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MEMORANDUM

**TO: BOARD OF EDUCATION MEMBERS
SUPERINTENDENT OF SCHOOLS**

FROM: SHAW, PERELSON, MAY & LAMBERT, LLP

RE: CONDUCTING HIGHER-RISK WINTER SPORTS

DATED: FEBRUARY 2, 2021

In accordance with [updated guidance](#) issued by the New York State Department of Health (“NYS DOH”) on January 22, 2021, school districts competing in Sections I, IX and XI are able to conduct “higher-risk” sports practice and interschool competition with the approval of their County Health Departments. Subsequently, on Thursday, January 28, 2021 County Executives from seven (7) counties¹ in the Hudson Valley issued a [Joint News Release](#) signaling the preliminary county-based approval and affirming the ability of school districts to proceed with scholastic and non-scholastic “higher-risk” sports² effective February 1, 2021, at the discretion of their governing school boards. The Joint News Release further explained that in accordance with the January 22, 2021 updated guidance from NYS DOH, county health departments are regionally responsible for monitoring whether more-transmissible variants of COVID-19 have been identified in the area, as well as the percentage of local residents that test positive, and may grant or retract approval for higher-risk sports if local positivity rates or other conditions change.

Several days ago, Section One’s Executive Committee voted to approve the authorization of higher-risk sports, pending the authorization of the county health departments. On the evening of February 2, 2021, the Westchester County Department of Health issued additional information related to higher-risk Winter

¹ Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester counties.

² Such activities include, but are not limited to, football, wrestling, ice hockey, rugby, basketball, contact lacrosse, volleyball, martial arts, and competitive cheer/dance.

sports, including a cover memo to school districts, a “Health Risks” communication delineating the health risks of engaging in higher-risk sports, and a Sports Code of Conduct which student-athletes and their parents/guardians must sign and date, along with a Best Practices document.

In the Westchester County DOH “Best Practices” document,³ it delineates the following as best practices when engaging in higher-risk sports:

- Informed Consent
 - Obtaining informed consent to participate in the activity after learning the known and unknown risks associated with COVID-19, including the risk of potentially serious or life-threatening consequences.
- Medical Clearance
 - Clearance from a medical professional for each player should be obtained, as well as cardiovascular clearance for those individuals who have recovered from COVID-19.
- Enforcement
 - A hierarchical structure for oversight/addressing violations should be established and implemented.
- COVID-19 Testing
 - Plans for surveillance testing and/or pre-event testing of student-athletes and coaches should be developed, taking into consideration positivity rates, availability of testing supplies and other relevant factors.⁴
- When to Pause Sports
 - A student-athlete or coach testing positive for COVID-19 should put the entire team on pause for ten days from the date of a positive test.

Limiting Legal Liability.

School districts that will be permitting higher-risk sports are responsible for oversight and ensuring compliance with all published state guidance, including recreation activities, facilities where games and practices are held, as well as local team, section and relevant county-specific safety protocols. All requirements outlined in the January 22, 2021 [updated guidance](#) must be followed by sports teams. Practices and competitions must also be aligned with this updated guidance and the New York State Public High School Athletic Association’s (“NYSPHAA”) safety protocols explained in its [Return to Interscholastic Athletics Manual](#), updated January 25, 2021. Finally, parents, coaches, and athletes should be fully informed in relation to the risk of disease transmission in connection

³ The “Best Practices” document was adapted from the New York Municipal Insurance Reciprocal (NYMIR) High Risk Sport Protocols for Counties (Jan. 2021) and CDC indicators and thresholds for risk of introduction and transmission of COVID-19 in schools.

⁴ Putnam County issued a chart regarding when to consider testing, indicating that testing should be considered optional when the County positivity rate is below 3%; recommended when the County positivity rate is greater than 3% but less than 5%; and highly recommended when the County positivity rate is greater than 5%. While the Westchester County DOH did not disseminate recommendations for testing explicitly tied to positivity rates, the county expressed its willingness to assist districts seeking to implement sports-based COVID-19 testing programs to the extent that it has an available supply of rapid antigen tests.

with “higher-risk”⁵ sports and recreation activities. Consequently, informed consent forms must be reviewed and acknowledged after the undersigned have received such information necessary to fully inform them of the risks associated with such sports and conditions that are required for participation by the state and county, as applicable.

Local health authorities must consider the following factors in authorizing and/or continuing to permit higher risk sports and recreational activities as positivity rates evolve in many areas:

- 1) Whether there has been a more-transmissible variant of COVID-19 identified in the area;
- 2) Local rates of COVID-19 transmission or rate of positivity; and
- 3) Local ability to monitor and enforce compliance.

If the County Health Department determines that infection rates have increased to the point where it would be ill-advised to continue with high risk sports, the activities must be discontinued immediately. Surveillance testing programs may be considered but, unless specifically required by the County Health Department, are not otherwise required. Due to the recent proliferation of more contagious variants of the coronavirus (e.g. UK variant), strong consideration should be provided to conducting testing of student-athletes, especially to the extent prolonged close and/or proximate contact cannot be avoided (e.g. wrestling, competitive cheer). The County Health Department may be able to provide free rapid antigen tests to school districts for the purposes of implementing testing for student-athletes and their coaches to help mitigate against the asymptomatic spread of the virus.

There are several sources of liability involved in moving forward with high risk sports. With respect to student participation in close contact activities, there would be an assumption of risk on the part of the student if the risk is identified and the participation is sufficiently informed.⁶ A consent to participate form signed by the parent and student athlete should be secured prior to allowing the student to participate. The contacts that might occur at the locale of the event other than when engaged in the sport (e.g. spectators⁷ or teammates on the benches) might also present as a source of liability to the school district. All NYS DOH required virus avoidance measures for masking and social distancing on sidelines and in public areas must also be diligently followed. In addition, additional restrictions imposed by Section I and/or the local health department must be followed. The risk of litigation based upon failure to supervise the enforcement of the safety protocols is of concern and heightened supervision at these events is strongly recommended.

Insurance and Indemnification.

It is critical to secure from the District’s insurer an acknowledgement that it will provide indemnification and a legal defense regarding tort-based causes of action and claims based upon a failure to safely supervise student close contact sports activities. There may be demands by the County to indemnify and provide a legal defense if it is named as a co-defendant in litigation arising

⁵ The [Interim Guidance for Sports and Recreation](#) should be disseminated to all relevant school district staff, school athletic directors, sports facility directors, coaches, and parents.

⁶ See *Benitez v. Board of Educ. City of New York*, 73 N.Y.2d 650 (1989).

⁷ In an exercise of caution, Section One’s Executive Committee has determined that no spectators shall be permitted at indoor high-risk sporting events; provided, for higher-risk outdoor sporting events, each student-athlete will be permitted to have up to two spectators per home player.

from a high risk athletic event. Unless the District's insurer will agree to name the County as an additional insured, there should be strong opposition to including such language into any related Intermunicipal Agreement. We should be contacted to assist in negotiating terms with the County. To date, it appears that NYSIR and Utica National would add the county as an additional insured if there is a Memorandum of Understanding with the county that requires the same. These two insurance companies will insure school districts conducting higher-risk winter sports. If the County does not demand indemnification and a defense from the school districts, there is no need to seek an agreement from the County related to insurance.

Informed Consent Form.

Parents/students are required to affirmatively assume the risks of participation in higher-risk sports. A Word version of a consent form for the District's use in connection with obtaining the informed consent of participants has been provided along with this memo. The additional documents noted above issued by Westchester County DOH (Sports Code of Conduct and Health Risk Communication) should be issued to student-athletes and their parents for signature and review along with the consent form.⁸

Board Resolution.

Given that the County guidance explicitly requires the Board of Education to pass a resolution to authorize participation in higher-risk sports, below please find a model resolution that may be used to authorize the District's participation in those higher-risk sports that the Board believes it may safely undertake this winter:

“BE IT RESOLVED that the Board hereby approves student participation in the following “higher-risk” winter sports, subject to strict adherence to the guidelines and protocols established by state and local health authorities, as well as the rules of Section I of the New York State Public High School Athletic Association:

[Insert applicable sports/levels]”

Should the District decide to implement a surveillance testing program as a condition-precedent to participation in higher-risk sports, the following addition to the resolution should be made:

“BE IT FURTHER RESOLVED that the Board hereby directs the Superintendent to arrange for COVID-19 testing of student-athletes and coaches as a condition of participation in the above-referenced sports.”

If you have any questions regarding the contents of this memo, please do not hesitate to call or correspond.

DSS/MLM/JMS

⁸To date, Westchester, Putnam, Orange, Ulster and Suffolk Counties have issued additional guidelines for participation and we expect the same to be forthcoming from most other counties. We have been advised that Dutchess County does not intend to issue additional guidelines.