

# Shared Use of School Property in North Carolina

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## **The Role of Unorganized Recreation**

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# Introduction

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Shared or joint use of school recreation facilities by community agencies and residents has been identified as a key strategy to address the burden of obesity and physical inactivity in North Carolina.<sup>1</sup> The primary barrier preventing more shared use of school property is concern about liability.<sup>2</sup> North Carolina currently provides clear statutory liability protection to schools that enter into agreements with community groups to use school facilities for recreation.<sup>3</sup> On the other hand, protection for schools that allow community residents to use their facilities for unorganized recreational activities is not explicitly addressed by statute. This white paper presents policy options related to the shared use of school facilities with community residents for unorganized recreational activities during non-school hours.

# Background

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## **Obesity and Physical Inactivity in North Carolina**

Research shows that 31.4 percent of North Carolina youth (ages 10-17)<sup>4</sup> and 65.1 percent of North Carolina adults<sup>5</sup> are classified as overweight or obese. Physical inactivity is a recognized risk factor for overweight and obesity. The Physical Activity Guidelines issued by the United States Department of Health and Human Services (U.S. DHHS) recommend that youth participate in at least 60 minutes of physical activity daily<sup>6</sup> and that adults participate in at least 150 minutes of moderate intensity physical activity weekly.<sup>7</sup> However, only 26.0 percent of North Carolina high school students<sup>8</sup> and less than half of adults<sup>9</sup> report meeting these recommendations.

The cost of obesity and inadequate physical activity to North Carolina is high. The estimated 2010 state cost due to excess weight (overweight and obesity) and physical inactivity, calculated using medical costs and lost productivity measures, was almost \$30 billion.<sup>10</sup> Furthermore, decreased levels of physical activity have been linked to lower academic performance and achievement scores for students,<sup>11,12,13</sup> a perennial area of concern for the state.

## Access to Places for Physical Activity: The Role of Schools

One of the recommended strategies for increasing physical activity is to increase the number of places available for people to be active.<sup>2</sup> Schools have been identified as an important community partner in the effort to increase opportunities for all citizens to be active.<sup>2</sup> Indeed, Healthy People 2020, an evidence-based set of benchmarks developed by the United States Department of Health and Human Services, reported that 28.8 percent of the country's private and public schools provided community access to their physical activity facilities outside of school hours in 2006 and called for a 10 percent increase in this amount by 2020.<sup>14</sup> Within this state, the Healthy North Carolina 2020 Report also recommended joint use of school facilities as a strategy to prevent and reduce obesity.<sup>1</sup>

Schools are community institutions that are well-suited to provide access to physical activity opportunities for local residents. Schools are often centrally located within communities and are generally perceived to be safe environments.<sup>2</sup> Furthermore, schools have recreational infrastructure on their properties paid for by taxpayer dollars and can often provide access at little or no cost to community members. In rural areas, schools may be the only facilities available for physical activity.<sup>15</sup> In urban communities, schools offer opportunities for physical activity in the midst of barriers including traffic, crime, and the lack of alternative recreational space.<sup>15</sup> In suburban communities, schools can provide physical activity opportunities in environments that are physically dispersed and lack a community center.<sup>15</sup>

Opening school grounds to the community may result in a number of benefits to schools. Allowing community access to school facilities can strengthen community support for government expenditures on school infrastructure and improvements, including among residents without school-aged children.<sup>2</sup> In addition, some businesses and foundations may contribute funds, equipment, and resources to schools with the expectation that the entire community will benefit. For example, both the Kate B. Reynolds Charitable Trust and the non-profit organization KaBOOM! have funded playground improvements at North Carolina schools with the condition that the playgrounds be open to the broader community after hours. Ultimately, shared use of school facilities can help integrate schools into the life of the community and increase goodwill between school systems and local residents.

# Community Access to Schools in North Carolina

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## Legislative History

The North Carolina legislature has long recognized the value of promoting community access to school facilities. In 1955, the General Assembly enacted NCGS § 115C-133, containing the following provision:

*Boards of education shall have the power and authority to promulgate rules and regulations by which school buildings may be used for other than school purposes, to the end that the community may be encouraged to use school buildings for civic or community meetings of all kinds which may be beneficial to the members of the community and at the same time preserve and properly care for public school buildings.<sup>16</sup>*

This legislation was followed in 1957 by a change in language actually directing schools to promulgate rules for non-school use of school buildings, rather than simply giving them the authority to make such rules.<sup>17</sup> In 1963, the legislature gave liability protection to schools that allowed outside groups to use school buildings, adding to NCGS § 115C-133: “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.”<sup>18</sup>

Next, in 1977, the North Carolina legislature passed the Community Schools Act, declaring that it is “the policy of this State... [t]o assure maximum use of public school facilities by the citizens of each community in this State.”<sup>19</sup> This act authorized the creation of Community Schools Advisory Councils and the employment of Community Schools Coordinators “to promote and direct maximum use of the public schools and public school facilities as centers for community development.”<sup>20</sup> In 1995, most community schools activities were terminated at the state level due to lack of funding, but some have continued at the local level.<sup>21</sup>

In 1981, NCGS § 115C-133, the statute authorizing community use of school buildings, was re-codified as NCGS § 115C-524.<sup>22</sup> In 1992, a significant amendment to NCGS § 115C-524 occurred.<sup>23</sup> This amendment broadened the type of property schools were allowed to open to the community beyond “buildings” to “real and personal property, except for school buses.” It also gave schools the power to enter into “agreements” with outside groups for the use of school property, and specified that liability protection for the schools would be in place for personal injury resulting from use pursuant to these agreements. The amended statute, still in effect, reads as follows:

*...[L]ocal 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.*

The latest statutory change relating to community use of schools occurred in 2009, when the General Assembly passed NCGS § 115C-12(35) as an addition to the list of the powers and duties of the State Board of Education.<sup>24</sup> It reads as follows:

*The State Board of Education shall encourage local boards of education to enter into agreements with local governments and other entities regarding the joint use of their facilities for physical activity. The agreements should delineate opportunities, guidelines, and the roles and responsibilities of the parties, including responsibilities for maintenance and liability.*

## **Community Access to School Recreation Facilities: Organized vs. Unorganized Use**

It is clear that schools are authorized to enter into “agreements,” or contracts, with community groups for the use of school property for non-school purposes. Most school districts in North Carolina have “Community Use of Facilities” policies that set forth the rules governing these contracts, such as the amount of fees that can be charged to community groups for the use. These contracts are useful for situations where an organization, such as a parks and recreation department, church, YMCA afterschool program, or youth sports league, needs space to conduct its activities. These activities are conducted at the school at predictable times and by an identifiable organization that is capable of entering into a contract.

However, sometimes people desire to use school property for unorganized physical activity – activity that is not being conducted by a specific group at a specific time. In these cases, it is difficult to envision what kind of “agreement” could be entered into by the school and with whom. Many types of unorganized physical activity regularly occur on school grounds in North Carolina, including: families remaining on school grounds after student pick-up to allow children to play; community members using school playgrounds, fields, courts, tracks, and walking trails in the evenings, on weekends, and during the summer; and people coming onto school property to work in community gardens.

## **Authority to Allow Unorganized Non-School Use of School Property**

Unorganized community use of school property is so much a part of the historical practice in many North Carolina towns and cities, few people have ever thought to question whether schools have the authority to allow such use. The North Carolina statutes do not explicitly recognize the authority of schools to allow these unorganized uses of school property. NCGS § 115C-47 lays out the powers and duties of local boards of education and makes no mention of the subject. NCGS § 115C-524 is the only statute addressing boards' power to allow non-school use of school property, and, as conveyed above, NCGS § 115C-524 talks about community use of school property only in the context of "agreements" with community groups. With lack of specific treatment in the general statutes, authority to allow unorganized use of school property arguably flows from the broad provision of NCGS §115C-36, giving school boards "general control and supervision of all matters pertaining to the public schools."

## **Liability Protection for Injuries Arising Out of Unorganized Non-School Use of School Property**

Assuming school boards do have authority to allow unorganized community uses of school property, there is still a question about what kind of liability protection exists for school boards for injuries arising out of these unorganized non-school uses. School boards have governmental immunity for the performance of governmental functions, but not for the performance of proprietary functions.<sup>25</sup> According to the North Carolina Supreme Court, governmental functions are "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself," while proprietary functions are "commercial or chiefly for the private advantage of the compact community."<sup>26</sup> The question of what activities fall into the rubric of "governmental functions" can be complex to determine, even for the most learned judge. There is a strong argument that school boards fulfill a governmental, as opposed to a proprietary, function by providing free or for *de minimis* cost access to school grounds to the general public for recreation.

However, even if school boards do have governmental immunity against suit for injuries occurring during unorganized uses of school property, this immunity can be waived if the boards purchase liability insurance.<sup>27</sup> This lies in contrast to legal actions arising out of non-school uses of school property conducted pursuant to an "agreement," for which immunity is not waived even if liability insurance is purchased.<sup>28</sup> It is worthwhile to question the policy reasoning behind treating uses pursuant to an "agreement" and unorganized uses differently in terms of providing absolute liability protection for school boards in one case and not the other.

One argument for requiring non-school use of school property to be conducted only through the use of formal "agreements" is that schools can then require non-school organizations to purchase liability protection; in this way, parties injured due to negligence will be protected even though

they are unable to recover damages from schools. Indeed, many North Carolina school systems' "Community Use of Facilities" policies require organizations to have insurance to use school property. By contrast, for uses of school property outside of an "agreement," where there is no party being required to purchase liability insurance, members of the public must absorb the costs of injury on their own (if indeed schools have governmental immunity). The question for North Carolina policymakers is whether North Carolinians are better served by (1) having access to school grounds only when they are participants in programming conducted by insured organizations under an "agreement" with the school; or (2) by having additional access to recreational opportunities at schools outside of "agreements," but having to bear their own costs for injuries incurred during these unorganized uses.

The latter option provides more opportunities for community members to be physically active using school grounds and allows the continuance of the historic practice of unorganized use of school grounds. Furthermore, there is at least some built-in protection to the public from the risk of injury due to negligent conditions on school grounds. This is because schools must already maintain their facilities to a reasonable degree of safety to protect their students, so they would be less able to take unfair advantage of having immunity by allowing their facilities to become unsafe for the general public's use. However, it is up to policymakers to determine if the risk of some people being prevented from suing for compensation for injuries due to schools' negligence is worth prohibiting the public's access to school grounds outside of formal "agreements" with insured organizations.

### **Enabling Unorganized Non-School Use through Joint Use Agreements with Municipal Governments**

It should be noted that one policy option that is sometimes used to give the general public access to school property in an unorganized way is through joint use agreements between school boards and other local governmental agencies, such as city or county parks and recreation departments.<sup>29</sup> In this way, parks and recreation departments can assume the risk of liability and contribute resources for maintenance and repairs, and there is absolute liability protection for the schools under NCGS § 115C-524 because there is an "agreement" in place. However, it is unclear whether citizens would also be foreclosed from recovering for injuries in that situation, since parks and recreation departments have governmental immunity for governmental functions,<sup>26</sup> just as schools boards do. Furthermore, there may be jurisdictions in which parks and recreation departments are unable or unwilling to enter into a joint use agreement covering public use of school grounds for recreational use. Finally, there would be significant logistical hurdles to negotiating joint use agreements between schools and parks and recreation departments all across the state. Thus, while joint use agreements with parks and recreation departments may be an option for some schools to allow unorganized use of their grounds by the general public, it is probably not feasible for all school boards in the state to use this model.



# Policy Options Regarding Unorganized Community Use of School Property in North Carolina

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Given the above discussion of the current status of the law in regard to unorganized community use of school property in North Carolina, there are a number of options available for policymakers. These options are:

- 1) To make no changes in the law.
- 2) To explicitly ban school boards from allowing unorganized community use of school property.
- 3) To explicitly permit school boards to allow unorganized community use of school property for recreation, but make no changes in liability laws.
- 4) To explicitly permit school boards to allow unorganized community use of school property for recreation and clarify or add liability protections for school boards that do so.

## **Liability Protection for Unorganized Activities Used in Other States**

One possible avenue for liability protection for schools allowing unorganized community use of school property is through a state recreational user statute.<sup>30</sup> Typically, recreational user statutes protect property owners who give the public access to their property for recreational use for free or for a nominal charge. These statutes reduce the duty of care owed to persons allowed on the property for recreational use from the higher duty owed to invitees to the lower duty owed to trespassers – which is only to refrain from willful or wanton misconduct toward the persons. Spengler, et al., has opined that 42 states have recreational user statutes that are potentially applicable to protect public schools from liability. North Carolina’s recreational user statute (NCGS § 38A), unlike the vast majority of other recreational user statutes in the country, excludes governmental entities from protection<sup>31</sup> and so does not cover schools.

In Minnesota, as in North Carolina, schools are not protected under the state recreational user statute;<sup>32</sup> however, the Minnesota legislature recently gave protection to school districts similar to that found in a recreational user statute with an amendment to its statute on municipal immunities. In 2011, the legislature specifically barred “[a]ny claim for a loss or injury arising from the use of school property or a school facility made available for public recreational activity” with the exception of “conduct that would entitle a trespasser to damages against a private person.”<sup>33</sup>

Another state, Mississippi, passed a law in 2012 authorizing school boards to allow public use of school property during non-school hours for recreation, defined by statute as “any indoor or outdoor game or activity, either organized or unorganized, undertaken for exercise, relaxation, diversion, sport or pleasure.”<sup>34</sup> The statute also gives liability protection for injuries arising out of recreational use, but not for injuries due to “[d]eliberate, willful or malicious injury to persons or property by a school district employees” (a trespasser standard) or “injuring resulting from a lack of proper maintenance or upkeep of a piece of equipment or facilities” (a negligence standard that leaves schools more susceptible to liability than a trespasser standard).<sup>35</sup> Mississippi’s statute is unique in that it specifically refers to “unorganized” activity. The statute was guided by model language disseminated by the American Heart Association to promote shared use of school property.<sup>36</sup>

## Conclusion

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Schools can provide a safe, convenient, and inexpensive option to North Carolinians seeking opportunities to engage in physical activity. The North Carolina legislature has a long history of supporting shared use of school property for non-school purposes, although the shape of that support has changed over the years. Current statutory language provides clear authorization and immunity for school boards entering into “agreements” with non-school groups for the use of school property, while authority and immunity for allowing use of school property outside of agreements is not specifically addressed. It is clear that unorganized recreational use of school property is a longstanding tradition in many North Carolina communities and takes many forms. It behooves stakeholders, such as parents of school children, school board members, school administrators, city planners, parks and recreation department personnel, public health personnel, taxpayers, and legislators to have discussions about their vision for community use of North Carolina’s school property for recreation and the role of unorganized recreation in addition to organized recreation in increasing North Carolinians’ physical activity levels.

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