opening its facilities to the community for recreational use, the possibility of someone being injured on the school's property and bringing a legal claim against the district or its employees is a significant concern. Generally, a person is required to act "reasonably" toward others. If someone fails to act with as much care as a reasonable person would in the situation, and that failure results in injury or damage, a claim of negligence may arise.



## Negligence

In Kansas, negligence is never presumed and the injured party is responsible for demonstrating liability. For the injured parties to show negligence on the part of the school, they must prove: (1) the school owed a duty of care towards the injured party, (2) the school failed to carry out its duty, (3) the school's failure was the cause of the injury, and (4) the injured party suffered damages. An accident that cannot be foreseen by acting with reasonable care towards others does not constitute negligence.<sup>6</sup>

It is often more difficult for an injured party to prove liability and recover damages from a public entity than from a private individual or private entity. However, concerns about liability and the costs associated with defending claims are an important issue for schools that share their facilities with the community.

## Immunity

Although liability for injuries that could occur is an important concern, the law provides some protection for schools that open their facilities for community recreational use. Governmental entities and their employees are often provided with immunity from being sued unless otherwise specified by statute. Immunity is an exemption from a legal duty, responsibility, or liability.<sup>7</sup> An individual or entity who has immunity can use it as a defense against a lawsuit. Kansas law provides government entities, such as school districts, and their employees with "governmental immunity."<sup>8</sup> Governmental immunity provides several exemptions from liability, including for any injuries resulting from the use of public property intended or permitted to be used as a park, playground, or open area for recreational purposes.<sup>9</sup> Although this exemption is intended to refer to places such as city parks, it could apply to school facilities permitted to be used by the public for recreational activities.

School districts are also shielded from liability that might arise from discretionary conduct.<sup>10</sup> Discretionary acts are acts that do not have strict rules about the specific course of conduct that must be taken.<sup>11</sup> In other words, a discretionary act is one in which the governmental entity or its employees are required to use their personal judgement to make a decision regarding the situation.

Discretionary conduct is distinguished from ministerial conduct which does not involve exercising discretion. Ministerial acts are acts that must be taken according to law or an established plan.<sup>12</sup> This type of conduct is not protected and the school will not be given immunity for ministerial acts. Additionally, a school's failure to warn recreational users of known, hidden dangers may result in liability if that failure results in an injury.<sup>13</sup>



## Risk Management Strategies for Community Use of School Property

Simple, common sense precautions are an effective way to further avoid liability for injuries resulting from recreational activities. In addition to the legal protection provided by governmental immunity, there are several risk management strategies that can limit or shift a school's risk of liability. These risk management strategies include using documentation such as waivers and releases, as well as establishing safety policies and rules. Other risk management strategies include eliminating known dangers, and obtaining liability insurance.

### Waivers & Releases

Waivers and releases are a common risk management tool for schools to protect themselves from liability. Waivers and releases can be used to reduce the possibility of being sued if someone is hurt on school property during a community recreational activity. A waiver is a voluntary relinquishment of a legal right.<sup>14</sup> Waivers can be included as a provision in a community use agreement or can be a separate, signed, and written agreement. Other names for waivers include permission slips, releases, exculpatory clauses, indemnification clauses, and hold harmless agreements. In Kansas, the general rule is that agreement provisions that limit liability are valid if they are fairly and knowingly entered into and they do not violate the law.<sup>15</sup> A

waiver that limits liability must show a clear intent to release a party from liability for negligence.<sup>16</sup> This means that a waiver will not be upheld if it is ambiguous or attempts to protect a person from liability for intentional acts. A waiver is more likely to be enforceable under the following conditions:

- It is written in large print and placed prominently on the page;
- Clear, understandable language is used;
- It specifically applies only to negligent actions;
- It is signed voluntarily, with knowledge of the waiver and its effects; and
- The person signing the waiver was given time to review it.

## Clear Policies & Safety Rules

Creating clear safety policies and rules is a good way to avoid risk. Safety policies should balance social, economic, financial, and political factors. Safety rules must comply with any local, state, and federal laws. The policies and rules should also be handed out to students and parents so they are made aware of them. Additionally, policies and rules should be periodically reviewed and updated when necessary. Including information about community use policies and safety rules in the community use agreements is an important risk management strategy.

## Eliminating Dangers

An effective strategy to avoid liability for injuries that occur on school property is to avoid the injury altogether. Schools should take steps to eliminate any dangers as soon as the danger becomes known to them. Further, the school should keep a record of all precautions that are taken to avoid harm or risk.

## Liability Insurance

Governmental entities, including school boards, are allowed under Kansas state law to purchase insurance to protect against liability claims. Liability insurance would provide for both the defense of the school and the defense of its employees.<sup>17</sup> The Kansas Interlocal Cooperation Act also allows governmental entities to enter into interlocal agreements that provide for the purchase of liability insurance as well as agreements that allow the sharing of payments for judgements, settlements, defense costs, and other expenses arising from an injury claim.<sup>18</sup>

Additionally, schools are allowed to purchase insurance to protect against loss resulting from students becoming injured on school premises or during school sponsored activities.<sup>19</sup> This insurance might also protect the school from a claim by a student who was injured during a community recreational activity.

Finally, school boards can require that organizations using the school property carry liability insurance for any injuries that occur during the community use. This requirement is a common requirement outlined in community use agreements.

## Other Risk Management Strategies

There are several other risk management strategies that schools can take to reduce their risk of liability. Additional strategies include:

- Preserving a record of the school's decision-making process;
- Training and educating staff about their roles in implementing community use policies and enforcing safety rules; and
- Requiring parents or guardians of students to sign waivers before students participate in community recreational activities.

## Conclusion

School facilities can be an ideal place for community members to exercise and participate in recreational programs. In Kansas, school boards are permitted to allow members of the community to use school facilities, but are not required to do so. Community use is an effective way to promote health and physical activity by allowing the community to utilize school facilities. While schools may have concerns about liability for injuries that take place on school property, there are many protections available for schools who open their facilities for community recreational use, including immunity, waivers, and liability insurance. Using written community use agreements are an important risk management strategy. Generally, if schools act reasonably and in good faith, they are not likely to be found liable for injuries that occur on their properties during community recreational activities.

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## Endnotes

- 1 KAN. STAT. § 12-2901 (2016).
- 2 KAN. STAT. § 72-8212(d) (2016).
- 3 *Memorandum of Understanding*, BLACK'S LAW DICTIONARY (10th ed. 2014).
- 4 KAN. STAT. § 12-2908 (2016).
- 5 *Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).
- 6 *Wicina v. Strecker*, 242 Kan. 278, 280-281 (Kan. 1987).
- 7 *Immunity*, BLACK'S LAW DICTIONARY (10th ed. 2014).
- 8 KAN. STAT. § 75-6104 (2016).
- 9 KAN. STAT. § 75-6104(o) (2016).
- 10 KAN. STAT. § 75-6104(e) (2016).
- 11 *Dougan v. Rossville Drainage Dist.*, 243 Kan. 315, 321 (Kan. 1988).
- 12 *Cook v. Topeka*, 232 Kan. 334, 338 (Kan. 1982).
- 13 KAN. STAT. § 75-6104(k) (2016).
- 14 *Waiver*, BLACK'S LAW DICTIONARY (10th ed. 2014).
- 15 *Corral v. Rollins Protective Services Company*, 240 Kan. 678, 693 (Kan. 1987).
- 16 *Elite Professionals, Inc. v. Carrier Corporation*, 16 Kan.App.2d 625, 635 (Kan. Ct. App. 1992).
- 17 KAN. STAT. § 75-6111(a) (2016).
- 18 KAN. STAT. § 75-6111(b) (2016).
- 19 KAN. STAT. §§ 72-8416; 72-8417 (2016).