NOTES

We, The Parents and Participant, Promise Not to Sue . . . Until There is an Accident. The Ability of High School Students and their Parents to Waive Liability for Participation in School-Sponsored Athletics

We, the undersigned father and mother or guardian(s) of [name of student] a minor, do hereby consent to his/her participation in voluntary athletic programs and do forever RELEASE, acquit, discharge and covenant to hold harmless the [town], a municipal corporation of the [state], and its successors, departments, officers, employees, servants, and agents, of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses and compensation on account of, or in any way growing out of, directly or indirectly, all known and unknown personal injuries or property damage which we/I may now or hereafter have as the parent(s) or guardian(s) of said minor, and also all claims or right of action for damages which said minor has or hereafter may acquire, either before or after he/she has reached his/her majority resulting or to result from his/her participation in the [town] Public Schools athletic programs; FURTHERMORE, we/I hereby agree to protect the [town] and its successors, departments, officers, employees, servants and agents against any claim for damages, compensation or otherwise on the part of said minor growing out of or resulting from injury to said minor in connection with his/her participation in the [town] Public Schools voluntary athletic programs . . . .

1. ATHLETIC PARENTAL CONSENT, RELEASE FROM LIABILITY AND INDEMNITY AGREEMENT, Medfield Pub. Sch., Medfield, Mass. (Sept. 2002) (on file with author, also available from the Athletic Director’s Office at Medfield High School). Below the Release is a “Risk Acknowledgement and Consent to Participate” paragraph which reads:

I understand that any sport is an inherently dangerous activity and that there are genuine and serious risks to anyone who engages in this activity. Due to the nature of sport and physical activity, I understand that the risks involved include, without limitation, a full range of injuries, including catastrophic injury resulting in permanent paralysis, brain injury or death.

I knowingly assume responsibility for any and all such risks and such injuries. In furtherance thereof, I do hereby voluntarily choose to allow my child to participate in [town] High School Athletics and accept the risks as a condition of his/her participation . . . .

My signature below indicates that I have read this entire document and understood it completely.

Id. (emphasis altered). The form requires a student signature, and, if the student is under eighteen, a parent or
I. INTRODUCTION

Across the country, parents and their children sign waivers for the children to participate in many activities, including field trips, clubs, and sports. If a parent refuses to sign these forms, the provider often prevents the student from participating in the event or activity. Schools support waivers because they can minimize costs behind school-sponsored activities, and waivers often preclude parents from suing the school for their child’s injuries.

Approximately seven million American students engage in some type of interscholastic sport during the school year, and these students often injure themselves. Despite the large number of injuries each year, injured players and their parents rarely sue to recover damages from the school. Some legal scholars suggest that parents and students, unfamiliar with their legal rights, sign waivers and do not sue because they believe the waivers are valid.

In 2002, two state supreme courts rendered conflicting decisions on the effect of parent-signed waivers. In April, the Massachusetts Supreme Judicial Court (SJC) held enforcing parent-signed releases furthered the State’s public policy of encouraging youth athletic participation. Two months later, the Colorado Supreme Court held, as a matter of public policy, that parents cannot release their child’s prospective claims for negligence.

2. Richard B. Malamud & John E. Karayan, Contractual Waivers for Minors in Sports-Related Activities, 2 MARQ. SPORTS L.J. 151, 152 (1992) (describing organizations and events requiring parents to sign waivers). With a few exceptions, courts and providers use the terms “waiver,” “exculpatory clause,” and “release” interchangeably, and this Note will use them accordingly. See id. at 154 n.16.


4. Malamud & Karayan, supra note 2, at 155-56 (listing purpose of waivers); Murr, supra note 3, at 114 (noting design of waiver language to protect school from liability).


6. Id. at 350 (highlighting general reluctance to sue).

7. Id. (listing reasons parents or students do not sue); see Malamud & Karayan, supra note 2, at 165 (discussing inclusion of misleading indemnity clauses causing belief injured child cannot sue); Michael E. Sacks, Waiver of Liability Ineffective Against Minor, PA. L. W.K.Y., Nov. 16, 1998, at 1 (noting “surprisingly little law on subject”). Indemnity clauses and agreements are “closely akin” to exculpatory statements. Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10 (Wash. 1992) (distinguishing indemnity agreements from releases). In a sports context, both clauses attempt to shift responsibility for negligence, so courts construe them using the same legal principles. Id. This Note treats indemnification clauses and exculpatory clauses together because an indemnification clause attempts to shift responsibility, usually to the injured party, and, therefore, often produces the same result as an exculpatory clause. See id.


10. Cooper, 48 P.3d at 1231 (holding state public policy affords minors significant protections).
This Note will examine whether the inconsistent Massachusetts and Colorado holdings, based on elemental analysis and public policy, are reconcilable.\textsuperscript{11} First, this Note will examine the general principles of recovery for injury due to negligence and the defenses schools raise, including assumption of risk.\textsuperscript{12} Additionally, this Note will focus on the purpose, requirements, and enforceability of waivers on adults and high school students, and the effect of public policy on recovery for injuries due to negligence.\textsuperscript{13} This Note further analyzes the decisions and reasoning of other courts faced with situations regarding student participation in school-sponsored activities.\textsuperscript{14} This Note concludes with commentary on how waivers will affect future student participation in athletics.\textsuperscript{15}

II. HISTORICAL BACKGROUND

A. General Principles of Recovery for Injuries Due to Negligence

When students injure themselves while participating in a school athletic program, their parents, either separate from, on behalf of, or with their child, may sue the teacher, coach, school board, school district, or other entity for negligence.\textsuperscript{16} A prima facie case for negligence requires the court to find four elements to impose liability: a duty to exercise care for the safety of the student; a breach of the duty of care through a negligent act or omission; an injury to the student; and a proximate cause connection between failure to exercise care and the student’s injury.\textsuperscript{17}

\textsuperscript{11} See infra Part III.
\textsuperscript{12} See infra Parts II.A, B.
\textsuperscript{13} See infra Part II.C.
\textsuperscript{14} See infra Part II.D.
\textsuperscript{15} See infra Part IV.

\textsuperscript{17} Bjorklun, supra note 5, at 351 (listing elements of negligence). A duty obligates one person to adhere to a standard of reasonable conduct to protect another person from unreasonable risk of harm. Henderson, supra note 16, at 13-14 (defining duty in negligence cases); see El-Halees, 2002 Cal. App. Unpub. LEXIS 8124, at *5 (describing requirements for showing of negligence); Socorro v. City of New Orleans, 579 So. 2d 931, 938-39 (La. 1991) (listing requirements for duty-risk analysis); Mark Seiberling, Casenote, “Icing” on the
Coaches and others involved with students must ensure a safe environment for their students and aim to eliminate negligence in school athletics. In school athletic programs, students ought to have proper instruction and supervision, safe facilities and equipment, proper medical attention, and appropriate competition. In addition, teachers charged with the duty of protecting students must exercise the amount of supervisory care appropriate for the child’s age and the situation involved.

B. Defenses to Claims of Negligence: Assumption of Risk

When students or parents sue, school personnel raise affirmative defenses to try to exonerate blame or mitigate damages. School representatives often claim they are not liable for damages because the athletes assumed the risk of injury. Jurisdictions recognizing assumption of risk allow school officials to prove that athletes accept the risk either impliedly through their conduct or explicitly by signing the waiver or release.


19. Bjorklun, supra note 5, at 351 (describing owed duties to participant in school athletics); see Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 820 (1996) (stating party controlling activity may have duty of care to provide safe environment). It is not unreasonable, however, to require a student to challenge themselves beyond their current level of ability. Allan, 59 Cal. Rptr. 2d at 820-21. But see Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 204 (Ohio 1998) (acknowledging coaches cannot completely prevent unauthorized activity from which injuries may result).

20. Henderson, supra note 16, at 15 (explaining care required from school personnel); see El-Halees, 2002 Cal. App. Unpub. LEXIS 8124, at *7 (stating coach owes duty to student not to increase inherent risks in particular sport); Allan, 59 Cal. Rptr. 2d at 818 (stressing provider owes duty not to increase risks beyond those inherent).


22. El-Halees v. Chausar, No. A095954, 2002 Cal. App. Unpub. LEXIS 8124, at *7 (Aug. 28, 2002) (recognizing assumption of risk common in athletic injury cases); Scott, 834 P.2d at 12-14 (developing assumption of risk as defense); Wagenblast, 758 P.2d at 974 (examining assumption of risk as bar to recovery); Bjorklun, supra note 5, at 354 (setting forth assumption of risk defense). An assumption of risk defense precludes the student from recovery because of the premise that the student completely understood the risk of harm and voluntarily chose to accept it. Bjorklun, supra note 5, at 354. Assumption of risk acts as a total bar to recovery because it removes the duty of the caretaker to the participant. Henderson, supra note 16, at 17-18. If the provider does not owe a duty to the participant, there can be no negligence. Id. Whether an instructor owes a duty to the participant can depend on the nature of the activity or the sport. El-Halees, 2002 Cal. App. Unpub. LEXIS 8124, at *7 (noting importance of relationship between parties and activity).

23. Bjorklun, supra note 5, at 354-55 (stating courts do not always accept assumption of risk); see also Scott, 834 P.2d at 12-14 (rejecting assumption of risk defense because participant neither expressly nor
Implied assumption of risk requires courts to find three elements. The student must have had actual knowledge of the danger associated with participation, understood and appreciated the risk of participating, and voluntarily accepted the risk of injury. Courts do not hold minors and adults to the same standard of care. The standard of care for minors compares a child to one in similar circumstances, varying according to age and experience. Risks inherent and ordinary in a particular sport and unassociated with any negligence of school personnel permit a defense of assumption of risk.

Express assumption of risk alleviates a party’s duty of care when a participant makes an oral or written statement by which he agrees to accept the risk of harm. The most common forms of express assumption of risk are waivers or releases. Courts use four factors to determine whether a participant has expressly agreed to assume the risk. Express assumption of the risk requires that the participant agreed in advance, and had knowledge, full subjective understanding, and voluntary acceptance of the risk. Generally, courts favor freedom of contract principles and will uphold voluntary contracts that include a clause shifting responsibility from one party to another.
some cases, however, public policy reasons, such as preserving a duty of care, outweigh the allegiance to freedom of contract.\textsuperscript{34}

\section*{C. Discussion of Waivers}

\subsection*{1. Purpose of Waivers}

School waivers may appear to waive all legal rights against the school and establish the participant’s obligation to both indemnify and defend the school if a claim arises.\textsuperscript{35} Waivers and releases, also known as exculpatory clauses, are contractual in nature.\textsuperscript{36} A waiver reduces costs of the provider by shifting liability to the participant.\textsuperscript{37} Waivers ensure the viability of smaller schools and private sports programs by passing the risk and cost of injury to the families.\textsuperscript{38} Costs of litigation and damage awards can devastate both public and private organizations.\textsuperscript{39} For this reason, schools can prohibit children from participating in activities when parents refuse to sign a waiver or attempt to

\begin{itemize}
\item Scott, 834 P.2d at 11 (noting instances when public policy trumps freedom of contract); Arango & Trueba, supra note 33, at 3 (describing strong policy considerations to protect individual from harm); Henderson, supra note 16, at 18 (highlighting public policy reasons for invalidating waivers).
\item Malamud & Karayan, supra note 2, at 154 (outlining purpose of waivers).
\item Malamud & Karayan, supra note 2, at 156 (highlighting purpose of waiver). The costs the provider seeks to reduce can be from insurance and litigation. \textit{Id.} at 155-56.
\item Murr, supra note 3, at 115 (recognizing cost of sport programs necessitate passing risk to participants).
\item Malamud & Karayan, supra note 2, at 155 n.22 (describing damaging costs of litigation); see Murr, supra note 3, at 115 (recognizing waivers minimize expense of financing sports by reducing cost of insurance). Waivers ensure the viability of sports programs in small and public organizations. Murr, supra note 3, at 115; see Fischer v. Rivest, No. X03CV000509627S, 2002 Conn. Super. LEXIS 2778, at *14 (Aug. 15, 2002) (noting agreement allowed Club to offer affordable recreation without overwhelming costs of litigation). The court in \textit{Fischer} stated that, although thousands of children benefit from recreational and sports activities, those programs are decreasing due to limited financial and tax support. Fischer, 2002 Conn. Super. LEXIS 2778, at *18 (quoting Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647 (Ct. App. 1990)).
\end{itemize}
strike offending clauses in the waiver.\footnote{Murr, supra note 3, at 115 (stating clauses offered in take-it-or-leave-it manner); see Beehner v. Cragun Corp., 636 N.W.2d 821, 828 (Minn. Ct. App. 2001) (emphasizing lack of negotiation not enough to ban waiver on public policy grounds); Malecha v. St. Croix Valley Skydiving Club, 392 N.W.2d 727, 732 (Minn. Ct. App. 1986) (Randall, J., dissenting) (postulating boilerplate contracts leave injured parties with no recourse); Recent Case, supra note 33, at 729 (recognizing children often cannot participate without signed waiver).}

\section*{2. Requirements for Waivers to be Valid}

Most jurisdictions do not have case law regarding sports waivers.\footnote{See, e.g., Fischer, 2002 Conn. Super. LEXIS 2778, at *12 (stating enforceability of exculpatory contract not previously considered by state appellate court); Sharon v. City of Newton, 769 N.E.2d 738, 740 (Mass. 2002) (noting sports waiver question one of first impression in Massachusetts); Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 969 (Wash. 1988) (noting legality of releases question of first impression). Some states apply the case law from general exculpatory agreements to sports waivers. Simmons, 670 F. Supp. at 141-42 (outlining Pennsylvania law regarding exculpatory agreements). Existing law on school sports waivers is unclear because many jurisdictions lack statutes or common law in the area. Murr, supra note 3, at 114 (suggesting schools recognize viability of releases in their jurisdictions).} Courts that have dealt with the issue of sports waivers evaluate their validity by first reviewing the waiver’s language, requiring a clear and unequivocal statement of what liability the form purports to waive.\footnote{Miller, supra note 36, at 86 (noting requirement of clear language in waiver).} Other determinative factors include whether the exculpatory agreement is against public policy and whether the releaser knew and understood the assumed risk.\footnote{Seiberling, supra note 17, at 429 (recognizing agreements invalidated for public policy reasons, print size, and ambiguous language).}

Waivers pertaining to school athletic participation should initially inform the parents of the risk involved in the activity, emphasize that an element of risk is inherent in all athletics, and warn that the school cannot guarantee the child will remain injury-free.\footnote{Henderson, supra note 16, at 33-34 (stating requirements for athletic permission slips).} The form should also request health information and a health verification statement from a family physician that the student is physically able to participate.\footnote{Henderson, supra note 16, at 33-34 (describing medical certification recommended for permission slips).} Finally, the release should request permission for the child to participate and travel to athletic competitions.\footnote{Henderson, supra note 16, at 33-34 (outlining athletic permission slip requirements). The parents also need to understand that the student must adhere to all rules, regulations, and instructions; otherwise the school providers could prevent the child from participating. Id.}

\section*{3. Enforceability of Waivers on Adults}

An adult is generally free to contractually waive liability for another’s negligence.\footnote{Bjorklun, supra note 5, at 357 (describing freedom of contract). Accordingly, most courts generally enforce waivers of sports-related activities against adults. Murr, supra note 3, at 114 (noting applicability to adults); see Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11 (Wash. 1992) (adhering to Washington law} Courts, therefore, will uphold a waiver if the language is clear, it
does not violate public policy, or participants knowingly and voluntarily waived their rights.\textsuperscript{48} Most legislatures have not addressed the validity of waivers in sports activities, even though they have enacted statutes explicitly permitting waivers in other areas.\textsuperscript{49} Therefore, most law regarding athletic waivers comes from courts.\textsuperscript{50}

A court will uphold a waiver if participants knowingly and voluntarily waived their rights.\textsuperscript{51} A release must be unambiguous in releasing a party of liability for negligence.\textsuperscript{52} Most courts look to the “four corners of the instrument” to determine the intent of the parties and the waiver’s effect.\textsuperscript{53} Courts, however, will not require the participant to read the document, noting a waiver is valid if the party has adequate opportunity to read the document but

allowing adults to waive liability); Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 970 (Wash. 1988) (stating exculpatory releases generally accepted as consistent with public policy).

\textsuperscript{48} Malamud & Karayan, supra note 2, at 159 (emphasizing conditions when waivers invalid). Waivers are also invalid in adhesion contracts, when a party of superior bargaining strength drafts and imposes the terms without negotiation. Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 824 (Cal. App. 1996) (defining contracts of adhesion).

\textsuperscript{49} Malamud & Karayan, supra note 2, at 158 (describing legislative action in waivers). For example, in the Uniform Commercial Code (UCC), Congress allows parties to waive consequential damages unless it would be unconscionable. \textit{Id.} In Article 2, the UCC says disclaimers of consequential damages for personal injury are prima facie unconscionable. \textit{Id.} Workers compensation law provides strict limits on what injured employees can recover in exchange for employers giving up the ability to protect themselves with waivers. \textit{Id.}

\textsuperscript{50} Malamud & Karayan, supra note 2, at 158 (noting courts more active in addressing waiver validity); see Scott, 834 P.2d at 9-10 (tracing cases addressing exculpatory clauses); Wagenblast, 758 P.2d at 969 (emphasizing case of first impression on validity of parental waivers).


\textsuperscript{52} Malamud & Karayan, supra note 2, at 159 (observing waiver must be clear and unambiguous on its face). Some courts have invalided waivers for lack of prominent language, disclosure, or adequate explanation. \textit{Id.;} see Fischer v. Rivest, No. X03CV0005096278, 2002 Conn. Super. LEXIS 2778, at *34 (Aug. 15, 2002) (stating ambiguity emanates from language of contract rather than subjective interpretation of contract); Malecha v. St. Croix Valley Skydiving Club, 392 N.W.2d 727, 729 (Minn. Ct. App. 1986) (finding only one reasonable interpretation of lengthy agreement); Turnbough v. Ladner, 754 So. 2d 467, 469 (Miss. 1999) (requiring clear and precise language of exculpatory agreement); Scott, 834 P.2d at 9 (recognizing clauses must be clear). A release does not need to be perfect, as long as it is “clear, unambiguous and explicit” in releasing a party from negligence. \textit{Fischer,} 2002 Conn. Super. LEXIS 2778, at *38.

\textsuperscript{53} Malamud & Karayan, supra note 2, at 159 (observing courts look to party’s intent). The word “negligence” need not be included in the waiver if the intent of the parties was to waive all liability. \textit{Id.;} see Scott, 834 P.2d at 10 (asserting “negligence” not essential to effectiveness of release); \textit{see also United States v. Seckinger,} 397 U.S. 203, 211-12 (1970) (approving rule for determining whether waiver valid). The \textit{Seckinger} Court said,

\textit{[A} contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties . . . . \textit{[T}he mutual intention of the parties to this effect should appear with clarity from the face of the contract.

chooses not to.54

4. Enforceability of Waivers on Minor Students

When adults enter into exculpatory agreements, courts usually allow such transactions to occur.55 Courts are reluctant, however, to allow those with a duty of exercising reasonable care towards school-aged children to remove their obligation by contract when children are engaged in risky activities like sports.56 When parents sign releases on behalf of or in addition to their minor child, courts have split on whether the waiver bars the parent’s claim of action.57

Although a minor can sign a waiver, contract law allows minors to disaffirm contracts any time before or within a reasonable period after reaching the age of majority, unless the child contracts for necessities.58 Most courts have not categorized athletics as a necessity.59 Regardless of this classification, many

54. Malamud & Karayan, supra note 2, at 160 & n.45 (citing Dixon v. Manier, 545 S.W.2d 948, 949 (Tenn. Ct. App. 1976)); see Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 824 (Ct. App. 1996) (recognizing one cannot avoid contract impact by claiming he did not read it before signing); Fischer, 2002 Conn. Super. LEXIS 2778, at *31 (holding contents of waiver imputed if person negligently fails to read); Malecha, 392 N.W.2d at 731 (stating court upholds waiver regardless of whether Malecha read agreement before signing); Craig, 1997 Wash. App. LEXIS 907, at *11 (recognizing person who signs without reading plain and unambiguous instrument bound by its terms).

55. See supra Part II.C.3 (describing waivers with regard to adults).


57. See Simmons, 670 F. Supp. at 142 (holding mother’s cause of action barred by signed exculpatory agreement); Scott, 834 P.2d at 10 (determining parent cannot waive child’s cause of action, but can waive own claim).

58. Simmons, 670 F. Supp. at 142 (reiterating longstanding common law rule minors may disaffirm contracts); Bjorklun, supra note 5, at 357 (outlining minor’s ability to disavow contract); Malamud & Karayan, supra note 2, at 170-71 (describing minor contract principles); Miller, supra note 36, at 84-85 (observing agreements with minors have little binding effect); Murr, supra note 3, at 117 (stating guidelines for minors in contract law). Necessities include food, shelter, clothing, and education. Malamud & Karayan, supra note 2, at 170-71; Murr, supra note 3, at 116. In exculpatory clauses, a necessary or public service is “a service subject to public regulation or of practical necessity for some members of the public.” Beehner v. Cragun Corp., 636 N.W.2d 821, 828 (Minn. Ct. App. 2001) (noting contract for recreational services and not necessaries); see Allan, 59 Cal. Rptr. 2d at 825 (stating athletic and recreational pursuits beneficial but not essential activities). But see Malamud & Karayan, supra note 2, at 171 n.133 (recognizing minors have ability to waive constitutional rights). Minors, for example, can waive their Fifth Amendment rights if the waiver is “knowing and intelligent.” Id. (citing People v. Lara, 62 Cal. Rptr. 586 (1967)).

59. Bjorklun, supra note 5, at 357. Scholars argue that if sports were a necessity, schools would require all students to participate. Murr, supra note 3, at 119 (deeming participation voluntary); see Beehner, 636 N.W.2d at 828 (declaring horseback riding not necessity); Malecha, 392 N.W.2d at 730 (holding Skydiving Club’s service not “public or essential”); cf Adam A. Milani, Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports, 49 ALA. L. REV. 817, 826 (1998) (identifying judicial split whether sports considered major life activity under Americans with Disabilities Act). Although intercollegiate sports could be
school sports programs require liability waivers from children before participation.60

Some school athletic programs attempt to cure the problem of contracting with minors by requiring a parent or guardian’s signature.61 In most cases, however, a parent’s signature does not constitute a waiver of liability for the student’s own claims of negligence.62 Despite these results, schools continue to include exculpatory language, hoping the waiver will restrict the rights of both children and parents.63

5. Public Policy Effect on Waivers

Courts typically recognize waivers as promoting public policy.64 Without waivers, a number of dangerous sports activities would not exist.65 Most courts

the major learning activity for some students, it is not by itself a major life activity. Milani, supra, at 834-35. But see Wagenblast, 758 P.2d at 972 (arguing interscholastic sports necessity); Milani, supra, at 849 (quoting mission statement of national athletic association). According to the National Athletic Association, athletics is an integral part of the school educational program, providing unique experiences. Milani, supra, at 849. Additionally, athletics develop a child’s knowledge, skills, and emotions and will help children develop into better citizens. Id.

60. Malamud & Karayan, supra note 2, at 164 (noting some providers require student waivers). Normally providers only require parents to sign the waivers, but some forms also require student signatures. Id.

61. See, e.g., Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1231 (Colo. 2002) (noting parent and participant signed release); Sharon v. City of Newton, 769 N.E.2d 738, 744 (Mass. 2002) (noting parent and student signatures); Scott, 834 P.2d at 8 (highlighting parent signature in application); Wagenblast, 758 P.2d at 969 (recognizing requirement of parent or guardian signature to limit school liability).

62. Simmons, 670 F. Supp. at 143 (finding mother’s release did not excuse defendants from minor’s potential claims); Meyer v. Naperville Manner, Inc., 634 N.E.2d 411, 414 (Ill. App. Ct. 1994) (holding parent cannot release child’s cause of action). The Meyer court held that no reasoning existed to allow a parent to release a child’s claims before an injury because statutory or judicial authority is necessary to waive claims after the injury. Meyer, 634 N.E.2d at 414; see Scott, 834 P.2d at 11 (concluding allowing pre-injury release would be nonsensical because post-injury release not allowed); Bjorklun, supra note 5, at 357 (noting parental signature does not waive child’s rights). Under express assumption of risk, some courts honor parental waivers as to the parent’s claims. Simmons, 670 F. Supp. at 142 (holding mother’s, not child’s, cause of action barred by exculpatory agreement). But see Fischer v. Rivest, No. X03CV000509427SS, 2002 Conn. Super. LEXIS 2778, at *28-30 (Aug. 15, 2002) (explaining state public policy supports releases signed by parent and student); Sharon, 769 N.E.2d at 746 (indicating parents possess capacity to waive child’s claims of liability); Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 207 (Ohio 1998) (holding parents have authority to bind minor children to exculpatory agreements). Some states, including Texas, have statutes that specifically permit parents to waive their child’s rights. Malamud & Karayan, supra note 2, at 164 (noting Texas statute).

63. Malamud & Karayan, supra note 2, at 165 (observing court decisions have not prevented waiver language from appearing in documents). Even if the waiver is invalid, providers hope that parents and students believe in its enforceability and consequently refrain from bringing suit. Id. Some parents and students may feel bound by their word, regardless of the waiver’s validity. Id. at 172.

64. Malamud & Karayan, supra note 2, at 163 (observing public policy favors waivers). Allowing people to freely enter contracts and voluntarily shift risk promotes public policy. Id.; see Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 446 (Cal. 1963) (recognizing no policy opposes considering private voluntary releases); Murr, supra note 3, at 119 (noting school sports waivers do not violate public policy).

65. Murr, supra note 3, at 116 (recognizing need to pass any costs onto participants). If schools must purchase insurance or defend lawsuits for negligence, lack of sufficient funding may force them to cancel certain sports programs. Id. Such a result seems unfair to the students. Id.; see Fischer, 2002 Conn. Super. LEXIS 2778, at *35-39 (noting if courts did not enforce waivers, sports programs for children would cease to
deciding on whether exculpatory clauses violate public policy use the test set forth in Tunkl v. Regents of the University of California. Applying the test to sports waivers, most courts focus on the second prong that asks whether sports qualify as a public necessity. Additionally, courts view some public services as so important to the public to require a certain standard of non-negligent performance.

For public policy reasons, some courts allow sports providers to exculpate their liability for negligence against adults who sign waivers. Other courts,
however, use public policy arguments to hold exculpatory agreements void.\textsuperscript{70} An examination of the common law and legislative history in these jurisdictions reveals a long-standing history of protecting children and others from future negligent acts.\textsuperscript{71} Public policy is difficult to define, and courts seem to draft its definition on a case-by-case basis.\textsuperscript{72} Although some courts have adopted the criteria of \textit{Tunkl}, others have not agreed on a uniform test to determine when a waiver violates public policy.\textsuperscript{73}

\section*{6. Alternatives to Waivers}

Juries and courts may still use waivers to determine damages, even if the waiver is unenforceable for liability purposes.\textsuperscript{74} Schools have alternatives available if waivers for students are invalid.\textsuperscript{75} Schools can remove the sport program completely or improve and invest in the safety of the given activity.\textsuperscript{76} Another alternative is to insure the activity or the school for liability from negligence.\textsuperscript{77} All of these alternatives cost more than requiring a parent to sign a liability waiver.\textsuperscript{78}

\textsuperscript{70} See \textit{Cooper v. Aspen Skiing Co.}, 48 P.3d 1229, 1231 (Colo. 2002) (holding Colorado public policy allows parents to sign exculpatory agreements for themselves and their children); \textit{Wagenblast}, 758 P.2d at 970 (holding exculpatory clauses violate public policy); \textit{Espaldon}, \textit{supra} note 68, at 28 (recognizing agreement to release liability for negligence prior to injury against Virginia public policy).

\textsuperscript{71} See \textit{Wagenblast}, 758 P.2d at 975 (noting legislature held school districts accountable for negligence since territorial days).

\textsuperscript{72} \textit{Espaldon}, \textit{supra} note 68, at 43 (highlighting difficulty of defining public policy). Virginia courts have defined public policy as a principal of law which can limit the freedom of contract and private dealings for reasons of the public good. \textit{Id.}

\textsuperscript{73} See \textit{Recent Case}, \textit{supra} note 33, at 732 (recognizing lack of common test). For example, Idaho bans exculpatory clauses when one party is at an obvious disadvantage in bargaining or if a public duty is involved; Kansas strikes a release if it interferes with the public welfare or safety; and New Hampshire considers contracts that bargain away duty of care illegal, so it refuses to enforce any exculpatory clauses. \textit{Id.}

\textsuperscript{74} \textit{Bjorklun}, \textit{supra} note 5, at 358 (recognizing alternative use of waiver). A court can view the waiver as giving the participant full knowledge and appreciation of the risks inherent in the activity. \textit{Id.} A minor’s signature may be useful in settlement negotiations or proving a tort defense of contributory negligence in jurisdictions recognizing such a defense. See Malamud & Karayan, \textit{supra} note 2, at 172 (noting signature used in tort defense). Most states have eliminated contributory negligence as a complete bar to recovery and instead adopt a comparative negligence standard, allowing recovery based on the relative degree of fault. Henderson, \textit{supra} note 16, at 16 n.31 (outlining contributory negligence and comparative negligence); see Socorro v. City of New Orleans, 579 So. 2d 931, 941 (La. 1991) (holding old doctrine of assumption of risk in Louisiana subsumed into comparative fault system).

\textsuperscript{75} See Malamud & Karayan, \textit{supra} note 2, at 157 (describing alternatives to waivers).

\textsuperscript{76} Malamud & Karayan, \textit{supra} note 2, at 157 (acknowledging schools can withdraw or invest in safety). The cost of making an activity injury-free may be too high for a school to bear. \textit{Id.} It is impossible to make any sport injury-free. \textit{Id.}

\textsuperscript{77} Malamud & Karayan, \textit{supra} note 2, at 157 (describing insurance as third way to shift risk). Hurdles include the availability and affordability of insurance. \textit{Id.}

\textsuperscript{78} Malamud & Karayan, \textit{supra} note 2, at 157 (noting cost of all alternatives).
D. Waivers in School-Sponsored Sports, Representative Cases

1. Wagenblast v. Odessa School District\textsuperscript{79}

In 1988, the Washington Supreme Court held public schools could not enforce releases required as a condition of student participation in school-sponsored athletic activities.\textsuperscript{80} The court acknowledged that although parties may sign releases, there are public policy reasons for voiding them.\textsuperscript{81} The court found that the waiver for participation in a public school interscholastic activity violated all six \textit{Tunkl} factors.\textsuperscript{82} Exculpatory clauses in Washington, therefore, are not effective against a minor or a parent who signs the form.\textsuperscript{83}

In 1992, \textit{Scott v. Pacific West Mountain Resort}\textsuperscript{84} revisited \textit{Wagenblast}.\textsuperscript{85} The Supreme Court of Washington reconsidered whether parents have legal authority to waive a child’s future cause of action for injuries resulting from negligence.\textsuperscript{86} The court held that parents are unable to waive their child’s future claims for negligence.\textsuperscript{87} Although this decision did not overrule \textit{Wagenblast}, the \textit{Scott} court did not examine the exculpatory agreements using

\textsuperscript{79} 758 P.2d 968 (Wash. 1988).

\textsuperscript{80} Id. at 970 (holding exculpatory agreements for future negligence violate public policy). \textit{Wagenblast} consisted of two consolidated cases in which the Supreme Court of Washington answered, upon certification, the question of whether required releases for school-related activities were lawful. Id. at 969 (presenting question for certification before court).

\textsuperscript{81} See infra note 82 (highlighting public policy reasons); see also \textit{Wagenblast}, 758 P.2d at 970 (citing Prosser & Keeton and exculpatory agreements). The court recognized certain cases that are exceptions to the general freedom of contract rule. Id. Prior decisions had not developed clear standards of review for evaluating whether a particular situation qualified as an exception. Id. at 971. Desiring a uniform application, the court adopted the \textit{Tunkl} test. Id. (citing \textit{Tunkl} v. Regents of the Univ. of Cal., 383 P.2d 441, 444-46 (Cal. 1963)) (outlining public policy test).

\textsuperscript{82} \textit{Wagenblast}, 758 P.2d at 971 (finding all \textit{Tunkl} characteristics present). The court recognized the intense self-regulation of interscholastic sports and noted several factors: public importance of sports; open nature of the program to all students who meet certain skill and eligibility standards; lack of alternative programs for interested public school students; requirement of the release form for participation; and the school’s control over the student athlete. Id at 972-74 (applying facts of case to \textit{Tunkl} analysis).

\textsuperscript{83} \textit{Wagenblast}, 758 P.2d at 970 (holding exculpatory clauses against public policy). The \textit{Wagenblast} court recognized that finding all six \textit{Tunkl} factors is not necessary to invalidate an exculpatory clause. Id. at 971. The more factors that a court finds, the more likely the court will invalidate the clause. Id.

\textsuperscript{84} 834 P.2d 6 (Wash. 1992).


\textsuperscript{86} \textit{Scott}, 834 P.2d at 10. In \textit{Scott}, the twelve-year-old child had sustained severe head injuries while skiing at a commercial ski resort. Id. at 8. His mother, with his father’s knowledge, completed and signed an application to the ski school that allegedly released the school from any liability due to negligence. Id. Recognizing that a skier impliedly assumes certain risks by engaging in the sport, the court remanded the case for a decision on whether the injury was due to inherent or unnecessary dangers. Id. at 15.

\textsuperscript{87} Id. at 10 (recognizing parents cannot release another for negligent acts injuring their child). The court examined the clarity of the release’s language and held that the language showed the intent to shift the risk of loss. Id. at 9. The court concluded that because a parent cannot waive a child’s claim after an injury, the parent also could not release a child’s claim pre-injury. Id. at 11-12.
the Tunkl public policy factors.88

2. Childress v. Madison County89

Using contract principles, the Court of Appeals of Tennessee invalidated a waiver as to the child-participant, but upheld the waiver against the parent.90 The mother signed the release form acknowledging that her son was participating in Special Olympics training exercises at his own risk, and she agreed to release, discharge, and indemnify the Special Olympics from liability for injury to her son.91 Although she thought she was signing a permission slip, the court found she had adequate notice of the exculpatory clause.92 The appellate court ruled that, as a matter of law, a parent cannot waive a child’s rights.93

3. Zivich v. Mentor Soccer Club, Inc.94

In 1998, the Supreme Court of Ohio upheld an exculpatory agreement a parent signed on behalf of her son.95 Rejecting the analysis from Tunkl, the

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88. Wagenblast, 758 P.2d at 971-73 (analyzing Tunkl public policy factors); Purdy, supra note 85, at 464 (criticizing Scott for failing to follow precedent). Although courts often try to establish consistent approaches when it comes to public policy decisions, the Scott court failed to provide guidance for future causes of action. Purdy, supra note 85, at 466 (noting goal of court to establish clear guidelines undermined by decision).
89. 777 S.W.2d 1 (Tenn. Ct. App. 1989).
90. Id. at 6-7 (holding indemnity provisions parent executed prior to cause of action invalid). The child, Todd, participated in Special Olympics training at the Y.M.C.A. Id. at 2. At the end of one of the training sessions, the lifeguard noticed Todd at the bottom of the pool. Id. The lifeguard retrieved him and resuscitated him, and an ambulance took him to the hospital. Id. His parents brought suit for negligence both individually and on behalf of Todd. Id.
91. Id. at 5 (detailing agreement purporting to release, discharge, and indemnify Special Olympics from liability). Only the mother signed the form. Id. at 6. The court held that the mother would have to compensate the father because he did not sign the form. Id. In addition, even if Todd had signed the form, his status as incompetent would have rendered his signature invalid. Id. The mother, however, could not waive Todd’s claim because a parent needs court approval or statutory authority to waive claims of an incompetent or infant child. Id.
92. Id. The court held that the clear and unambiguous language sufficed as notice, either actual or constructive. Id. Failure to read, the court held, does not constitute lack of notice. Id.
93. Childress, 777 S.W.2d at 7. Although the student did not sign the waiver, the court stated his mental handicap rendered him incompetent and, therefore, a minor in the context of contractual abilities. Id. at 7; see Malamud & Karayan, supra note 2, at 168 (noting ability to waive student rights same for minor and incompetent children). The court concluded, “[m]inors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them.” Childress, 777 S.W.2d at 7 (quoting Khoury v. Saik, 33 So. 2d 616, 618 (Miss. 1948)).
94. 696 N.E.2d 201 (Ohio 1998).
95. Id. at 203-04 (holding public policy supports exculpatory agreement). After a youth soccer practice, the child hung on the goalpost, causing him injury when it fell on him. Id. at 204. His parents tried to argue that because the injury occurred after practice, the injury was outside the scope of the waiver. Id. The court rejected this claim, however, finding that the risk of a seven-year-old child climbing on a goal shortly after winning a game is a natural incident of participation. Id. Turning toward the public policy considerations, the court examined whether the waiver itself was valid. Id.
court did not examine whether the release violated public policy. Instead, the court examined whether public policy justifies enforcement of the exculpatory agreement. The court upheld the parental waiver, concluding that enforcement of exculpatory agreements encourages more active family involvement and furthers the overall quality and safety of activities. The court concluded that because parents can release their individual claims, they can also release claims growing out of injury to their minor children.

4. Sharon v. City of Newton

In April of 2002, the Massachusetts SJC upheld an exculpatory release a student and her parent signed. When the student was sixteen, she and her father signed a waiver for her participation in the school cheerleading program. The student sued upon reaching the age of majority, seeking to invalidate the waiver. The SJC focused on the release, concluding the school clearly labeled the waiver and the family knowingly signed it as a requirement to participate in the cheerleading program.

The SJC recognized that Massachusetts public policy favors enforcement of releases. In the absence of fraud, a person may exempt himself from any future liability he may incur as a result of his negligence. Absent such a finding, the court would not invalidate the waiver, even if the parents did not
understand what the release purported to waive. The court noted that cheerleading was not an essential service like public education, medical attention, housing, or public utilities.

The SJC also discussed whether a parent can waive a minor’s cause of action for negligence. The court conceded that minors may disaffirm most contracts they may enter before reaching the age of eighteen. If a parent signs a waiver with his child, however, the waiver is valid because the parent cannot disaffirm the contract. Upholding a waiver for a voluntary, nonessential activity is consistent with parental and student rights.

Finally, the court examined the public policy of encouraging youth sports programs. The court stated that invalidating exculpatory clauses would put a number of sports programs at risk. School sports programs are often the first victims of school budget cuts because public schools are not required to have athletic programs. Any additional costs from increased insurance would exacerbate this situation.


Just two months following Sharon, the Supreme Court of Colorado held a parent cannot waive a child’s future cause of action for negligence. Upon

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107. Id. at 743-44 (clarifying failure to read and understand contents of release does not avoid its affects). The SJC stated that the parties had ample opportunity to read and understand the waiver before signing it. Id. at 743.

108. Sharon, 769 N.E.2d at 745 (describing essential services as public education, medical attention, housing, and public utilities). If cheerleading had been an essential service, the court suggested it might offend public policy to uphold waivers for participation. Id.

109. Id. at 745-48 (discussing parent waiver of child’s claim under Massachusetts law).

110. Id. at 746 (detailing common law principles allowing minor to disaffirm contract). Although statutes have modified the common law rule, the SJC noted a minor may still generally disaffirm a contract upon turning eighteen. Id. The court stated that the reasons for this are to protect minors from their own carelessness and lack of sound judgment. Id.

111. Id. (stating parent can exercise own sound judgment on behalf of minor child). The court recognized that allowing parents to sign waivers on behalf of their child does not defeat the purpose of the waiver, protecting the child from his own carelessness. Id. Recognizing that fit parents act in the best interests of their children, when making decisions about care, custody, and upbringing, the SJC concluded that parents have a fundamental right to make those decisions on their child’s behalf. Id.

112. Sharon, 769 N.E.2d at 747 (stating court will not interfere with waivers for voluntary or nonessential activities).

113. Id.

114. Id. (emphasizing non-enforcement of waivers leads to reduction of programs due to increased costs).

115. Id. at 747 n.11 (highlighting voluntary school programs first to go in times of financial constraint).

116. Sharon, 769 N.E.2d at 747 n.11 (discussing public schools not required to offer voluntary extracurricular sports).

117. 48 P.3d 1229 (Colo. 2002).

118. Id. at 1231 (holding public policy of state precludes parent from releasing minor’s prospective claim). In Cooper, the mother of a seventeen year old ski racer signed a liability waiver, as she had for nine years, as a condition to her son competing with the Aspen Valley Ski Club. Id. The student received injuries while training for a high-speed alpine race. Id. at 1232.
turning eighteen, the student and his parents filed suit alleging negligence. The court cited the state’s strong public interest in protecting children, as reflected by legislation protecting minors and decisions from other jurisdictions. The court held that allowing parents to release a child’s future claims did not further the court’s role of protecting children’s interests.

III. ANALYSIS

Most school programs require parents and students to sign waivers releasing the school from all liability due to negligence. Schools continue to require waivers despite inconsistent court decisions regarding the validity of those releases. Courts have inconsistently defined what constitutes “public policy” for purposes of releases, leading to confusion and more inconsistency. Courts examining waivers for the first time struggle to unearth a consistent, universal standard to apply because there is no such standard. A consistent standard across jurisdictions would provide all courts with a useful framework upon which to try the facts before them.

A. Inconsistent Standards

A parent or child who disregards the waiver’s exculpatory clause and sues for injuries resulting from a sports provider’s negligence cannot accurately predict the legal result. Court rulings regarding signed exculpatory

119. Id. (recognizing age of student and nature of injuries). Colorado law allows a minor to disaffirm a contract during his minority or shortly upon reaching his majority. Id. at 1232. The court examined state public policy to determine whether a parent or guardian could release a child’s cause of action. Id. at 1232-35.

120. Id. at 1232-33 (noting significant protections precluding parents or guardians from releasing minor’s claim). The court noted that Colorado does not permit parents to waive their child’s ability to recover for tortious actions. Id. at 1233. Colorado looks out for the interests of the minor child by providing significant procedural protections; for example, Colorado protects the child from parental actions that may foreclose the child’s right to recovery. Id. at 1233-34.

121. Cooper, 48 P.3d at 1235 (recognizing duty of courts to protect children). This decision does not go against the fundamental right of parents to make decisions regarding “the custody, care, and control of their children.” Id. at 1235 n.11. The court stated that a parent’s release of liability does not serve fundamental rights of establishing a home, bringing up children, and directing the children’s upbringing. Id. All court decisions noting the fundamental right of parents have also acknowledged the right of the state to restrict parental control in order to protect a child’s welfare. Id.

122. Supra note 3; see supra note 22 (examining assumption of risk as bar to recovery); supra notes 29-33 (outlining requirements for express assumption of risk); supra Part II.C.1 (highlighting purpose of waivers).

123. Compare supra Part II.D.1 (discussing Wagenblast and Scott’s holding public policy against waivers), and supra Part II.D.2 (stating Childress upheld waiver against parent not child), and supra Part II.D.5 (analyzing Cooper and recognizing public policy barring exculpatory agreement), with supra Part II.D.3 (recognizing Zivich upheld exculpatory agreement for policy reasons), and supra Part II.D.4 (reviewing Sharon and public policy reasons for upholdng waiver).

124. See supra part II.C.5 (setting forth public policy effect on waivers); see also supra note 82 (detailing public policy discussion in Wagenblast).

125. See supra note 41 (highlighting first impression cases discussing exculpatory agreements).

126. See supra note 73 and accompanying text (expounding upon lack of clear standard).

agreements for student athletic participants have been unpredictable absent analogous case law. Even if the court previously has decided a similar case, families are not guaranteed the same result in their cases; thus leading to more confusion and contradictory application.

Under traditional exculpatory clause analysis, courts are, unfortunately, free to interpret and weigh the claim’s merits. Courts may invalidate a waiver for public policy reasons despite satisfaction of all required elements of assumption of risk. Even the courts that choose to apply a public policy standard, however, fail to adopt a consistent and congruent method to determine whether an exculpatory clause is valid.

B. Inconsistent Public Policy Applications

Courts citing public policy in disregarding exculpatory agreements do not apply universal reasoning either. Some courts consider whether the exculpatory clause violates the imprecise standard, “public policy.” Applying the Tunkl factors, these courts balance the state’s undefined public policy interests against freedom of contract principles. If more of the Tunkl factors are present than not, the court presumes that the exculpatory clause is void for public policy reasons—without determining whether the clause violates contract law.

Other courts, however, claim to examine whether the waiver itself is valid. Relying on traditional contract principles, these courts look to the contract’s language to determine whether to uphold the release, thereby avoiding the vague determination of “public policy.” These courts do not
examine whether public policy disfavors the actual act of releasing oneself for claims of negligence liability.139 Worse than the courts with purported standards, other courts do not seem to have any structure to examinations; these courts instead claim to be evaluating the exculpatory clause for public policy reasons.140

IV. CONCLUSION

The current trend in applying inconsistent rules to determine the validity of waivers for participation in school sports programs has left courts with conflicting standards and results. Courts, under the guise of public policy, apply rules that favor the particular policy interests of the judiciary. As a result of the inconsistent standards among jurisdictions, there is little hope for consistency in the future unless the courts take proactive steps to align the reasoning.

Courts should recognize that uniform public policy interests would benefit the judicial process. As more cases of first impression arise, judges should consider the tensions other courts have previously addressed in resolving waiver questions. Realizing the detrimental effects of jurisdictional splits, courts should strive to mirror their reasoning with that of other states. Perhaps then, courts will be able to provide a consistent and reliable standard for future courts to apply.

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95-97 (emphasizing validity of waiver).
139. See supra notes 94-97 (outlining court’s analysis of waiver validity).