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ARTICLE

INSTITUTIONAL LIABILITY FOR HAZING IN INTERSCHOLASTIC SPORTS

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I. INTRODUCTION

Hazing has been a part of life on college campuses throughout the United States for over one hundred years.¹ While many individuals likely link this ritualistic behavior with the stereotypical fraternal organization, another type of hazing has received a significant amount of media attention in the last several years. Athletic hazing is becoming a serious problem on both high school *and* college campuses nationwide.² This type of hazing is widespread, harmful, and misunderstood.³ More student-athletes are being prosecuted under state anti-hazing laws, and more institutions are being held responsible for the care of their students.⁴ The question of what actions or behaviors constitute hazing often arises. A clear concept is important because actions that are considered hazing by some are not considered hazing and are not objectionable to others. Hazing is defined as “any activity expected of someone joining a group that humiliates, degrades, abuses, or endangers, regardless of the person’s willingness to participate.”⁵ Athletic hazing can range in scope from relatively harmless initiation rites, such as having rookie team members carry the travel bags of veteran players or sing team songs, to potentially dangerous activities such as kidnapping, binge drinking, sexual harassment, and exploitation.⁶ While it is impossible to know exactly how prevalent hazing is in recreation and sport, the incidence of reported athletic hazing has increased dramatically since 1980, both in frequency and severity.⁷ In addition, it is obvious to all

1. See HANK NUWER, *HIGH SCHOOL HAZING: WHEN RITES BECOME WRONGS* 17 (2000).

2. For a thorough discussion of the legal issues surrounding hazing in this context, see R.B. Crow & S. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, ST. JOHN’S L. REV. (forthcoming 2002).

3. See Michael I. Levin, *Hazing—Debunking the Myths About This “Right” of Passage*, PSBA BULLETIN (Pennsylvania School Boards’ Association), Oct. 1999, available at <http://www.nsba.org/nepn/newsletter/500.htm> (last visited Apr. 19, 2002).

4. See Kevin Bushweller, *Brutal Rituals, Dangerous Rites: High School Hazing Grows Violent and Humiliating*, AM. SCH. BOARD J., (Aug. 2000) (noting that some hazing incidents have been followed by “lawsuits filed against school districts for failing to prevent hazing”), at <http://www.asbj.com/2000/08/0800coverstory.html> (last visited Mar. 6, 2002).

5. See Nadine C. Hoover, *Initiation Rites and Athletics for NCAA Sports Teams* 8 (Aug. 30, 1999), at http://www.alfred.edu/news/html/hazing_study.html.

6. *Id.* at 8–11 (sorting hazing activities into categories ranging from “acceptable behaviors” such as attending pre-season training to “unacceptable behaviors” such as being paddled, kidnapped, and/or abandoned).

7. See ESPN, *Sports Hazing Incidents* (Apr. 17, 2000) [hereinafter *Sports Hazing*] (providing a detailed list of reported hazing incidents in sports since 1980), available at <http://espn.go.com/otl/hazing/list.html>; Kim Wilson, *It Is News . . . and It Has a*

that most instances of hazing occur without being reported to coaches, school officials, or law enforcement, despite the fact that hazing constitutes an illegal activity under anti-hazing statutes enacted in forty-three states.⁸

Though an increasing number of students are being charged with criminal hazing, the application of these statutes is still quite rare. This is not surprising given the issues of prosecutorial discretion that exist because the penalties for conviction are not generally significant enough to warrant the pursuit of criminal charges. The majority of states consider hazing a misdemeanor that does not change the penalty or definition of any activity covered by other criminal statutes.⁹ Penalties for violating these state statutes include fines ranging from \$10 up to \$10,000, jail time from ten days to twelve months, a combination of fines and jail time, withholding of diplomas, expulsion from school, and rescission of the right to assemble on campus.¹⁰ The most common penalty is three to twelve months in jail, a \$1,000 fine, or both.¹¹

In addition, the anti-hazing legislation of any one state tends to be flawed in at least one of several manners. First, hazing may be defined too narrowly. Though the definition varies from state to state,¹² it often includes only pre-initiation or initiation activities;¹³ thus, it does not apply to any hazing that occurs post-initiation. The definition often excludes athletic teams¹⁴ and frequently applies only to institutions of higher education and not secondary schools.¹⁵ In these states, the limited definition allows much of the sports-related hazing activity to fall outside

Sensational Twist!, (discussing the increased media coverage of high school hazing incidents since 1981), at http://stophazing.org/high_school_hazing/kwilsonpaper.htm (last visited Mar. 3, 2002).

8. Refer to Appendix *infra*. Only Alaska, Hawaii, Michigan, Montana, New Mexico, South Dakota, and Wyoming do not have anti-hazing statutes.

9. Refer to Appendix *infra*. (showing that 31 states make hazing a misdemeanor).

10. See Stophazing.org, (listing the various penalties for violating state hazing statutes), at <http://www.stophazing.org/laws>; see also Melissa Dixon, *Hazing in High Schools: Ending the Hidden Tradition*, 30 J.L. & EDUC. 357, 359-60 (2001).

11. See, e.g., CAL. EDUC. CODE § 32051 (West 1994) (assessing a fine, imprisonment, or both for violation of the statute).

12. See Dixon, *supra* note 10, at 359 (recognizing the variation in anti-hazing laws and calling for stricter laws).

13. For example, California defines hazing in this fashion. See CAL. EDUC. CODE § 32050 (West 1994).

14. See, e.g., LA. REV. STAT. ANN. § 17:1801 (West 2001) (limiting the definition of hazing to include only initiations into fraternal organizations at publicly funded educational institutions).

15. Pennsylvania limits the definition of hazing in this manner. PA. STAT. ANN. tit 24, § 5352 (West 1992); see also Dixon, *supra* note 10, at 359 (noting that only three states specifically apply their anti-hazing policies to primary or secondary schools).

the scope of the law. Some states require bodily harm to result before hazing laws will apply.¹⁶ Numerous other states allow the consent of the victim to be a defense to hazing,¹⁷ though twenty-five of the forty-three states with hazing laws specifically state in their codes that implied or express consent, or a willingness on the part of the victim to participate in the initiation, is not an available defense.¹⁸ Beyond these definitional issues, seven states penalize those who observe but fail to report hazing incidents.¹⁹ Thirteen states require educational institutions to adopt anti-hazing policies;²⁰ however, not all specifically require secondary schools to do so,²¹ and there are no significant penalties connected with these provisions.²² This should not be surprising given the rather soft penalties proscribed by many states' hazing laws as previously discussed.

II. HAZING IN INTERSCHOLASTIC SPORTS

A. *High School Hazing Studies*

In addition to numerous newspaper reports chronicling hazing incidents at high schools throughout the United States,²³ the findings of two recent studies suggest that hazing is pervasive in interscholastic athletics. The findings of a national survey of 1,541 high school juniors and seniors indicate that, of the athletes responding, 35% reported being subjected to some

16. See, e.g., 720 ILL. COMP. STAT. ANN. 120/5 (West 1993 & Supp. 2001). In 1995, the Missouri Supreme Court ruled the state's anti-hazing law constitutional after a fraternity member claimed the statute's reference to "beating" was vague and ambiguous. Elisa Crouch, *Hazing Law Upheld*, MO. DIGITAL NEWS (Sept. 19, 2000), at <http://www.mdn.org/1995/stories/haze.htm>.

17. There are currently eighteen states with this provision. Refer to Appendix *infra*.

18. See, e.g., ARIZ. REV. STAT. ANN. § 15-2301 (West Supp. 2001).

19. Refer to Appendix *infra*. A constitutional challenge to this type of provision on Fifth Amendment grounds was recently rejected by the Texas Court of Criminal Appeals. See Armando Villafranca, *Ex-cadets Can Be Tried in Texas A&M Hazing*, HOUS. CHRON., Feb. 8, 2001, at 27A (referring to State v. Boyd, 38 S.W.3d 155 (Tex. Crim. App. 2001)).

20. Included in this list are Arizona, Florida, Kentucky, Maine, Minnesota, Tennessee, Vermont, and West Virginia. Refer to Appendix *infra*.

21. For example, Florida and Kentucky do not require secondary schools to adopt anti-hazing policies. See FLA. STAT. ANN. § 240.262 (West 1998 & Supp. 2002) (prohibiting hazing for purposes of admission or initiation into university organizations); KY. REV. STAT. ANN. § 164-375 (Michie 1999) (requiring state universities and colleges to adopt statements of campus policy prohibiting hazing). Tennessee recently expanded its anti-hazing laws to require public school systems to adopt a written policy prohibiting hazing. See TENN. CODE ANN. § 49-2-120 (Supp. 2001).

22. See Dixon, *supra* note 10, at 359-60 (comparing the various penalties among the states making hazing a criminal offense).

23. See Wilson, *supra* note 7.

form of hazing.²⁴ Forty-five percent of these individuals were subjected to humiliating hazing,²⁵ 22% participated in hazing involving substance abuse, and 22% were subjected to dangerous hazing.²⁶ Extrapolating this data to the nationwide population, the survey estimated that approximately 800,672 high school athletes are hazed every year.²⁷ While boys were more involved than girls in all forms of hazing behaviors, girls were involved in all forms of hazing at very high levels.²⁸ Finally, 40% of students said that they would not report hazing.²⁹ These results have been supported by the findings of a survey of student-athletes at five suburban New York high schools.³⁰ According to this survey, 17.4% of high school athletes were subjected to hazing activities,³¹ with boys and girls hazed in similar numbers.³² While it is clear from these surveys that hazing is common in high school athletics,³³ anecdotal evidence arising from two recent high school incidents indicates the seriousness of athletic hazing in the new millennium.

B. Recent High School Hazing Incidents

A recent high school wrestling incident has the potential to symbolize the dangerous nature of athletic hazing in the new millennium. Eight members of the Trumbull (Connecticut) High School wrestling team were arrested in connection with a hazing scandal.³⁴ Over a three month period, the victim was “hog-tied”

24. See Nadine C. Hoover & Norman J. Pollard, *Initiation Rites in American High Schools: A National Survey* 6 (Aug. 2000) [hereinafter *High School Hazing Study*], at www.alfred.edu/news/html/hazing_study.html (last visited Jan. 30, 2002). It must be noted that the reliability of this study has been questioned due to a low response rate, as only 1,541 of the 18,500 students selected (8.28%) returned their surveys. STATS, *Facts Hazy on High School Hazing* (Sept. 2000), available at <http://www.stats.org/newsletters/0009/hazing.htm> (last visited Mar. 8, 2002).

25. *High School Hazing Study*, *supra* note 24, at 8.

26. *Id.*

27. *Id.* at 6.

28. *Id.* at 9.

29. *Id.* at 11.

30. See Jeffrey C. Gershel et al., *Hazing of Suburban Middle and High School Athletes*, Paper presented at the Pediatric Academic Societies' Annual Meeting, Baltimore, Maryland, Apr. 30, 2001, (describing hazing as a “largely unrecognized issue for younger age groups”), at <http://www.abstracts-on-line.com>.

31. *Id.*

32. *Id.*

33. Due to privacy concerns, neither of the aforementioned studies directly surveyed sexually exploitative hazing activity. See *High School Hazing Study*, *supra* note 24, at 4; Telephone Interview with Jeffrey Gershel, M.D. (June 7, 2001) (on file with author).

34. Denise Lavoie, *Eight High School Wrestlers Charged in Brutal Attack on Teammate*, ASSOCIATED PRESS NEWSWIRE (Mar. 2, 2000); see also Associated Press, *High School Wrestlers Arrested* (Mar. 2, 2000), available at <http://abcnews.go.com/>

with athletic tape, stuffed inside a locker, thrown against a wall, and repeatedly sodomized with a plastic knife.³⁵ This hazing is even more heinous because the fifteen-year-old victim is a special education student diagnosed with attention deficit disorder and a hyperactivity condition.³⁶ The victim had been counseled by school officials to join the wrestling team.³⁷ Seven of the eight assailants were expelled from school;³⁸ the five individuals charged as juveniles spent a week in juvenile detention.³⁹ The three wrestlers who were charged as adults pleaded guilty to assault and conspiracy charges and were sentenced to two years of probation, ordered to perform three hundred hours of community service each, and ordered to reimburse the victim's family for \$7,500 in medical expenses.⁴⁰ It was alleged by team members accused in the incident that school officials knew about the hazing for years⁴¹ and that the school's basketball and wrestling coaches saw the victim hog-tied, yet did nothing.⁴² The coaches of the wrestling team were subsequently dismissed.⁴³

Another hazing incident involving male athletes, which led to both criminal and civil charges, occurred at Winslow (Arizona) High School during the 1999–2000 academic year.⁴⁴ Five

onair/closerlook/wnt_000302_cl_hazing_feature.html.

35. Lavoie, *supra* note 34.

36. Associated Press, *Trumbull Teens Charged with Hazing Apply for Special Probation*, THE NEWS TIMES (July 9, 2000), available at <http://www.newstimes.com/archive2000/jul09/rgc.htm>.

37. Rick Green, *Disability Made Hazing Victim a Target: School Move Backfired on Special-Ed Student*, THE HARTFORD COURANT (Mar. 8, 2000), available at 2000 WL 4232218.

38. *Id.*

39. *Id.*

40. Diane Scarponi, *Judge Grants Probation to Three Trumbull Wrestlers in Hazing Abuse Case*, THE NEWS TIMES (July 25, 2000), available at <http://www.newstimes.com/archive2000/jul25/rga.htm>; see also Lavoie, *supra* note 34.

41. See Lavoie, *supra* note 34.

42. See *Sports Hazing*, *supra* note 7.

43. See David M. Herszenhorn, *Trumbull: Coaches Dismissed*, N.Y. TIMES, Oct. 13, 2000, at B4.

44. See Mark Shaffer, *Winslow 7 Get Jail Time: Hazing Caused 'So Much Trouble'*, ARIZ. REPUB., Oct. 19, 2000, at A1 [hereinafter Shaffer, *Winslow 7*]. It must be noted that hazing among high school aged athletes is not the sole province of school-sponsored teams. In youth hockey, reliance upon veteran players for guidance is prevalent because the players spend an inordinate amount of time together on-ice, traveling, in social settings, and in the locker room. See Tom Farrey, *Like Fighting, Part of Game* (Apr. 14, 2000), available at <http://espn.go.com/otl/hazing>. This reliance on veterans led to a serious hazing incident in 1994 when thirteen veteran members of the Tilbury Hawks of the Ontario Hockey Association were charged with 135 criminal violations stemming from an initiation party at the home of one of the team owners. *Id.* Many of the charges involved sexual assault and exploitation, resulting in the team trainer and team captain pleading guilty to committing indecent sexual acts. *Id.*

basketball players and three track and field athletes were indicted in May, 2000, on twenty-two sexual assault and kidnapping charges stemming from the hazing of at least ten other team members;⁴⁵ the basketball coach was indicted on three counts of felony child abuse for failing to prevent the attacks despite his prior knowledge of them.⁴⁶ During the hazings that occurred over a two month period, younger athletes were held down by their older teammates who pulled down their pants and inserted markers, pencils, fingers, and other objects into their rectums.⁴⁷ The incidents took place behind the school's pole vault pit, on school buses traveling from competitions, and in locker rooms and parking lots at the school.⁴⁸ Seven of the athletes pleaded guilty to lesser charges of aggravated assault; of these individuals, the three 'ringleaders' received sentences of nine months in jail, two to three years of probation, and community service; two perpetrators were sentenced to six months in jail and two others received sentences of two months in jail.⁴⁹ In reaction to this scandal, Arizona became the forty-third state to pass an anti-hazing law.⁵⁰ Eight of the hazing victims have filed civil lawsuits against the school district, the former basketball coach, and the individuals convicted of assault.⁵¹

While most hazing incidents are unreported,⁵² those that do get reported often involve civil rather than criminal charges.⁵³ In

45. See Mark Shaffer, *Athletes Indicted in Sex Assaults*, ARIZ. REPUB., May 10, 2000, at B1.

46. See Mark Shaffer, *Winslow Coach Indicted in Hazing*, ARIZ. REPUB., May 23, 2000, at A1 [hereinafter Shaffer, *Winslow Coach*].

47. See Shaffer, *Winslow 7*, *supra* note 44.

48. See Mark Shaffer, *Winslow Star May Face Jail in Hazing*, ARIZ. REPUB., Aug. 26, 2000, at A1. See also Shaffer, *Winslow Coach*, *supra* note 46.

49. See Shaffer, *Winslow 7*, *supra* note 44.

50. The law requires all public educational institutions in the state to adopt and enforce a zero-tolerance hazing policy. See ARIZ. REV. STAT. ANN. § 15-2301 (West Supp. 2001); see also Robbie Sherwood, *Battle Against Hazing*, ARIZ. REPUB., Feb. 12, 2001, at A1 (discussing the upcoming hearing of Senate Bill 1096 that creates a new crime of hazing and recognizes that the incident at Winslow High School focused attention on the practice of hazing).

51. See Mark Shaffer, *Hazing Victims File New Suit*, ARIZ. REPUB., Jan. 25, 2001, at B4 (noting that a \$4 million lawsuit against the school district alone alleges negligence, while a separate personal injury lawsuit has been filed against all of the aforementioned parties seeking an unspecified amount of damages).

52. See *Sports Hazing*, *supra* note 7.

53. See David S. Doty, *No More Hazing: Eradication Through Law and Education*, UTAH B.J. 18, Nov. 1997, at 19 (discussing Utah's newly enacted statute). This is frequently due to the narrow scope of some state laws. Refer to notes 12-22 *supra* and accompanying text (discussing how some states' hazing statutes define hazing narrowly). In April, 2001, no criminal hazing charges were filed in the touching and prodding of new members of the Bel Air (Maryland) High School wrestling team because the Maryland anti-hazing law prohibits hazing only for the purpose of initiation; the hazed individuals

addition to suing the perpetrators of these acts for intentional torts such as assault and battery as well as negligence-based actions, the plaintiffs file lawsuits against the school district and its employees under a variety of theories in both federal and state courts.⁵⁴ The following sections review these various causes of action. Part III will address the federal law claims that hazing victims may bring against the school district under 42 U.S.C. § 1983 for violations of their rights under the Fourth and Fourteenth Amendments, as well as under Title IX of the Education Acts of 1972 for sex discrimination. Part IV addresses the defendants' liability under a state tort law claim of negligent supervision.

III. FEDERAL LAW CLAIMS ARISING FROM HAZING

A. *Fourth and Fourteenth Amendment Claims*

Public schools may be held liable for both monetary damages and injunctive relief under 42 U.S.C. § 1983.⁵⁵ Plaintiffs who are deprived of an independently existing federal right may seek remedy via § 1983.⁵⁶ The United States Supreme Court has held that a student's right to bodily integrity is a constitutionally-protected liberty interest.⁵⁷ Therefore, students who are victims of athletic hazing may argue that they have been deprived of an existing federal right.⁵⁸ In order to successfully raise this claim,

were already on the team, and thus no initiation was involved. *See* Tim Craig, *Police, School Look Into Bel Air High Hazing Allegation*, BALTIMORE SUN, Apr. 5, 2001, at 2B. The deputy chief of the local police department stated, "it is hazing in a broad sense, but not hazing in a legal sense[.]" *Id.*

54. *See* Tom Farrey, *Laws Get a Workout* (Apr. 17, 2000) (discussing options for recourse available to hazing victims), available at <http://espn.go.com/otl/hazing/Friday.html>.

55. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

56. *See* *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (holding that a § 1983 action is not available to review evidentiary questions in school disciplinary proceedings, to interpret school regulations, or to review the exercise of discretion by school officials unless that exercise involved violations under the Constitution).

57. *See* *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (holding that freedom from bodily restraint and punishment is within the liberty interest protected by the Fourteenth Amendment).

58. Despite the fact that *Ingraham* addressed the corporal punishment of students, federal courts have "readily accepted it as the foundation for other types of school violence

the plaintiff must prove that the school acted with “deliberate indifference” to the student’s constitutional rights by failing to prevent future harm against the student despite its knowledge of prior violent behavior.⁵⁹ A federal district court has ruled that hazing impacts one’s right to bodily integrity.⁶⁰ Despite this ruling, courts have been reluctant to hold schools liable for hazing under § 1983, relying heavily on the Supreme Court’s decision in *DeShaney v. Winnebago County Department of Social Services*.⁶¹ In *DeShaney*, the Court held that states do not have a general, affirmative duty under the Constitution to protect their citizens,⁶² though a duty to protect can arise if a state restrains personal liberty by taking a person into custody.⁶³ Most courts have refused to recognize that school attendance laws restrain students’ liberty interests, which would have created a custodial relationship between the schools and students, giving rise to an affirmative duty to protect students.⁶⁴

actions in federal court.” Deborah Austern Colson, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169, 172 (1995).

59. Landra Ewing, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence*, 36 BRANDEIS J. FAM. L. 627, 642 (Fall 1997–98) (discussing the dangers students face at school).

60. *Alton v. Hopgood*, 994 F. Supp. 827, 836–37 (S.D. Tex. 1998) (holding that university officials are shielded by qualified immunity because they acted with reasonable efforts to protect plaintiff’s constitutional rights). See also David S. Doty, *Enough is Enough: The Legal Responsibility of Public Schools and Universities to Prohibit Hazing*, 134 EDUC. L. REP. 423, 426–27 (1999) (discussing a federal civil rights claim filed against eight members of the Texas A&M Corps of Cadets in which the court addressed the issue of bodily integrity in a hazing situation).

61. 489 U.S. 189 (1989).

62. *Id.* at 195. The Court stated:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. . . . Nor does history support such an expansive reading of the constitutional text. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195–96.

63. *Id.* at 198–200. The Court further stated:

It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. . . . But these cases . . . stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The affirmative duty to protect arises . . . from the limitation which it has imposed on his freedom to act on his own behalf.

Id.

64. See Laura Beresh-Taylor, *Preventing Violence in Ohio’s Schools*, 33 AKRON L. REV. 311, 319–20 (2000) (evaluating the impact of alternative schools on school violence);

The federal courts that have heard and rejected victims' claims in athletic hazing cases have relied heavily on *DeShaney*. In *Reeves v. Besonen and Owendale Gagetown Area Schools*,⁶⁵ a freshman football player suffered a broken nose and bruised ribs during a "hit line" hazing ritual inflicted by older teammates while returning from a game on the team bus.⁶⁶ Despite the coaches' presence on the bus and the fact that both the head coach and at least one school board member had long known about the ritual,⁶⁷ the court refused to find a violation of § 1983 and granted the defendants' motion for summary judgment.⁶⁸ The plaintiff's claim that the hazing violated his Fourth Amendment right to be free from an unreasonable seizure and unreasonable and excessive force was summarily dismissed because the court found that no search or seizure by any state actor had occurred.⁶⁹ In addition, the plaintiff claimed that his Fourteenth Amendment substantive due process rights were violated by the defendants' failure to prevent the hazing ritual despite their knowledge of it.⁷⁰ The court relied on *DeShaney* in rejecting this argument and finding no constitutional violation.⁷¹ Because the plaintiff voluntarily participated on the football team, his riding the school bus did not amount to "incarceration' or 'involuntary commitment,' or 'police custody,' or anything of that sort."⁷² The court held that "[i]n the absence of such State coercion, *DeShaney* makes clear that the *Constitution* imposes no duty on the state to care for the Plaintiff's safety."⁷³ Finally, the court stated that "the remedies for such negligence . . . are adequately addressed in state tort law."⁷⁴

see also Colson, *supra* note 58, at 171–80 (discussing 42 U.S.C. § 1983 as a possible theory under which a school may have a duty to protect its students).

65. 754 F. Supp. 1135 (E.D. Mich. 1991).

66. *Id.* at 1137 (explaining that the "hit line" was a hazing ritual that usually consisted of some team members "roughing up" the other members of the team).

67. *Id.* at 1136–38 (noting that both the football coach and the one member of the school board had been aware of the "hit line" hazing ritual for over ten years).

68. *Id.* at 1139 (concluding that the plaintiff failed to prove that he was deprived of a constitutionally protected right, privilege, or immunity by a person acting under the color of state law).

69. *Id.*

70. *Id.* (noting that the plaintiff contended that, in the event the Due Process Clause did not impose an affirmative duty to protect, such a duty may arise under a "special relationship" created or assumed by the State).

71. *Id.* at 1140.

72. *Id.* (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 1141. In support of this argument and its concern about creating a slippery slope for such federal claims, the court wrote:

If the Court were to accept the Plaintiff's argument here that the Constitution somehow imposes a duty on school officials to provide for the safety of students

In *Seamons v. Snow*,⁷⁵ the Tenth Circuit Court of Appeals considered the § 1983 claims of another high school football player. As the plaintiff left a locker room shower, he was attacked by his teammates who forcibly restrained him and bound him naked with athletic tape to a towel bar while also taping his genital area; subsequently, a girl that the plaintiff had dated was brought into the locker room to view him.⁷⁶ The plaintiff claimed that he suffered violations of, among other things, his Fourteenth Amendment right to procedural and substantive due process.⁷⁷ The court first considered the plaintiff's procedural due process claims, including being forced to attend a school far removed from his parents, his dismissal from the Sky View football team, and damage to his reputation.⁷⁸

with respect to extracurricular activities, even though their participation in those activities is wholly voluntary, then there would no longer be any practical distinction between ordinary state-law negligence claims and federal constitutional violations, so long as the negligent party was acting under the color of state law. It is foreseeable, for example, that the Plaintiff's reasoning could be extended to school sports in general. The Plaintiff's theory here, if accepted, might be thought to impose a constitutional duty on school officials to protect student athletes—and, perhaps, others—from unreasonable risk of injury during athletic events both on and off the field. Similarly, the constitution might be construed to require school officials to make school property safe, not only with respect to students and others on the premises for legitimate purposes, but to outsiders (such as vandals or thieves) whose presence on public property is unauthorized, but nevertheless foreseeable.

Id. at 1140.

75. 84 F.3d 1226 (10th Cir. 1996).

76. *Id.* at 1230. The plaintiff reported the incident to the coach shortly thereafter. *Id.* After talking to the individuals involved, the coach required the plaintiff to apologize to the team for reporting the incident in order to avoid any internal disharmony on the squad. *Id.* When the plaintiff refused to do so, the coach removed him from the team. *Id.* Upon further complaints to the school principal, the principal immediately cancelled the remainder of the team's season. *Id.* The plaintiff was continually threatened and harassed at school thereafter, and eventually transferred to another high school at the principal's suggestion. *Id.*

77. *Id.* The plaintiff also claimed a violation of Title IX as well as his First Amendment rights pursuant to section 1983. *Id.* The Tenth Circuit allowed the First Amendment claims to survive summary judgment. *Seamons v. Snow*, 206 F.3d 1021, 1028 (10th Cir. 2000). The court's analysis of the Title IX claims will be addressed in Part III.B *infra*.

78. *Seamons*, 84 F.3d at 1234–35. The plaintiff claimed:

that he had constitutionally protected property interests (1) in his education at Sky View High School, (2) the advanced placement courses and credits, and (3) participation in interscholastic athletics. He also claim[ed] he had constitutionally protected liberty interests in: (1) attending public school in the district where he resides; (2) bodily integrity, which includes the right to be free from sexual assault and harassment at school; (3) living with his family and not being forced to attend school in a district far removed from his family; (4) not being dismissed from the Sky View football team; and (5) his reputation and standing in the community.

Id. at 1234.

Recognizing the plaintiff's constitutional right to receive a public education,⁷⁹ the court nonetheless found that the defendants failed to take any deliberate action to remove him from school; rather, the plaintiff made the decision to transfer on his own.⁸⁰ In addition, the court refused to recognize a constitutionally protected right to any specific aspect of education; therefore, the plaintiff had no right to participate in sports, take advanced placement courses, or attend a particular school.⁸¹ Finally, as to the plaintiff's injured reputation, the court stated that "damage to an individual's reputation alone, apart from some more tangible interest, is not enough to establish a due process violation."⁸²

After disposing of the procedural due process claims, the court turned to the plaintiff's substantive due process arguments. Interestingly, these claims were not based on the locker room incident itself; rather, they were premised on the argument that the defendants' removal of the plaintiff from the football team and failure to investigate the incident, discipline the students involved, or adopt or follow procedures to protect the plaintiff's property interests constituted a violation of his rights.⁸³ Though acknowledging the plaintiff's removal from the football team, the court found that the plaintiff's liberty interests were not affected because he lacked a constitutional right to play high school sports.⁸⁴ The court also denied the plaintiff's "failure to protect" claims.⁸⁵ Because there was neither state action nor the existence of the *DeShaney* requirement of a custodial or other "special relationship" between the plaintiff and the school district, the defendant did not have a duty to protect the plaintiff.⁸⁶ The court then attempted to find liability under an alternative "danger

79. *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 573 (1975)).

80. *Id.*

81. *Id.* at 1234-35 (recognizing that there are "innumerable separate components" within the educational context not protected by the Constitution).

82. *Id.* at 1235 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

83. *Id.* The plaintiff relied on the Fifth Circuit Court of Appeals decision in *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994), in support of his claim that he had a liberty interest in his bodily integrity for which the defendants could be held liable for their omissions, if such omissions constituted a "deliberate indifference" to his rights. *Id.* However, the court distinguished *Doe* on its facts because that case involved teacher-student sexual abuse in which the plaintiff clearly possessed liberty rights and state action was not present. *Id.*

84. *Id.*

85. *Id.* (stating that the Due Process Clause was not intended to protect individuals against private violence).

86. *Id.* at 1235-36 (noting that taking an individual into custody against his or her will is an example of a situation in which the state owes some measure of constitutional protection).

creation” theory.⁸⁷ This theory is premised on the notion that state officials can be held liable for the acts of third parties if the officials engaged in extremely reckless or intentional acts sufficient to create a danger that causes harm to the plaintiff.⁸⁸ The court found the defendants did not engage in such behavior because they did not intend to harm the plaintiff or place him at an unreasonable risk of harm,⁸⁹ although the defendants may have acted in a negligent, incorrect, and ill-advised fashion, their behavior did not rise to the level required to find liability under the danger creation theory.⁹⁰ The federal court of appeals thus affirmed the district court’s dismissal of the plaintiff’s substantive due process claims.⁹¹

Despite these adverse rulings, at least two courts have allowed hazing victims’ constitutional law claims to proceed against school officials. In *Hilton v. Lincoln-Way High School*,⁹² the court addressed the § 1983 claims of a freshman student hazed during a marching band retreat. The new members of the marching band were forced to wear paper bags over their heads on bus rides to and from the band’s initiation ritual, where they were led into the woods and forced to participate in a medieval knighting ceremony that included “sword-wielding” men dressed in costumes resembling those of the Ku Klux Klan.⁹³ The plaintiff alleged that she was so frightened that she hyperventilated and subsequently blacked out,⁹⁴ she claimed that the hazing constituted an illegal seizure violative of her Fourth Amendment rights.⁹⁵ In denying the defendant’s motion for summary judgment, the court found that the plaintiff sufficiently alleged a pattern of unconstitutional conduct that was participated in by school officials on the retreat who had policymaking authority.⁹⁶

87. *Id.* at 1236.

88. *Id.* (citing *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995)).

89. *Id.* (citing as evidence the fact that the school cancelled the remainder of the team’s season in addition to requiring the team to send the plaintiff a written apology letter).

90. *Id.* (concluding that the defendants’ conduct did not satisfy the “shock the conscience” standard required by the danger creation theory).

91. *Id.* at 1229–30, 1239. The plaintiff’s only surviving claim of a violation of his right to freedom of speech was remanded on the finding that there was no overriding school interest in denying the plaintiff’s right to report the incident. *Id.* at 1239.

92. No. 97-C-3872, 1998 WL 26174 (N.D. Ill. Jan. 14, 1998).

93. *Id.* at *1–2 (recounting that the plaintiff was forced to kneel before one of the “Grand Dragons” who then tapped her on the shoulder with his “sword”).

94. *Id.* at *2.

95. *Id.* The plaintiff also asserted several state claims including battery, false imprisonment, hazing, negligence, and intentional infliction of emotional distress. *Id.*

96. *Id.* at *5. The band director and his assistant were among those on the retreat. *Id.* at *1. The court dismissed the plaintiff’s federal claim of racial discrimination as well

Because many hazing incidents involve similar acts of kidnapping, blindfolding, or transporting of victims;⁹⁷ plaintiffs alleging such behavior may rely on *Hilton* in alleging Fourth Amendment violations.

In *Nabozny v. Podlesny*,⁹⁸ the Seventh Circuit Court of Appeals refused to dismiss a homosexual student's claims that the failure of school officials to intervene in a pattern and practice of male-on-male harassment constituted a violation of his Fourteenth Amendment Equal Protection rights.⁹⁹ The plaintiff alleged that school officials refused to stop the longtime physical and mental harassment of him by fellow male students despite receiving numerous reports of this behavior.¹⁰⁰ The court found that while students involved in male-on-female harassment were aggressively punished under the school's discipline code, school officials did not react similarly to the plaintiff's complaints; instead the officials allegedly laughed at the plaintiff's complaints and told him that he deserved the abuse because he was a homosexual.¹⁰¹ Upon remand for trial, a jury also found in the plaintiff's favor, and a \$900,000 settlement offer from the school district was accepted shortly before jury deliberations on damages began.¹⁰² As most hazing cases involve same-sex harassment that school officials are frequently aware of yet fail to prevent,¹⁰³ *Nabozny* provides important precedent upon which plaintiffs may rely in asserting their constitutional rights.

as one made under the Illinois hazing statute; the plaintiff failed to allege that the school's actions were motivated by race, as is required in order to find a violation. *Id.* at *3-4.

97. See, e.g., *Psi Upsilon of Philadelphia v. Univ. of Pa.*, 591 A.2d 755, 757 (Pa. Super. Ct. 1991) (upholding sanctions levied against fraternity for kidnapping a student during a hazing ritual); *Ohio v. Brown*, 630 N.E.2d 397, 404-06 (Ohio App. 3d 1993) (stating that although paddling and other acts of hazing occurred in one county, venue was proper as to a general hazing charge in the county from where the victim was transported).

98. 92 F.3d 446 (7th Cir. 1996).

99. *Id.* at 460.

100. *Id.* at 449 (noting that the plaintiff reported these incidents in both middle school and high school).

101. *Id.* at 451, 454-55. This particular incident reported by the plaintiff involved two other male students who pushed the plaintiff to the floor and then proceeded to mock rape the plaintiff as twenty students looked on and laughed. *Id.* at 451.

102. Linda Jacobson, *Gay Student to Get Nearly \$1 Million in Settlement*, EDUC. WEEK, Nov. 27, 1996, at 7 (disclosing that the plaintiff also received up to \$62,000 for potential medical expenses related to the injuries he suffered).

103. See Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 641, 660-63 (2001) (providing several possible reasons why school officials might be reluctant to interfere with same-sex harassment among students).

However, courts may choose to limit the case to its facts and apply it only in instances of harassment of homosexual students.

To avoid a court decision as to its § 1983 liability for an alleged Fourteenth Amendment violation, a suburban Philadelphia school district recently settled a lawsuit brought by a hazed student-athlete. In *Nice v. Centennial Area School District*, a tenth grade wrestler at William Tennent High School was subjected to various forms of hazing including a ritual where the victim was forcibly held down while a teammate sat on his face with his exposed buttocks.¹⁰⁴ The student sued the school district, school administrators, the team coaches, and his teammates who were involved in the hazing and their parents, claiming that his Fourteenth Amendment right to protection of his bodily integrity was violated when the school district failed to prevent the incidents despite its knowledge of the hazing.¹⁰⁵ The plaintiff received a settlement in the amount of \$151,000.¹⁰⁶

B. Title IX Claims Arising from Hazing

Title IX of the Education Amendments of 1972 is a federal law prohibiting sex discrimination in education programs and activities receiving or benefiting from federal funding.¹⁰⁷ In *Davis v. Monroe County Board of Education*,¹⁰⁸ the Supreme Court determined that Title IX applies to peer sexual harassment that occurs in schools.¹⁰⁹ Specifically, students are protected from being “excluded from participation in” or “denied the benefits of” an “education program or activity receiving [f]ederal financial assistance” on the basis of sex.¹¹⁰ The Supreme Court defines “hostile environment sexual harassment” under Title IX as unwelcome behavior “so severe, pervasive, and objectively offensive” that it amounts to a denial of or exclusion from the school’s educational opportunities or benefits.¹¹¹ A school district may be liable for “subject[ing] their students to discrimination

104. 98 F. Supp. 2d 665 (E.D. Pa. 2000).

105. See Levin, *supra* note 3.

106. *Nice*, 98 F. Supp. 2d at 666 (approving the settlement agreement).

107. 20 U.S.C. § 1681(a) (1994) provides in relevant part that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”

108. 526 U.S. 629 (1999).

109. See *id.* at 632–33 (emphasizing that Title IX is applicable to situations in which a school responds with deliberate indifference to known acts of harassment).

110. *Id.* at 638 (citing 20 U.S.C. § 1681(a)).

111. *Id.* at 651 (clarifying that it is not necessary to show physical exclusion to prove a denial of educational opportunity based on gender).

where [it] is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."¹¹² In order to rise to this level, the harassment must have a "specific, identifiable, negative effect on [the victim's] ability to receive an appropriate education."¹¹³ A single incident of peer sexual harassment is generally insufficient to cause such effects under Title IX;¹¹⁴ rather, the complained of behavior must be so "serious" and "persistent" that it systematically denies the victim access to educational benefits or opportunities.¹¹⁵ School districts can be held liable only for *their* actions and not those of the harassing student.¹¹⁶ In *Gebser v. Lago Vista Independent School District*,¹¹⁷ the Supreme Court determined that, even if sexual harassment is occurring at the school, liability does not arise unless the school had *actual* notice of the behavior *and* acted in a deliberately indifferent manner by failing to remedy it.¹¹⁸ Actual notice of the harassment by a school official "with authority to take corrective action to end the discrimination" must occur before a school district may be held liable.¹¹⁹ A plaintiff may prove that the school district acted with deliberate indifference by establishing that its response to allegations of harassment was "clearly unreasonable"¹²⁰ and, thus, was tantamount to an "official decision . . . not to remedy" the harassment.¹²¹

112. *Id.* at 646–47 (quotation marks omitted).

113. Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U.J. GENDER SOC. POL'Y & L. 575, 604 (2000) (discussing *Davis*, 526 U.S. at 629).

114. *Davis*, 526 U.S. at 652–53.

115. *Id.* at 650; see generally Harris & Grooms, *supra* note 113, at 604–06.

116. *Davis*, 526 U.S. at 642. In addition, the Department of Education's sexual harassment guidance provides that:

[A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039-40 (Mar. 13, 1997).

117. 524 U.S. 274 (1998).

118. *Id.* at 290.

119. *Id.*

120. See *Davis*, 526 U.S. at 648.

121. See *Gebser*, 524 U.S. at 290 (noting that a school district's response must amount to deliberate indifference to establish liability).

The high standards established by the Supreme Court in both *Davis* and *Gebser* make it very difficult for student-athletes injured during hazing incidents to recover for peer sexual harassment under Title IX. At the outset, the student must establish that the discrimination occurred on the basis of sex;¹²² this may be done only if the student shows that “the harasser treated him or her differently from other students based on gender.”¹²³ In order to do so, a hazed athlete would likely have to prove that peer, same-sex hazing attacks were treated differently by the school than peer, opposite-sex hazing attacks. Second, it would be necessary to prove that the hazed athlete was “denied the benefits of” or “excluded from participation” in “any education program or activity”;¹²⁴ this may be shown if it can be established that the student-athlete’s participation on a school-sponsored athletic team was negatively affected by the hazing. Third, the student-athlete must prove that the hazing was so “severe” and “pervasive” that it constituted a denial of education opportunities;¹²⁵ this is more easily accomplished if the hazing consisted of a series of incidents rather than only one egregious act. Fourth, the student-athlete must prove that a school official “with authority to take corrective action to end the discrimination” had actual notice of the hazing;¹²⁶ this may be shown if the team’s coach or an administrator had knowledge of the hazing.¹²⁷ Finally, the student-athlete must prove that the school’s response to actual knowledge of the hazing was so “clearly unreasonable” that it reached the required deliberate indifference standard;¹²⁸ the student would need to show that the school official’s acts or omissions in response to the hazing were the functional equivalent of no response at all.¹²⁹

122. See 20 U.S.C. § 1681 (1994) (prohibiting discrimination by educational institutions on the basis on sex).

123. See Harris & Grooms, *supra* note 113, at 597 (discussing the elements needed to prove Title IX liability under the deliberate indifference standard).

124. 20 U.S.C. § 1681.

125. See *Davis*, 526 U.S. at 650 (explaining when an educational institution may be liable for damages under Title IX).

126. *Gesber*, 524 U.S. at 290.

127. This may be a difficult hurdle for a plaintiff to overcome, given the general reluctance of student-athletes to report hazing to coaches and administrators, as well as the inability of many student-athletes to discern hazing activities from non-hazing activities. See Hoover & Pollard, *supra* note 24, at 6, 11 (reporting that “[m]ost high school students did not perceive even the most dangerous initiation activities as hazing” and that forty percent would not report hazing).

128. See *Davis*, 526 U.S. at 648.

129. See *Gebser*, 524 U.S. at 290.

*Seamons v. Snow*¹³⁰ describes one court's analysis of a hazed athlete's claims under Title IX and highlights the difficulty a plaintiff may have establishing this particular cause of action. In *Seamons*, the Tenth Circuit evaluated the plaintiff's Title IX claim in addition to his aforementioned constitutional due process claims.¹³¹ Seamons argued that he was excluded from participation in an educational program on the basis of sex because of the school district's creation and tolerance of a hostile educational environment.¹³² Specifically, the plaintiff alleged that the school district: (1) "failed to adopt and publish Title IX grievance procedures"; (2) "knew or should have known of the prior occurrences of sexual harassment" at the school; and (3) failed to properly investigate the incident or discipline the students involved.¹³³ The plaintiff argued that this constituted sex discrimination because it imposed masculine stereotypes on him, as per the coach's statements that he "should have taken it like a man" and that the conduct complained of was simply a matter of "boys will be boys."¹³⁴ The court held that neither the coach's comments nor any other aspect of the defendants' behavior constituted sex discrimination.¹³⁵ The school's cancellation of the final football playoff game had the unfortunate effect of increasing the hostile environment in the school towards the plaintiff.¹³⁶ The court, noting that the school's action was intended to punish those involved in the hazing, held that the cancellation did not constitute an attempt to "exacerbate or create a hostile sexual environment for" the plaintiff.¹³⁷ In other words, the plaintiff was treated hostilely not because of his sex but because the student body felt that he had betrayed the team by reporting the incident and failing to apologize for doing so.¹³⁸

130. 84 F.3d 1226 (10th Cir. 1996). Notably, this case was decided prior to the Supreme Court's decision in *Davis*.

131. *Id.* at 1232.

132. *Id.*

133. *Id.* (citing factors Seamons alleged created a hostile educational environment).

134. *Id.*

135. *Id.* at 1233 (determining that the defendants' actions or inaction reflected their sense that Seamons betrayed the team and did not rise to the level of sex discrimination).

136. *Id.*

137. *Id.*

138. *Id.* While the court dismissed the plaintiff's Title IX claims, Judge McKay's concurrence was noteworthy:

I cannot agree that the alleged harassment in this case was not based on sex within the meaning of Title IX. The majority writes that statements such as "boys will be boys" and "take it like a man" are not sufficiently sex related to state a claim. I believe, however, that these statements can only be understood as a response to the original hazing incident. In my view, this incident was

IV. STATE LAW CLAIMS ARISING FROM HAZING

In addition to the aforementioned federal claims, student-athletes injured in hazing incidents may file lawsuits under state laws. Indeed, several plaintiffs have pursued civil litigation under state laws with varying degrees of success.¹³⁹ Though no consistent results have been reached, there appear to be several principles gaining increased acceptance in the courts. Many plaintiffs seeking remedies against a secondary educational institution believe that the common law doctrine of *in loco parentis*¹⁴⁰ establishes a responsibility on the behalf of the school to ensure the welfare of students.¹⁴¹ Specifically, a parent:

may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz.: that of restraint and correction, as may be necessary to answer the purposes for which he is employed.¹⁴²

Along with this power comes an obligation for schools to maintain order and use reasonable care to prevent negligent conduct and physical attacks by other students.¹⁴³ One court has interpreted the doctrine of *in loco parentis* by stating that a teacher's "relationship to the pupils under his care and custody differs from that generally existing between a public employee and a member of the general public. . . . [I]n such a relationship,

clearly sexual in nature. Members of the football team taped Plaintiff to a towel rack while he was naked, taped his genitals, and then displayed their captive to a girl Plaintiff had dated. These actions clearly derive their power to embarrass and to intimidate from their sexual and sex-based nature. It is hard for me to believe that the display of the male genitalia to a female for other than medical or educational reasons has a non-sexual connotation. The coach's statement that "boys will be boys" clearly relates to and flows out of the original sexual harassment. As such, it may be considered to be a continuation by the school official of the student-initiated sexual harassment, even if the statement by itself is not sexual in nature.

Id. at 1239–40 (McKay, J., concurring).

139. Compare *Rupp v. Bryant*, 417 So. 2d 658, 660 (Fla. 1982) (finding a valid cause of action against the school board, principal, and teacher for injuries a student received during a hazing incident) with *Caldwell v. Griffin Spalding County Bd. of Educ.*, 503 S.E.2d 43, 43–44 (Ga. Ct. App. 1998) (dismissing a suit brought against the school board, the principal, and a coach for injuries suffered during a hazing incident).

140. Literally, "in the place of a parent." BLACK'S LAW DICTIONARY 791 (7th ed. 1999).

141. See, e.g., *Eastman v. Williams*, 207 A.2d 146, 148 (Vt. 1965) (noting that some courts utilize the doctrine of *in loco parentis* in order to impose a duty of supervision on an educational institution).

142. 1 WILLIAM BLACKSTONE, COMMENTARIES *453.

143. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 358 (5th ed. 1984) (discussing a person's duty to exercise reasonable care).

he owes his pupils the duty of supervision”¹⁴⁴ A failure to so supervise may result in a lawsuit brought by a student-athlete injured during a hazing incident under a theory of negligent supervision. This occurs when a school’s failure to properly train or supervise a student leads to a foreseeable injury to another student.¹⁴⁵ Under this theory, the plaintiff must prove the existence of the elements of common law negligence—duty, breach, cause, and harm. Typically, the key issues are whether a duty of care exists on behalf of the school and, if so, what the applicable standard of care is.

In *Benitez v. New York City Board of Education*,¹⁴⁶ the New York Court of Appeals held that a school owes a duty of reasonable care to protect interscholastic student-athletes from injuries resulting from “unassumed, concealed, or unreasonably increased risks.”¹⁴⁷ In doing so, the court rejected the trial court’s heightened standard that a school owes a student-athlete the duty of a reasonably prudent parent.¹⁴⁸ Similarly, the Indiana Supreme Court held that school officials owe a duty of reasonable care and supervision to high school athletes.¹⁴⁹ While noting that schools are not intended to be insurers of their student-athletes’ safety nor are they strictly liable for the injuries suffered by those student-athletes, the court rejected the lower standard of care proffered by the school district that it should only be liable if it acted with “deliberate, willful, or with a reckless disregard” for the safety of its student-athletes.¹⁵⁰

In addition to the existence of a legal duty of care, a hazing injury also must be foreseeable for liability to arise. For example, in *Rupp v. Bryant*,¹⁵¹ a case involving a student injured while

144. *Eastman*, 207 A.2d at 148.

145. It has generally been held that, with respect to school athletics, “[t]he duty owed an athlete takes the form of giving adequate instruction in the activity, supplying proper equipment, making a reasonable selection or matching of participants, providing nonnegligent supervision of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury.” Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutes of Higher Learning for Accident Occurring During School Athletic Events*, 35 A.L.R. 3d 725, 734 (1971) (citations omitted).

146. 541 N.E.2d 29 (N.Y. 1989).

147. *Id.* at 33 (dismissing a student’s claim because there was insufficient evidence to show the school breached its duty of care).

148. *Id.* at 32 (rejecting the reasonably prudent parent standard and applying the ordinary reasonable care standard).

149. See *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 553 (Ind. 1987) (rejecting the theory that a lower standard of care is warranted when supervising high school as opposed to elementary school students).

150. *Id.* at 553–54.

151. *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982).

participating in an unsupervised extracurricular club hazing, the Florida Supreme Court, held that:

[C]ertain student misbehavior is itself foreseeable and therefore is not an intervening cause which will relieve principals or teachers from liability for failure to supervise: "[W]e should not close our eyes to the fact that . . . boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years." Recognizing that a principal task of supervisors is to anticipate and curb rash student behavior, our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence. Courts following this standard find that a lack of deportment in unsupervised students is to be expected. Thus roughhousing or hazing at a high school club initiation is behavior which is not so extraordinary as to break the chain of causation between the school's failure to supervise and the injury to the student.¹⁵²

Nonetheless, it is unclear whether state courts require actual or constructive notice of hazing incidents at the schools in determining whether or not a particular incident was foreseeable. However, based on the court's holding in *Rupp*, it is possible that the prevalence of hazing in high school athletics indicated by the two studies conducted on the issue provides the requisite level of foreseeability necessary to impose liability for injuries arising out of hazing incidents. It appears that schools will be held liable for any foreseeable hazing injury that is proximately caused by the absence of supervision.¹⁵³

The three defenses most frequently asserted by schools in response to hazing-related claims arising under state laws are assumption of the risk, comparative negligence, and immunity. In *Siesto v. Bethpage Union Free School District*, the Nassau County (New York) Supreme Court granted summary judgment for the plaintiff, a junior varsity football player who required fifty-eight stitches after being hit in the forehead by a weighted football practice pad during a traditional locker room hazing ritual that occurred a short distance from the coaching staff's

152. *Id.* at 668–69 (citations omitted) (quoting *Dailey v. Los Angeles Unified Sch. Dist.*, 470 P.2d 360, 364 (Cal. 1970)).

153. *See Siesto v. Bethpage Union Free Sch. Dist.*, as reported in *Student Athletes Do Not Assume the Risk of Injury From Hazing Rituals*, N.Y.L.J., Dec. 30, 1999, at 21, 29 (finding the doctrine of assumption of risk does not bar the claims of a student athlete injured in a hazing incident).

office.¹⁵⁴ The plaintiff alleged that the school district was negligent in allowing the hazing to occur, arguing that school officials knew or should have known about the ritual based on its long history and the players' discussions of it in the presence of the coaches.¹⁵⁵ The trial court dismissed the affirmative defenses of comparative negligence and assumption of risk proffered by the defendant, summarizing that:

[W]hile a student athlete assumes the risk of injury from the risks inherent in the sport in which he or she participates, such students do not assume the risk of injury from a hazing ritual or tradition, which has no place in organized student athletics, even if they have knowledge that such rituals or traditions exist.¹⁵⁶

School districts and their employees often claim to be free from liability for negligence in hazing litigation, citing an immunity doctrine as a defense. This issue is addressed in *Caldwell v. Griffin Spalding County Board of Education*.¹⁵⁷ In 1994, a high school freshman football player, accompanying his team to their annual summer training camp, was attacked in a dormitory, severely beaten, and knocked unconscious.¹⁵⁸ He sued the football coach, the principal, and the school board, alleging that school officials had knowledge of these hazings and, therefore, had a duty to protect him from the attack.¹⁵⁹ In upholding the trial court's summary dismissal of the case, the Georgia Court of Appeals ruled that the coach and principal, as school board employees, were immune from civil liability because their actions arose out of the discretionary act of supervising student safety.¹⁶⁰ In his concurring opinion, Judge John H. Ruffin, Jr., called for stricter Georgia laws regarding immunity, stating that "school officials should not be immune from suit when they are . . . acting in the place of the students' parents, but

154. *Id.*

155. *Id.*

156. *Id.* Courts have differentiated student-athlete hazing from fraternity hazing with regard to the assumption of risk defense to negligence. In *Barran v. Kappa Alpha Order, Inc.*, the Alabama Supreme Court upheld a summary judgment in favor of the defendant fraternity stating that, by voluntarily subjecting himself to hazing for more than one year, the victim assumed the risk of being hazed. 730 So. 2d 203, 206-07 (Ala. 1998). The plaintiff argued that "peer pressure created a coercive environment that prevented him from exercising free choice," but his testimony that 20-40% of the members of his pledge class dropped out convinced the court he could have quit at any time. *Id.* at 207.

157. 503 S.E.2d 43, 44 (Ga. Ct. App. 1998) (analyzing the state's immunity statutes as applied to hazing incidents).

158. *Id.* at 43-44.

159. *Id.* at 44.

160. *Id.*

then fail to take precautionary measures . . . when the potential for harm is known.”¹⁶¹ Thus, the distinction between whether supervision of students constitutes a discretionary or ministerial act will be determinative as to whether a school district and its employees are entitled to immunity from hazing litigation arising under state laws.

V. RECOMMENDATIONS AND CONCLUSION

It is imperative that athletes, coaches, athletic administrators, and school officials be aware of the anti-hazing statutes in their jurisdictions and appreciate the fact that they can be held liable for injuries resulting from hazing activities. In light of this fact, these sport administrators must be aggressive in investigating athlete complaints and should stop initiation rites before they reach the level of criminal hazing. Numerous other proposals regarding the curtailment of hazing in interscholastic and intercollegiate athletics have been made.¹⁶² Schools must adopt a clearly written, zero-tolerance hazing policy with a plain language explanation of both the definition of hazing and the consequences of engaging in this behavior.¹⁶³ All parents and students should sign a form stating that they have read and agree to abide by the policy.¹⁶⁴ Pursuant to the adoption of this policy, educational institutions should educate students, parents, coaches, and both athletic and school administrators about hazing by conducting informational presentations, team

161. *Id.* at 46–47 (Ruffin, J., concurring) (arguing that student supervision involves a ministerial rather than a discretionary act).

162. *See, e.g.,* Doty, *supra* note 53, at 18, 19–20 (proposing a plan of action “to ensure that a concerted effort is made to eradicate hazing”); Kelley R. Taylor, *Hazing: Harmless Horseplay?*, *PRINCIPAL LEADERSHIP*, Mar. 2001, at 75, 77–78 (recommending the needed elements for a model anti-hazing policy).

163. *See* Doty, *supra* note 53, at 19 (“School (as well as university and Greek) officials must, by means of carefully drafted and well-communicated policy, unequivocally prohibit hazing and firmly discipline students who participate in hazing.”). One commentator explains the need for a zero-tolerance policy as follows:

[S]plitting hairs over the seriousness of the incident is a bad idea when you're dealing with high school students; when it comes to teenagers, they often don't know when to quit. Allowing room for conjecture as to what is and what isn't acceptable in hazing is an invitation to more disaster

. . . .

. . . Better they understand that they should never get started in the first place.

Brad Rock, *Memo to Hazers: Read the Handbook*, *DESERET NEWS*, Sept. 12, 1996, at D1; *see also* Levin, *supra* note 3; Bushweller *supra* note 4, at 18 (noting that “anti-hazing policies should define hazing and identify behaviors that are unacceptable”); Taylor, *supra* note 162, at 77–78 (noting the necessary components for an effective anti-hazing policy).

164. *See* Taylor, *supra* note 162, at 78 (recommending that school districts make their policy available to students and parents).

meetings, and posting educational materials about hazing and its dangers.¹⁶⁵ It is particularly important for coaches to be educated about hazing and made aware of its warning signs.¹⁶⁶ As the individuals with the most contact with the athletes, coaches must be especially vigilant of obvious, relatively benign behaviors that may indicate that more serious hazing is occurring.¹⁶⁷ Schools may also adopt proactive practices to prevent hazing such as adult supervision in locker rooms, where many hazing incidents occur.¹⁶⁸ Knowledge of specific hazing activity may be gleaned by conducting a survey of alumni, who may be more willing to disclose the hazing after graduation than they were during their active playing careers at the school.¹⁶⁹ In addition, schools should encourage athletes to notify school officials of any hazing by designing an anonymous reporting system; perhaps students would be more willing to disclose the hazing if they could avoid the negative consequences associated with doing so.¹⁷⁰

If a hazing incident is reported, school officials should immediately conduct a fair investigation,¹⁷¹ take prompt, strong remedial action to punish those involved, and ensure that the behavior is stopped.¹⁷² The school board should keep a thorough record of the incident and its aftermath.¹⁷³ If appropriate, the school should refer the activity to law enforcement officials.¹⁷⁴ The subsequent discovery by law enforcement officials of any criminal activity should be followed by vigorous prosecution of the perpetrators.¹⁷⁵

165. See *id.*; see also Bushweller, *supra* note 4, at 21 (analyzing effective methods for implementing an anti-hazing policy).

166. See Bushweller, *supra* note 4, at 21 ("Many coaches participated in hazing rituals when they were younger, and some might believe the experience made them tougher.").

167. See *id.*

168. *Id.*

169. *Id.* (recognizing that some hazing forms may be passed from one class to the next).

170. See Taylor, *supra* note 162, at 78 (outlining a model anti-hazing policy that includes an anonymous reporting system).

171. *Id.* (emphasizing that an effective anti-hazing policy requires unbiased investigations).

172. See Bushweller, *supra* note 4, at 21 (calling for "immediate" and "aggressive" responses to allegations of hazing); see also Levin, *supra* note 3 (suggesting possible actions such as discipline, expulsion, or counseling).

173. See Levin, *supra* note 3 (emphasizing the need to prove and to publicize its responses to hazing); see also Taylor, *supra* note 162, at 78 ("As with any complaint or serious issue in your school, it is extremely important to document every step of an investigation.").

174. See Taylor, *supra* note 162, at 78; see also Levin, *supra* note 3 (analogizing hazing to other forms of criminal activity such as weapon or drug offenses).

175. See Doty, *supra* note 53, at 19 (propounding a plan of action to eliminate

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It is clear that hazing is widespread, harmful, and misunderstood.¹⁷⁶ School officials, administrators, and coaches must be proactive in their approach to hazing. Hazing is dangerous, contemptuous behavior that does nothing to enhance “team chemistry” and certainly does not help a team win its contests. All it does is harm innocent young individuals and prevent them from maximizing their athletic experiences because they may walk away with memories of torture and humiliation rather than athletic glory. Important lessons and lifetime friendships are gained from meaningful competition in interscholastic sports, not from senseless initiation rites. There is no reason for these two activities to be connected, nor should they be. The time for the eradication of hazing in interscholastic sports is past due. However, until these policy recommendations are adopted, these senseless initiation rites will continue unabated and more educational institutions will be subjected to liability.

hazing).

176. See Levin, *supra* note 3 (correcting the myths that hazing is rare, not harmful, and includes innocuous activities such as carrying books).

APPENDIX

STATE ANTI-HAZING LAWS

<i>State</i>	<i>State Hazing Statute</i>	<i>Classification of Crime</i>	<i>Is Failure to Notify a Crime?</i>	<i>Is Anti-Hazing Policy Required in Schools?</i>	<i>Was Victim's Willingness to be Initiated a Defense?</i>
Alabama	ALA. CODE § 16-1-23 (2001)	Class C Misdemeanor	YES	NO	YES
Alaska	None				
Arizona	ARIZ. REV. STAT. ANN. § 15-2301 (West Supp. 2001)		NO	YES	NO
Arkansas	ARK. CODE ANN. §§ 6-5-201 to 6-5-203 (Michie 1999)	Class B Misdemeanor	YES	NO	YES
California	CAL. EDUC. CODE §§ 32050 to 32051 (West 1994)	Misdemeanor	NO	NO	YES
Colorado	COLO. REV. STAT. ANN. § 18-9-124 (West Supp. 2001)	Class 3 Misdemeanor	NO	NO	YES

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Connecticut	CONN. GEN. STAT. ANN. § 53-23(a) (West 2001)	Punishable by fine	NO	NO	NO
Delaware	DEL. CODE ANN. tit. 14, §§ 9302 to 9304 (1999)	Class B Misdemeanor	NO	YES	NO
Florida	FLA. STAT. ANN. § 240.262 (West 1998 & Supp. 2002)		NO	YES	NO
Georgia	GA. CODE ANN. § 16-5-61 (1999)	High and aggravated misdemeanor	NO	NO	NO
Hawaii	None				
Idaho	IDAHO CODE § 18-917 (Michie 1991)	Misdemeanor	NO	NO	YES
Illinois	720 ILL. COMP. STAT. ANN. 120/5 (West 1993 & Supp. 2001)	Class A misdemeanor Class 4 felony if death or great bodily harm	NO	NO	YES
Indiana	IND. CODE ANN. § 35-42-2-2 (West 1998 & Supp. 2001)	Ranges from misdemeanor to felony	NO	NO	NO
Iowa	1993 IOWA CODE ANN. § 708.10 (West 1993)	Serious or simple misdemeanor	NO	NO	NO
Kansas	KAN. STAT. ANN. § 21-3434 (1995)	Class B misdemeanor	NO	NO	YES

Kentucky	KY. REV. STAT. ANN. § 164.375 (Michie 1999)		NO	YES	YES
Louisiana	LA. REV. STAT. ANN. § 17:1801 (West 2001)	Punishable by fine or imprisonment	NO	NO	YES
Maine	ME. REV. STAT. ANN. tit. 20 § 6553 (West 1993 & Supp 2001)		NO	YES	YES
Maryland	MD. CODE ANN. art. 27, § 268H (1996 & Supp. 2001)	Misdemeanor	NO	NO	NO
Massachusetts	MASS. GEN. LAWS ANN. ch. 269, §§ 17 to 18 (West 2000)	Punishable by fine or imprisonment	YES	NO	NO
Michigan	None				
Minnesota	MINN. STAT. ANN. § 121A.69 (2000 & Supp.)			YES	YES
Mississippi	MISS. CODE. ANN. § 97-3-105 (1999)	Misdemeanor	NO	NO	YES
Missouri	MO. ANN. STAT. §§ 578.360 to 578.365 (1995 & Supp. 2002)	Class A Class C felony if substantial risk to life or Misdemeanor	NO	YES	NO
Montana	None				

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Nebraska	NEB. REV. STAT. ANN. § 28-311.06 (1995)	Class II Misdemeanor	NO	NO	NO
Nevada	NEV. REV. STAT. ANN. § 200.605 (Michie 2001)	Misdemeanor	NO	NO	NO
New Hampshire	N.H. REV. STAT. ANN. § 631.7 (1996)	Class B misdemeanor	YES	NO	NO
New Jersey	N.J. STAT. ANN. § 2c 40-3 (West 1995 & Supp. 2001)	4th Degree crime if there is serious bodily injury	NO	NO	NO
New Mexico	None				
New York	N.Y. PENAL LAW §§ 120.16 to 120.17 (McKinney 1998 & Supp. 2001)	Class A misdemeanor	NO	NO	YES
North Carolina	N.C. GEN. STAT. §§ 9:14:35 to 9:14:38 (1999)	Class 2 Misdemeanor	NO	NO	YES
North Dakota	N.D. CENT. CODE § 12.1-17-10 (1997)	Class A or B Misdemeanor	NO		NO
Ohio	OHIO REV. CODE ANN. §§ 2307.44; 2903.31 (Anderson 1999 & Supp. 2000)	4th Degree Misdemeanor	NO	NO	NO

Oklahoma	OKLA. STAT. ANN. tit. 21 § 1190 (West Supp. 2001).	Misdemeanor	NO	YES	NO
Oregon	OR. REV. STAT. § 163.197 (2001)	Class A or B Misdemeanor	NO	NO	YES
Pennsylvania	PA. STAT. ANN. tit. 24, §§ 5351 to 5353 (West 1992)	3rd degree misdemeanor	NO	YES	NO
Rhode Island	R.I. GEN. LAWS §§ 11- 21-1 to 11- 21-2 (2000)	Misdemeanor	NO	NO	YES
South Carolina	S.C. CODE ANN. §§ 16- 3-510 to 16- 3-540 (Law. Co-op. Supp. 2001)	Misdemeanor	YES	NO	NO
South Dakota	None				
Tennessee	TENN. CODE ANN. §§ 49-2-120; 49-7-123 (1996 & Supp. 2001)		NO	YES	YES
Texas	TEX. EDUC. CODE ANN. §§ 37.151 to 37.157 (Vernon 1996 & Supp. 2002)	Class A or B Misdemeanor	YES	NO	NO
Utah	UTAH CODE ANN. § 76- 5-107.5 (1999 & Supp. 2001)	Ranges from Misdemeanor to felony	NO	NO	NO

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Vermont	VT. STAT. ANN. tit. 16, § 140b (Supp. 2001)		NO	YES	NO
Virginia	VA. CODE ANN. § 18.2- 56 (Michie 1996)	Class 1 Misdemeanor	NO	NO	YES
Washington	WASH. REV. CODE ANN. §§ 28B.10.900 to 28B.10.902 (West 1997)	Misdemeanor	YES	NO	NO
West Virginia	W. VA. CODE ANN. §§ 18-6-1 to 18-6-4 (Michie 1999)	Misdemeanor	NO	YES	NO
Wisconsin	WIS. STAT. ANN. § 948.51 (West 1996)	Misdemeanor or felony if death or great bodily harm	NO	YES	NO
Wyoming	None				