



SHIPMAN & GOODWIN LLPSM
COUNSELORS AT LAW

MEMORANDUM

TO: Glenn M. Lungarini, Executive Director, CAS-CIAC

FROM: Jessica Richman Smith and Dori P. Antonetti

RE: Capacity for Sporting Events and Out-of-Season Rules

DATE: September 28, 2020

We write in response to your request for legal advice on behalf of the Connecticut Association of Schools-Connecticut Interscholastic Athletic Conference (“CIAC”) regarding several questions related to sports in the time of the COVID-19 pandemic health emergency (the “COVID-19 Pandemic”). Specifically, you requested legal advice on (1) capacity guidelines and/or rules for sporting events and (2) out-of-season coaching rules for football. We address these questions below.

QUESTION ONE (CAPACITY FOR SPORTING EVENTS):

“How do schools apply the capacity guidelines issued by Governor Lamont to their sporting events? Are schools limited to 100 people, including athletes, at outdoor venues? If there is a stadium, is that capacity 25%? What would the indoor capacity be for a pool or gymnasium?”

SHORT ANSWER:

There are no specific capacity *rules* that apply to public school-sponsored sporting events *held on school grounds or at school facilities*.¹ The rules for businesses and social and recreational gatherings included in certain of Governor Ned Lamont’s Executive Orders and established pursuant to such orders by the Connecticut Department of Economic and Community Development (DECD) (collectively, the “Gathering Restrictions”) generally do not apply to school districts. The rules that apply directly to public school districts are set forth in the Connecticut State Department of Education’s (CSDE) reopening guidance for school districts entitled, Adapt, Advance, Achieve: Connecticut’s Plan to Learn and Grow Together (Last Updated: September 4, 2020) (“the School Reopening Guidance”). To be sure, the School Reopening Guidance

¹ Our response to this question addresses only public school districts. We have not included independent schools or the CIAC itself in our analysis.

includes multiple requirements related to maintaining appropriate social distancing; however, it does not include specific limitations on capacity within public school facilities or at school-sponsored events.

Importantly, the Connecticut Department of Public Health (DPH) has issued *guidance* for the continued operation of sporting activities for private, municipal, and interscholastic youth and adult sports leagues (the “DPH Guidance”). See DPH, General Guidance for the Operation of Interscholastic, Youth and other Amateur Sport Activities during the COVID-19 Pandemic Fall/Winter 2020 (Last Updated: September 25, 2020). The DPH Guidance describes the risks associated with various sporting activities and offers recommended risk mitigation strategies, including recommendations for the operation of various sporting activities for different sports based on the designated level of risk associated with such sports (*i.e.*, “lower risk sports,” “moderate risk sports,” and “higher risk sports”). Although the recommendations set forth in the DPH Guidance are neither rules nor requirements, the DPH Guidance -- including the risk categorizations therein -- could be viewed as establishing the standard of care for school-sponsored, interscholastic, and other sporting activities. As such, we recommend that school districts follow the recommendations in the DPH Guidance to mitigate their risk of liability, even where such recommendations are more conservative than other relevant capacity rules or guidelines.

In the absence of specific rules for school-sponsored sporting events held on school grounds or at school facilities, we recommend that school districts adhere to the capacity limits and social distancing requirements addressed in the relevant Gathering Restrictions. The relevant Gathering Restrictions include, by way of example, DECD Rules for Gatherings and Venues, Sector Rules for Outdoor Events, Sector Rules for Indoor Events, and Sector Rules for Sports, Sports Clubs & Complexes, Gyms, Fitness Centers and Pools (“Sector Rules for Sports”). We also advise that school districts adhere to any applicable social distancing requirements set forth in the School Reopening Guidance, which may involve consulting a school district’s local public health officials. In the event that following the Gathering Restrictions would not allow for appropriate social distancing consistent with the School Reopening Guidance, the School Reopening Guidance should control. Moreover, to mitigate their risk of liability, we recommend that school districts follow the DPH Guidance even where such guidance is more conservative than both the Gathering Restrictions and the School Reopening Guidance.

Based on the rules and guidance described above, the specific capacity rules and guidelines we recommend *for school-sponsored sporting events held on school grounds or at school facilities* are below. In addition to the specific rules and guidelines recommended below, we recommend that school districts consult with their local public health officials when planning for any sporting event to ensure such planning is consistent with public health guidelines in place at that time, as required by the School Reopening Guidance.

- **Sporting events held in a stadium:**
 - 25% of Fire Capacity with appropriate social distancing such that attendees (excluding immediate family, caretakers, and household members) remain six feet apart except when eating, attendees are six feet away from the sporting activity, and visual social distancing markers are used to encourage individuals to remain six feet apart. ***Anticipated to take effect October 8, 2020:*** 50% of Fire Capacity accompanied by the foregoing rules.
 - Follow the DPH Guidance (*available at <https://portal.ct.gov/DPH/Communications/Guidance/General-Guidance-for-Youth-and--Amateur-Sport-Activities-during-COVID-19-Pandemic>*) regarding the operation of the sporting event (interscholastic or in-state contest, meet, or tournament; interscholastic or other contest between teams from different states) for the sport involved. Such guidance will vary depending on the risk categorization of the sport and the event type.

- **Sporting events held on an outdoor field:**
 - Limit to two teams, officials, and limited family members with appropriate social distancing such that attendees (excluding immediate family, caretakers, and household members) remain six feet apart except when eating, attendees are six feet away from the sporting activity, and visual social distancing markers are used to encourage individuals to remain six feet apart.
 - Follow the DPH Guidance regarding the operation of the sporting event (interscholastic or in-state contest, meet, or tournament; interscholastic or other contest between teams from different states) for the sport involved. Such guidance will vary depending on the risk categorization of the sport and the event type.

- **Indoor sporting events:**
 - Limit to group sizes of 10 or less with appropriate mitigation strategies for indoor settings in place (face coverings if practical and safe, 6 feet or more of social distancing, etc.). ***Note: This recommendation is based on the DPH Guidance. We recommend that school districts follow this guidance to mitigate their risk of liability.***

Alternative approach (higher risk of liability): Limit to 50% of building capacity or 25 people (whichever is smaller) per field, court, pool, rink, etc. with appropriate social distancing such that attendees

(excluding immediate family, caretakers, and household members) remain six feet apart except when eating, attendees are six feet away from the sporting activity, and visual social distancing markers are used to encourage individuals to remain six feet apart. Capacity limits can be exceeded only to include two competing teams, officials, and one parent/guardian per athlete.

- Follow the DPH Guidance regarding the operation of the sporting event (interscholastic or in-state contest, meet, or tournament; interscholastic or other contest between teams from different states) for the sport involved. Such guidance will vary depending on the risk categorization of the sport and the event type.

If a school-sponsored sporting event is held in a location other than on school grounds or at school facilities (e.g., at a private sports complex or a private pool), the relevant Gathering Restrictions (e.g., the Sector Rules for Sports), including the capacity limits, social distancing requirements, and other significant and extensive requirements outlined therein, would be mandatory for, and enforceable against, the facility that hosts the sporting event. Moreover, although you have not specifically asked about the capacity rules that might apply to CIAC itself, we wish to point out that the Gathering Restrictions might be binding on any events hosted and/or sponsored by CIAC (e.g. CIAC tournaments). If you would like us to further explore the requirements applicable to CIAC (as opposed to school districts), we would be glad to do so.

Finally, we note that the capacity rules and guidelines related to the COVID-19 Pandemic continue to change and evolve. *The advice and recommendations herein are based on the rules and guidelines in effect as of the date of this memorandum.* Such rules and guidelines may change, for example, when Governor Lamont updates the Gathering Restrictions for Phase 3 of Connecticut's reopening plan. Phase 3 is targeted to take effect on October 8, 2020. *See* "Governor Lamont Announces Connecticut Moves Toward Phase 3 Reopening on October 8" (September 24, 2020).

LONG ANSWER:

I. Legal Framework.

Through a series of Executive Orders, including, among others, Executive Orders 7D, 7N, 7PP, 7TT, 7XX, and 7ZZ, Governor Lamont has placed restrictions on social, recreational, and religious gatherings in light of the risks associated with gathering during the COVID-19 Pandemic. In addition, Governor Lamont has delegated authority to DECD to establish rules for each of various business sectors, which rules relate to slowing the spread of COVID-19 and are legally binding and enforceable. *See, e.g.,* Executive Orders 7PP, 7ZZ. Collectively, such restrictions and rules are referenced herein as the "Gathering Restrictions."

*With the exception of the graduation ceremony rules set forth in Section 2 of Executive Order 7XX, the Gathering Restrictions do not apply to school districts. See, e.g., Executive Order 7N (noting that the restrictions on social and recreational gatherings “[do] not apply to government operations . . . or other activities that are not social or recreational gatherings”); Executive Order 7PP (addressing Phase 1 Business Reopening to provide for the safe resumption of limited social, recreational, athletic, and economic activity pursuant to Sector Rules for various **business sectors** and providing for the Enforcement of Sector Rules Governing the Reopening of **Businesses**) (emphasis added); Governor Ned Lamont, *Frequently Asked Questions on the State of Connecticut’s Actions Related to COVID-19* (updated June 8, 2020) (stating that the sector-specific rules developed by Governor Lamont and DECD contain “guidance on reopening for **businesses** that choose to do so beginning May 20, 2020”) (emphasis added); Sector Rules for June 17th Reopen (stating that “[i]ndividual businesses within sectors allowed to open . . . must comply with the rules we lay out to safeguard their employees and customers”); Executive Order 7NNN (granting authority to DECD to issue or amend size limits for private gatherings, regardless of whether such gatherings are organized by a business). Indeed, Governor Lamont has issued a series of Executive Orders specifically directed to school districts (including, without limitation, Section 2 of Executive Order 7XX) separate and apart from the rules concerning businesses, and the process for reopening schools in Connecticut has been the subject of an entirely separate process which culminated in the issuance of the School Reopening Guidance.*

Although the Gathering Restrictions do not apply to school districts, it is clear from the Executive Orders that such Gathering Restrictions are the product of health-related considerations by public health authorities such as the United States Centers for Disease Control and Prevention (CDC) and DPH. For example, Executive Order 7ZZ provides, in relevant part:

[T]o reduce the spread of COVID-19, the [CDC] and [DPH] recommend implementation of community mitigation strategies to slow transmission of COVID-19, including cancellation of gatherings of ten people or more and social distancing in smaller gatherings

Therefore, it would be prudent and appropriate for school districts to use the Gathering Restrictions as guidelines when planning activities that could involve large group gatherings, such as sporting events. In addition, as noted below, CSDE has referenced the Gathering Restrictions in advising on appropriate gathering guidelines for school-sponsored and school-related activities. ***Moreover, it is important to note that any school-sponsored events held at private facilities such as private sports complexes or private pools will be subject to the relevant Gathering Restrictions (including capacity, social distancing, and other requirements) because such rules will apply to the organization that operates such facilities.***

While the Gathering Restrictions can be viewed as relevant guidelines for school-sponsored events held on school grounds or at school facilities, the School Reopening

Guidance is binding on school districts. As such, school districts should be mindful of the social distancing and other health-related requirements, including requirements pertaining to physical education and physical activity, set forth in the School Reopening Guidance. Such social distancing requirements performe will impact the number of individuals who can safely gather in one place simultaneously. Notably, with respect to physical education and physical activity, the School Reopening Guidance advises (but does not require) that school districts adhere to “restrictions on gatherings” and consult guidance provided by CIAC. In the event that following the Gathering Restrictions would not allow for appropriate social distancing consistent with the School Reopening Guidance, the School Reopening Guidance should control.

Finally, as described above, DPH has issued the DPH Guidance for the continued operation of sporting activities for private, municipal, and interscholastic youth and adult sports leagues. The DPH Guidance describes the risks associated with various sporting activities and offers recommended risk mitigation strategies, including recommendations for the operation of various sporting activities for different sports based on the designated level of risk associated with such sports (*i.e.*, “lower risk sports,” “moderate risk sports,” and “higher risk sports”). Although the recommendations set forth in the DPH Guidance are neither rules nor requirements, the DPH Guidance -- including the risk categorizations therein -- could be viewed as establishing the standard of care for school-sponsored, interscholastic, and other sporting activities. ***As such, we recommend that school districts follow the recommendations in the DPH Guidance to mitigate their risk of liability, even where such recommendations are more conservative than both the Gathering Restrictions and the School Reopening Guidance.***

II. Applicable Rules.

As described above, there are no specific capacity rules for school-sponsored sporting events held on school grounds or at school facilities. In the absence of such rules, we recommend that school districts adhere to the capacity and social distancing requirements identified in the relevant Gathering Restrictions (*e.g.*, DECD Rules for Gatherings and Venues, Sector Rules for Outdoor Events, Sector Rules for Indoor Events, and Sector Rules for Sports), as well as any applicable social distancing requirements set forth in the School Reopening Guidance. In the event that following the Gathering Restrictions would not allow for appropriate social distancing consistent with the School Reopening Guidance, the School Reopening Guidance should control. Moreover, to mitigate their risk of liability, we recommend that school districts follow the DPH Guidance even where such guidance is more conservative than both the Gathering Restrictions and the School Reopening Guidance. We further recommend that school districts consult with their local public health officials when planning for any sporting event to ensure such planning is consistent with public health guidelines in place at that time, as required by the School Reopening Guidance.

The specific capacity rules and guidelines we recommend for school-sponsored sporting events are set forth in the Short Answer above. The basis for these recommendations follows.

Gathering Restrictions

The rules set forth below, which are current as of September 28, 2020, are available on DECD's website at <https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Sector-Rules-and-Certification-for-Reopen>. For an updated list of these rules, please consult DECD's website directly, including the relevant Gathering Restrictions linked below. *We note specifically that such rules and guidelines may change as of October 8, 2020, which is the target date for Phase 3 of Connecticut's reopening plan.*

- **Indoor Events**

See https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery-Sept-17-updates/IndoorEvents917.pdf.

- Capacity limit of 50%.
- Capacity limited to 25 people.
- Attendees shall remain 6 feet apart, excluding immediate family members, caretakers, and household members, except when eating.
- Allow for 6 feet of social distancing within the audience areas between groups. Recommend eliminating the first few rows of seating to ensure performers are at least 6 feet away from audience at all times.

- **Outdoor Events**

See https://portal.ct.gov//media/DECD/Covid_Business_Recovery-Sept-17-updates/OutdoorEvents917.pdf.

- Capacity limit of 50%.
- Attendees shall remain 6 feet apart, excluding immediate family members, caretakers, and household members except when eating.
- Allow for 6 feet of social distancing within the audience areas between groups. Recommend eliminating the first few rows of seating to ensure performers are at least 6 feet away from audience at all times.

- **Outdoor Event Venues (e.g., Amphitheaters, Race Tracks)**

See <https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Sector-Rules-and-Certification-for-Reopen>.

- 25% of Fire Capacity and distancing.

- *Anticipated to take effect October 8, 2020:* 50% of Fire Capacity and distancing.
- **Sports, Sports Clubs and Complexes, Gyms, Fitness Centers, and Pools**
 See https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery-Sept-17-updates/Sports_FitnessCenters917.pdf.
 - Each outdoor sporting event field will be limited to two teams, officials, and limited family members.
 - Indoor sporting events will be limited to 50% of building capacity or 25 people (whichever is smaller) per field, court, pool, rink, etc.
 - For indoor sporting events, capacity limits can be exceeded but only to include two competing teams, officials, and one parent/guardian per athlete.
 - For pools, limit the total number of patrons in the pool area and pool to the number of people/households that can safely fit on the pool deck area while maintaining the 6 feet social distance guideline, including 3 feet wide walking paths.
 - Dugouts, benches, and bleachers are allowed to open only if they can be thoroughly cleaned before and after every use, and 6 feet of distance can be maintained.
 - Install visual social distancing markers to encourage customers to remain 6 feet apart (*e.g.*, the entrance to the facility, locker rooms, class spaces, fan areas).

School Reopening Guidance

The School Reopening Guidance includes multiple requirements regarding maintaining appropriate social distancing in schools. Such social distancing requirements perforce will impact the number of individuals who can safely gather in one place simultaneously. These requirements include the following:

- Review building space and reconfigure available classroom space, such as gymnasiums and auditoriums, to maximize social distancing, consistent with public health guidelines in place at that time.
- Maximize social distancing between student workstations, achieving 6 feet when feasible, when determining the classroom layout. Desks should face in the same direction (rather than facing each other), or students should sit on only one side of tables, spaced apart.

- In conjunction with the considerations outlined [in the School Reopening Guidance] concerning classroom and hallway social distancing rules, assist staff and students to maintain social distancing between individuals to reduce the transmission of the virus per the public health guidelines at that time.
- Be prepared to adjust the approach to social distancing if guidance from the CDC or DPH changes due to shifting public health data or evolving understanding of COVID-19 disease, including transmission.
- Follow all CDC, state, and local guidelines related to social distancing and disinfecting areas and equipment used for physical education and physical activity, including recess.

In addition, the School Reopening Guidance provides, in relevant part, the following “guidance” (not requirements) concerning physical education and physical activity. Notably, such guidance includes adhering to “restrictions on gatherings” and consulting guidance provided by the CIAC:

- Provide physical education through a combination of in-classroom instruction and activities tailored according to available spaces, restrictions on gatherings, and use of shared equipment.
- Match the instructional design to the available space; use stations, marked off areas, and staggered participation to ensure separation and distancing between students during activities.
- Plan for regular cleaning and disinfecting of all indoor and outdoor facilities, playscapes, and equipment between use by students.
- For further considerations on interscholastic athletics and activities, consult the guidance provided by CIAC.

DPH Guidance

See <https://portal.ct.gov/DPH/Communications/Guidance/General-Guidance-for-Youth-and--Amateur-Sport-Activities-during-COVID-19-Pandemic>.

The DPH Guidance provides, in relevant part, the following guidance regarding interscholastic sporting activities:

The ability to operationalize and ensure compliance with appropriate mitigation strategies in a way that does not introduce additional safety risks or unintended consequences to health are other important factors that should be considered and applied to decision-making for various sports, in consultation with sports

medicine professionals. Some of these mitigation strategies include (but are not limited to):

- Moving indoor activities outdoors and keeping individuals in small cohorts
- Increasing and maintaining the distance between participants
- Implementing rule changes that reduce the number, frequency, duration, and/or exertional level of person-to-person physical contact
- Limiting the sharing of equipment without appropriate cleaning and disinfection
- Adding face covering masks that completely cover the nose and mouth to the required equipment for players and coaches

The DPH Guidance also provides recommendations for the operation of various sporting activities for different sports based on the designated level of risk associated with such sports (*i.e.*, “lower risk sports,” “moderate risk sports,” and “higher risk sports”). There are different recommendations for different “tiers” of activities depending on the sport involved. The activity tiers applicable to sporting events include:

- **Tier 3:** Interscholastic or in-state contests, meets, and tournaments.
- **Tier 4:** Interscholastic or other contests between teams from different states (particularly states on the Connecticut Travel Advisory List).

The DPH Guidance advises that “[i]n all cases indoor activities should be limited to group sizes of 10 or less with appropriate mitigation strategies for indoor settings in place (face coverings if practical and safe, 6 ft or more distancing, etc.).”

QUESTION TWO (OUT-OF-SEASON RULES):

“Traditionally, CIAC rules would prohibit a school coach from coaching more than 6 football players on a non-school sanctioned team, out-of-season. However, because the CIAC currently does not have a scheduled football season for 2020-2021, there is no ‘out-of-season’ rule that can be violated. Would you recommend that although this anomaly has identified a loophole in the CIAC out-of-season coaching rule, schools should adhere to best practice and past precedent of the spirit of that rule, especially considering that a regular season is scheduled for 2021-2022?”

ANSWER:

The premise of the question is that “because the CIAC currently does not have a scheduled football season for 2020-2021, there is no ‘out-of-season’ rule that can be

violated.” As described below, we do not believe the current circumstances have identified a loophole in CIAC’s rules. Rather, the current status of football is out-of-season, and therefore the out-of-season rules should apply.

Section 1.0 of Article XII, IN SEASON/OUT-OF-SEASON RULES, sets forth the rules that apply “DURING AUTHORIZED CONTEST SEASON,” -- *i.e.* “In-Season Rules.” Section 2.0 of Article XII sets forth the rules that apply “OUT OF SEASON (BOTH DURING THE SCHOOL YEAR AND DURING THE SUMMER).” Therefore, the rules appear to be binary: either we are operating during an “authorized contest season” (“in-season”), or we are operating “out-of-season” (either during the school year or during the summer).

Given that there is no “authorized contest season” for football this fall, we must performe be “out-of-season.” The out-of-season period can be viewed in reference to the next in-season period, whether such period takes place in the fall of 2021 (as currently planned), or at some other time. Given that we are in an out-of-season period, the out-of-season rules would apply. Inferring a third status not contemplated under the existing rules would have the unintended consequence of permitting coaches and athletes to act in any manner they choose during this intervening period between seasons, which actions may be contrary to the purpose and spirit of CIAC’s existing rules.

Even if we assume that the out-of-season rules apply, CIAC may choose to waive or amend certain of such rules on a temporary basis in light of these unique circumstances, including the rule prohibiting a school coach from coaching more than six football players on a non-school sanctioned team. There may be sound reasons to grant such waivers or make such amendments. However, any such waivers or amendments should be effectuated on a case-by-case and temporary basis, with the assumption being that all out-of-season rules remain in effect unless CIAC decides otherwise.

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We hope this information is helpful. Please feel free to contact us with additional questions. Thank you.