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Who Will Take Ownership of Florida High School Football Concussion Figures?

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Abstract

This study explores the existence and documentation of varsity football player concussions and sport-related traumatic brain injuries at dozens of Florida high schools. The paper explores the legal creation and deference due the Florida High School Athletic Association as a regulatory body for Florida's student-athletes, the lived experiences of sport-related brain injuries and whether the maintenance and publication of these concussive records implicates student-athletes' privacy rights. For nearly two years, the Brechner Center for Freedom of Information at the University of Florida pursued physical copies of redacted concussive documentation at dozens of Florida high schools and verified numerical accounts of how many varsity football players had been concussed in connection with play during the 2017-2018 school year.

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Introduction

In certain communities, Florida high school football is nucleic. To that end, the sport's pervasiveness and profitability¹ fuel recurring debates about student-athletes' health, collegiate access and equity, and state responsibility for harm. Football players often come from communities of color, particularly Black communities, where stakeholders carry dreams of NCAA scholarships² and beyond.³ Though the public knows that student-athletes' likelihood of "going pro" is slim, Florida has cultivated more NFL players than other states.⁴ Consistent with American professional football dreams, many student-athletes in Florida began competing in early childhood. However, as research connecting contact sports and grave brain injuries mounts, society continues wrestling with the human costs of sports including football—and having the information necessary to adequately gauge the risks involved and take responsible actions to protect players.

Concussions⁵ can spur both short and long term consequences, including "cognitive, affective and behavioral changes."⁶ In extreme scenarios, concussed athletes may develop Chronic Traumatic Encephalopathy (CTE), a progressive degenerative brain disease suffered by people with histories of routine brain trauma.⁷ Though a century ago the disease was primarily known to affect boxers, today's CTE sufferers tend to be football players, hockey players and military veterans who sustained brain injuries. As Boston University scholars noted, though, CTE is not confined to the realm of professional sports. The disease also affects athletes who stopped playing sports after high school or college.⁸

And even as concussive risks loom large, millions of U.S. youth continue to play contact sports.⁹ To grapple with the problem of related brain injuries, the Centers for Disease Control and Prevention (CDC) assessed relevant data from the 2017 Youth Risk Behavior Survey.¹⁰ After

¹ See Joey Knight & Mari Faiello, *Amid Pandemic, High School Football Remains in Holding Pattern*, TAMPA BAY TIMES (May 15, 2020), <https://www.tampabay.com/sports/high-schools/2020/05/15/amid-pandemic-high-school-football-remains-in-holding-pattern/>. ("At most Florida high schools, an athletic department's economic fate hinges on football." ... "You have schools that can make thousands of dollars in one night," Pasco County athletic director Matt Wicks said. "And that helps pay for uniforms in other sports that don't generate one dollar in gate fees.").

² Chip Patterson, *NCAA Finds Sizable Number of Florida High School Players are Division I Recruits*, CBS SPORTS (Apr. 18, 2017), <https://www.cbssports.com/college-football/news/ncaa-finds-sizable-number-of-florida-high-school-players-are-division-i-recruits/>.

³ Richard Lapchick, *The 2019 Racial and Gender Report Card: National Football League*, THE INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT, 9 (Oct. 30, 2019),

https://435301336e94f52811a182c7a91933b.filesusr.com/ugd/3844fb_1478b405e58e42608f1ed2223437d398.pdf (finding that about 60% of NFL players racially identified themselves as African-American).

⁴ Staff Reports, *What States and Cities Produce the Most NFL Talent?*, GWINNETT DAILY POST (Sept. 13, 2018), https://www.gwinnettdaily.com/sports/what-states-and-cities-produce-the-most-nfl-talent/article_8f4c2ea4-b796-11e8-9bc9-c7fe32f59d89.html.

⁵ The Centers for Disease Control and Prevention defined concussion as "a type of traumatic brain injury" ... "caused by a bump, blow, or jolt to the head or by a hit to the body that causes the head and brain to move rapidly back and forth." What is a Concussion?, https://www.cdc.gov/headsup/basics/concussion_what.html.

⁶ Lara DePadilla, Gabrielle F. Miller, Sherry E. Jones, Alexis B. Peterson & Matthew J. Breiding, *Self-Reported Concussions from Playing a Sport or Being Physically Active Among High School Students — United States, 2017*, 67 MMWR MORB MORTAL WKLY REP 682 (2018).

⁷ *Frequently Asked Questions, What is CTE?*, BU RESEARCH CTE CTR., <https://www.bu.edu/cte/about/frequently-asked-questions/>.

⁸ *Id.*

⁹ Lesley Lueke, *High School Athletes and Concussions - More Than a Game at Stake*, 32 J. LEGAL MED. 483 (2011) (noting that sports form "an integral part of many high school students' lives").

¹⁰ DePadilla et al., *supra* note 6.

assessing this data, the CDC reported that 15 percent of students (approximately 2.5 million) reported suffering at least one sport or physical activity related concussion. According to the 2017 survey, six percent of youth reported two or more concussions. The survey captures reported concussions which occurred up to 12 months prior to the survey. The CDC determined that concussion prevalence was substantially more common in male students when compared with female students. The findings also showed that concussions were more common for students who played on at least one sports team than for students who were not athletes on a team. Across gender, grade and ethno-racial demographics, the likelihood of reporting a concussion increased for students who played two or more sports.

It bears remembering that concussions are notoriously underreported. Experts have observed that surveillance efforts probably overlook some youth concussions that are connected with sport and physical activity.¹¹ Further, sport culture¹² tends to be “an environment in which athletes expect to push through pain.”¹³ Researcher Jeanette F. Green’s Nursing Sciences dissertation at the University of Florida explained that student-athletes “who perceived themselves to be hurt, not injured, continued [to] play. Hurt athletes made sense of symptoms through crucial conversation with a trusted person.”¹⁴

These relationships of trust between underage athletes, medical professionals, coaches and the community at large signal a need for deeper knowledge and more protective action for these young people. Despite increased awareness of high school sport related concussions, concussive incidences continue rising, according to a study released in connection with the American Academy of Orthopaedic Surgeons’ continuing education initiatives.¹⁵ Injury data covering 2015-2017 comprise the most recent contributions to a 13-years-long study analyzing documented concussions across several high school sports. Dr. Wellington Hsu, a Northwestern University School of Medicine professor and senior author of the study, explained, “What we found was that the overall average proportion of concussions (total estimated concussions proportionate to all other injuries for a particular sport) reported annually in all sports increased significantly, as did the overall rate of concussions (the number of concussions per 10,000 athlete exposures).”

High school football advocates tend to argue that football teaches goal-setting, teamwork and achievement to young competitors. Critics argue that sport-related traumatic brain injuries,¹⁶ including concussions, are “public health crises especially for American youth whose brains are still developing.”¹⁷ Consistent with other young ex-professional athletes’ retirement decisions,

¹¹ *Id.*

¹² See Matthew Futterman, *Sledding Athletes Are Taking Their Lives. Did Brain-Rattling Rides and High-Speed Crashes Damage Their Brains?*, NY TIMES, (July 27, 2020), <https://www.nytimes.com/2020/07/26/sports/olympics/olympics-bobsled-suicide-brain-injuries.html> (noting the colloquialism “sled head” for brain damage experienced by bobsledders, and connected it with “classic symptoms” linked with concussions and mild traumatic brain injuries that football players and other “high-impact” sport competitors play).

¹³ Jeanette F. Green, *Constructing the Process of Healthcare Decision-Making by Adolescent Athletes Post Sport-Related Concussion*. Ph.D. dissertation, University of Florida (2016) (copy on file with author).

¹⁴ *Id.*

¹⁵ See News Release, *Ongoing Study Shows Continued Increase in Concussions Among High School Athletes*, AM. ASS’N OF ORTHO. SURGEONS (May 19, 2020), <https://www.aaos.org/aaos-home/newsroom/press-releases/aaos-releases-clinical-news-increased-concussions-among-high-school-athletes/>.

¹⁶ University of Florida, *Sports-Related Concussions*, <http://www.ortho.ufl.edu/sites/ortho.ufl.edu/files/handouts/Sports-Related-Concussions.pdf>.

¹⁷ Anne Fetterman, Joseph Campellone, Raymond Kent Turley, *Understanding the Teen Brain*, University of Rochester Medical Center, <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051>.

former NFL linebacker Joshua Perry described the impact of his sixth documented concussion and how fears about medical unknowns inspired him to retire from the professional league at age 24.¹⁸ Perry, a young adult who played football at the highest and most profitable level, spoke to his autonomy in choosing to quit football. For high school athletes, most of whom are in legal infancy,¹⁹ their statuses are murkier. Many of these student-athletes are legally old enough to operate a motor vehicle, and may be erroneously viewed by the public as adults, but lack legal emancipation²⁰ from caregivers and the institutional authority of regulatory bodies like the Florida High School Athletic Association to make large-scale decisions about appropriate responses to student-athlete brain injuries. Based on these power discrepancies, athletic agencies and other state actors should act in the interscholastic athletic space *with care* for these young people as the north star for formal and informal decision-making.

Given the public interest in Florida schools as state entities, the vulnerabilities of legal infants, and Florida's broad public records laws,²¹ the Brechner Center for Freedom of Information at the University of Florida set out to collect the numbers. Specifically, the Brechner Center sought the number of reported varsity football player concussions or instances of "concussive activity" at dozens of Florida high schools during the 2017-2018 school year. While this investigation returned some data, most schools did not respond to these records requests. This paper will detail and discuss the rationales that officials provided when opting not to hide this information from the public.

Inconsistent concussive recordkeeping at Florida high schools with varsity football teams matters to the public because without data, measurable improvements cannot occur. Moreover, as parents and guardians consider which schools to entrust with the care of their children, schools that prioritize academic quality and brain protection practices for student-athletes could benefit from more robust participation. Conversely, schools that underreport concussive injuries and fail to report related data could experience declining enrollment. With respect to formal regulations, federal law generally does not ban the release of records when the student's identifying information is redacted. Similarly, various state courts have recognized that once a record is redacted, the record no longer contains information directly related to a student which can take the records out of the "education record" classification covered by the Family Educational Rights and Privacy Act (FERPA).

¹⁸ Aymann Ismail, *Getting Your Bell Rung*, SLATE (Oct. 14, 2019), <https://slate.com/culture/2019/10/joshua-perry-retirement-nfl-concussions-man-up.html>.

¹⁹ The Law.com Legal Dictionary defines infancy as "under-age or minority."

²⁰ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 115 S. Ct. 2386, 2388 (1995). The High Court reiterated: "Unemancipated minors lack some of the most fundamental rights of self-determination, including even the right of liberty in its narrow sense. They are subject, even as to their physical freedom, to the control of their parents or guardians."

²¹ The citizen's access to public records remains a fundamental constitutional right in Florida. Art. I, § 24(a), Fla. Const. (the Sunshine Amendment) grants every person the right to inspect or copy any public record made or received in connection with the official business of a public body, officer, or employee of the state, or persons acting on their behalf. *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 853 (Fla. Dist. Ct. App. 2013). Fla. Stat. ch. 119.07 (1) requires every person who has custody of a public record to permit the record to be inspected and examined by any person desiring to do so. *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 48 (Fla. Dist. Ct. App. 2004).

Background: Legal and medical authority for concussion protocols

Florida Statute 1006.20 designates the Florida High School Athletic Association (FHSAA) “as the governing nonprofit organization of athletics in Florida public schools.” The statute further provides that the agency’s bylaws “are to be the rules by which high school athletic programs in its member schools and the students who participate in them, are governed unless otherwise specifically provided by statute.”²² The FHSAA is a voluntary, not-for-profit corporation composed of members including public, private, parochial and institutional schools in Florida. The association adopts rules about eligibility and related concerns when pertaining to interscholastic athletic competition.²³

The Florida Supreme Court has reinforced the FHSAA’s authority. In its 1983 *Florida High School Activities Association v. Thomas* decision, the Court called the FHSAA the “exclusive authority with “responsibility for controlling all aspects of interscholastic activities in both public and private high schools throughout Florida.” In acknowledgment of the agency’s dominion over interscholastic sports, the Court also reasoned that when the agency promulgates and adopts rules it thus performs state action. This state action determination can affect claimants’ ability to seek legal redress for agency decisions.²⁴ In *Thomas*, the Court reviewed the Third District Court of Appeals’ decision declaring unconstitutional an agency rule capping the number of players who could compete in post-season football play-offs. Ultimately, the Florida Supreme Court rejected the lower court’s decision. Florida’s highest court reasoned that no constitutional right to play football or participate in post-season play-offs existed.

In *Lee v. FHSAA*, the Third District Court of Appeals held that “upon complaint of a citizen the court has the power and the duty to determine whether the citizen has been deprived of due process of law by the action of an association, whose conduct of affairs is state action in the constitutional sense.” The *Lee* Court reinforced the FHSAA’s authority over member school athletic activities and reasoned in dicta that athletic eligibility “will enhance [the student-athlete] complainant’s chances of being admitted to college and possible winning of a needed athletic scholarship.” In that case, the Court concluded that the student-athlete had sufficiently demonstrated in his complaint that the agency violated his due process rights by failing to provide him an opportunity to establish his eligibility to compete athletically.

That athletic eligibility concern affects other agency decisions and protocols as well. The FHSAA maintains requirements that student-athletes, head coaches and supporting coaches complete a digital course,²⁵ which is also available in Spanish, on concussions. After completing four units, student-athletes take a test. To certify completion, an Affidavit of Compliance for

²² The agency was formerly known as the Florida High School Activities Association until its official name change in 2003, <https://www.fhsaa.org/news/2003/0701>.

²³ Fla. High Sch. Ath. Ass’n v. Marazzito, 891 So. 2d 653, 653 (Fla. Dist. Ct. App. 2005). The Second District Court of Appeals ruled that Florida courts may intervene in the internal affairs of an association only when exceptional circumstances exist. Accordingly, Florida courts should interfere with a voluntary membership association’s internal affairs and rules *only* in limited circumstances, including when: (1) the association’s action negatively affects substantial property, contract or other economic rights and the association’s internal processes were inadequate or unfair, or if (2) the association acted maliciously or in bad faith.

²⁴ Federal precedent is also instructive. In *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288 (2001), the U.S. Supreme Court decided that the Tennessee Secondary School Athletic Association’s regulatory activity could be treated like state action because of pervasive entwinement of state school officials in the structure of the association. The Court also reasoned that no offsetting reason existed to not view the association as a state actor.

²⁵ See NFHS Learning Center, <https://nfhslearn.com/>.

Heat Illness, Concussion and Sudden Cardiac Arrest Courses is filled out and certified.²⁶ In Florida, student-athletes must satisfy course requirements before the “first practice date for their sport.” Policy 40.1.1 also requires FHSAA member school head coaches and ancillary coaches to view the course “Concussion in Sports—What You Need to Know.” This form was last revised in July 2019.

In the event of a documented head injury, the FHSAA requires a suitable health care provider, “trained in the latest concussion evaluation and management protocols” as FHSAA so defines, to complete a form certifying the student-athlete’s fitness to return to athletic competition. The agency requires that this form, the AT-18, be maintained on file at the student’s school. To proceed on the form, the certifying health care professional must indicate the satisfaction of several conditions precedent including that (i) the student-athlete is asymptomatic; (ii) the student-athlete is off medications connected to the concussion at issue; (iii) the student-athlete has a normal neurological exam; and (iv) the student-athlete resumed normal classroom activities.

As Florida statutory empowerment of the FHSAA, the Florida Supreme Court’s and lower Florida courts’ deference to the agency,²⁷ and the agency’s own rule promulgation and adoption demonstrate, the FHSAA wields extreme power over Floridian high school sports. To this point, the agency should both regularly update its concussion protocols and implement measures to realistically ensure that officials at members schools center student-athletes’ brain health. Brain health among student-athletes is of the utmost importance for academic, social, and athletic success.

Florida Statute 1006.20 indicates that a student-athlete suspected of sustaining a concussion or head injury in a practice or competition is to be immediately removed from the activity. This requirement depends on student-athlete symptom self-reporting that would result in removal of the student-athlete from school-sanctioned sport activities until the student submits a written medical clearance verifying that the student athlete no longer shows signs, symptoms, or behaviors consistent with a concussion. However, the broader sport culture contributes to student-athlete decisions to continue to play with pain and injuries. This withholding of symptom reporting works to keep the student-athletes available to play. Student-athletes who experience external pressure from coaches, teammates, fans, and parents are significantly more likely to continue to play while symptomatic rather than to seek healthcare for symptoms consistent with concussion. Research with student-athletes suggests that between 50% and 75% of concussion-like symptoms go unreported placing the athlete at risk for subsequent short- and long-term health consequences.

Given the sensitivity of minors’ health care information and the shared desire not to publish identifiable student health challenges (concussions and/or other brain injury), the Brechner Center reached out to a former athlete from a big football state for experiential insights. Bill Dorton, a physical therapist from Delray, Florida, grew up playing football in Ohio.²⁸ He said during a telephone interview that he received at least six concussions between second grade, when he started, and high school, when he stopped. Dorton said the concussions left his visual and spatial perception off-track. Often, “I felt like I had a knife in my head,” Dorton said. He started a Florida

²⁶ Florida High School Athletic Association Affidavit of Compliance for Heat Illness, Concussion and Sudden Cardiac Arrest Courses, https://www.fhsaa.org/sites/default/files/at17_affidavitcompliance_2018-07.pdf.

²⁷ Agency may be defined as any state, county, district, authority, ... or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 853 (Fla. Dist. Ct. App. 2013).

²⁸ Yaremi Farinas, *Local Man Committed to Helping People Recovering from Concussions*, CBS 12 NEWS (Sept. 21, 2018), <https://cbs12.com/news/local/local-man-committed-to-helping-people-recovering-from-concussions>.

non-profit to help sufferers of post-concussion syndrome receive funding for treatment. Dorton expressed empathy for today's high school football players largely because "football culture, in general, is a suck-it-up-culture," he explained.

Realistically, the landscape is complex: Some high school student-athletes would not want to speak up about possible and actual concussions. Some Floridian stakeholders may avoid documenting the information that could contribute to concussive injury solutions. Some members of the public likely believe that athletic cultures are impermeable. In addition to these factors, the lucrative nature of high school football in Florida can complement broader desires to just let the youth play without documenting and monitoring probable brain injuries.

State duties of care versus student-athlete rights

The line between the governmental duty to care for student-athletes and student-athlete rights to protection may be viewed like positive and negative rights.²⁹ While positive rights require one to act affirmatively, negative rights require one to abstain from action. Because state actors must provide certain levels of care for student-athletes in their custody,³⁰ student-athletes have an entitlement to an appropriate level of care. To these points, the U.S. Supreme Court has affirmed the protectionist nature of certain medical requirements for public school children, including "various physical examinations" and vaccinations against diseases.³¹ The Court reasoned: "Particularly with regard to medical examinations and procedures, ... students within the school environment have a lesser expectation of privacy than members of the population generally."³²

Likewise, Florida courts have determined that schools, as state actors, maintain several duties in connection with student-athletes. These duties include (i) adequate instruction of student-athletes;³³ (ii) the provision of proper equipment for student-athletes;³⁴ (iii) obligations to *reasonably match* athletic participants;³⁵ (iv) sufficient supervision of athletic events;³⁶ and (v) duties to appropriately respond post-injury to prevent student-athlete injury aggravation.³⁷

Similarly, these courts have reasoned that Florida schools and students have a special relationship (*in loco parentis*) during the school day and during school-sponsored activities. The compulsory education for legal infants of a certain age supports this relationship. Additionally, student-athletes have due process rights, including to an administrative process.³⁸ As an example, a general requirement that administrative remedies be exhausted before student-athletes file

²⁹ <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights/>.

³⁰ "A proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648, 115 S. Ct. 2386, 2388 (1995).

³¹ *Id.*

³² *Id.*

³³ *Limones v. Sch. Dist. of Lee Cnty.*, 111 So. 3d 901, 904 (Fla. Dist. Ct. App. 2013).

³⁴ FLA. STAT. § 1006.165 (2008), requires all public schools that are members of the Florida High School Athletic Association to have an operational automated external defibrillator (AED) on school property and to train all employees or volunteers who are reasonably expected to use the device in its application. *Limones v. Sch. Dist.*, 161 So. 3d 384, 387 (Fla. 2015).

³⁵ *Id.*

³⁶ *See id.* at 387 (requiring school employees to "reasonably supervise students during activities that are subject to the control of the school").

³⁷ *Id.*

³⁸ *FHSAA v. Melbourne Cent. Catholic H.S.*, 867 So. 2d 1281 (Fla. Dist. Ct. App. 2004).

complaints in court against the FHSAA or school officials also exists.³⁹ Yet, even though student-athletes in Florida possess certain founded rights, every student-athlete wish does not a legal entitlement make. “Participation in extracurricular sports activities is a privilege, not a right,” as the Fifth District Court of Appeals reasoned in *LPM v. School Board of Seminole County*.⁴⁰

There, the Court reiterated that high school students lack a constitutionally cognizable contract, property, or other economic right to participate⁴¹ in interscholastic sports and may be penalized for inappropriate behavior. (In *LPM*, students had illegally consumed alcohol. The school suspended them from athletic competition.) Additional student-athlete “non-rights” include the potential for a college scholarship, an entitlement to a private cause of action for the alleged agency failure to enact or enforce a certain bylaw⁴² and legal recognition of a school team as having a “constitutionally protected right or privilege to participate in interscholastic sports activities.”⁴³ The FHSAA also may limit the number of playoff competitors.⁴⁴

Seeking records from high schools

To get a better sense of the transparency of high school football concussions, the Brechner Center spent a year-and-a-half sending and following up on requests for return-to-competition affidavits (AT-18s)⁴⁵ at 8A Florida varsity schools. From a methodological standpoint, the Brechner Center chose 8A schools to narrow the focus for this large state that is also ripe with contact sport participation by varsity high school students. The 8A schools included populations between 2,332 and 4,492 students. These schools also reflect regional, racial, and socioeconomic diversity in Florida. The Brechner Center also requested other “relevant records of concussive activity in these student-athletes” during the same time period.

Like *InvestigateWest* reporters in Oregon,⁴⁶ the Brechner Center requested the redaction of students’ personally identifiable information on the AT-18s or other relevant documents. We spoke to coaches, athletic directors, a school district attorney, and various other officials in connection with the requests. We performed numerous telephonic interviews and email exchanges. Though several school officials responded, most provided numbers through a summary report instead of in the redacted AT-18 forms. When several school officials expressed reticence, we re-assured

³⁹ FLA. STAT. § 1006.20 and association bylaws provide a two-tier appeals process on rulings regarding a student athlete’s eligibility on rulings regarding a student athlete’s eligibility to participate in interscholastic activities. Step 1—Each student has the opportunity to appeal an unfavorable ruling pertaining to his or her ability to compete. Initial appeals must be made to a committee on appeals within the administrative region that the student lives. Step 2—SA or member school that gets an unfavorable ruling from a committee on appeals shall be entitled to appeal that decision to the BOD at its next regularly scheduled meeting or called meeting.

⁴⁰ 753 So. 2d 130 (Fla. Dist. Ct. App. 2000).

⁴¹ Similarly, in *Fla. High Sch. Activities Ass’n v. Bradshaw*, the court determined that when an individual student lacks a constitutionally protected right or privilege to participate in interscholastic sports, it follows that, without additional factors, a school’s football team as a group has no such constitutionally protected right or privilege. 369 So. 2d 398, 399 (Fla. Dist. Ct. App. 1979).

⁴² *Miulli v. Fla. High Sch. Ath. Ass’n*, 998 So. 2d 1155 (Fla. Dist. Ct. App. 2008).

⁴³ *Bradshaw*, 369 So. 2d at 398, 399.

⁴⁴ Even though FHSAA rules limiting the number of play-off competitors “will inevitably and unfortunately preclude certain players from participating in post-season play, this, in itself, does not deny those players equal protection under the law.” *Fla. High Sch. Activities Ass’n v. Thomas*, 434 So. 2d 306, 309 (Fla. 1983).

⁴⁵ <https://www.fhsaa.org/forms/general-athletic/at18>.

⁴⁶ Shasta Kearns Moore, *Getting Ahead of the Numbers Game*, INVESTIGATEWEST (May 2, 2018), <https://www.invw.org/2018/05/02/getting-ahead-of-the-numbers-game/>.

them that the focus is the number of concussions—as a public health concern—and not the names and identities of concussed student-athletes. Some school representatives argued that the numbers should be withheld for privacy reasons. As examples, an official from Broward County Public Schools said the county does not “maintain the information” sought. A Palm Beach County representative said the county was exempt from the request.

Results

Because FHSAA Bylaws 2.5.1 “Member Schools” and 7.1.2 “Principal’s Duty” require principals to ensure FHSAA compliance at member schools they helm, the first school official from whom we requested the concussion records were principals. For responsive schools, the school names, the number of varsity football concussions and the source of the number follow. If the representative provided the AT-18 then that is indicated.

Table 1: Reported Concussions for 2017-18 School Year, in Response to Records Requests

High School	Concussion Numbers	Source
Apopka	1	Records officer
Colonial	11	Records officer
Cypress	14	Records officer
Deland	1	AT-18 form
Dr. Phillips	2	Records officer
Evans	2	Records officer
Flagler Palm Coast	4	Athletic director
Fort Pierce Central	0	School paralegal
Freedom (Orlando)	0	Records officer
Lake Worth	4	AT-18 forms
Manatee	1	AT-18 form
Oak Ridge	7	Records officer
Olympia	1	Records officer
Palm Harbor	2	School board attorney
Sandalwood	0	Principal
Southeast	1	AT-18 form
Timber Creek	1	Records officer
University (Orlando)	11	Records officer
Vero Beach	2	Superintendent administrative assistant
Wekiva	0	Records officer
West Orange	5	Records officer
William R. Boone	4	Records officer
Winter Park	12	Records officer

Rationales for nondisclosure

While many of the 8A Florida schools that the Brechner Center sought records from declined to provide the records, school officials tended to provide similar rationales for nondisclosure. These rationales are as follows: (i) student privacy⁴⁷ concerns; (ii) the non-occurrence of concussive activity about which to report.⁴⁸ Both rationales are addressed in turn.

Both U.S. Supreme Court precedent and FERPA support the protection of students' privacy rights. At the same time, though, both federal sources also support the imposition of reasonable privacy intrusions geared toward protecting these students: School officials may drug test students,⁴⁹ search students without a warrant,⁵⁰ and require vaccinations against disease.⁵¹ Just like adults who work in a "closely regulated industry" come to expect a level of state supervision and surveillance, "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."⁵²

FERPA governs how educational agencies and institutions handle students' educational records. The Act primarily serves two functions. It (i) gives students and their parents control over the students' educational records and (ii) bars the disclosure of "personally identifiable information in education records." The educational agencies and institutions covered by FERPA are defined as "any public or private agency or institution which is the recipient of funds" under applicable programs. The Act requires educational agencies and institutions to establish appropriate procedures to ensure that parents and their children (the students protected by FERPA) can request access to the students' education records "within a reasonable period of time."

As covered by FERPA, education records include "... records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." Given the sensitivity of student records, some jurisdictions hire data privacy officers who work to protect the sensitive information.⁵³ While the Florida legislature adopted the FERPA definition of "education records,"⁵⁴ students' pertinent privacy rights attach "to records or reports which permit the personal identification of a pupil or student."⁵⁵ It stands to reason that redacted documents do not necessarily identify students.

⁴⁷ FLA. STAT. § 228.093(3)(D) recognizes a strong privacy interest for every student with respect to the student's educational records. *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 48 (Fla. Dist. Ct. App. 2004).

⁴⁸ In Jacksonville, an official reported zero instances at Sandalwood High School. In Apopka, an official reported the same for Wekiva High School. The same held true for Fort Pierce's Fort Pierce Central High School.

⁴⁹ The justices reasoned that "special needs" exist in public schools. So, while schoolchildren do not lose their constitutional rights when they enter the schoolhouse, these rights operate differently in public schools. For example, the "reasonableness inquiry" for searches and seizure must include officials accounting for "the schools' custodial and tutelary responsibility for children." *Bd. of Educ. v. Earls*, 536 U.S. 822, 825, 122 S. Ct. 2559, 2562 (2002).

⁵⁰ *New Jersey v. T. L. O.*, 469 U.S. 325, 327, 105 S. Ct. 733, 735 (1985).

⁵¹ *Zucht v. King*, 260 U.S. 174, 175, 43 S. Ct. 24, 24 (1922). A state's police power allows it to require vaccination, and "no right under the Federal Constitution is infringed by excluding unvaccinated children from public and private schools."

⁵² *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 115 S. Ct. 2386, 2388 (1995).

⁵³ *Shawna De La Rosa, Refreshing Staff on FERPA Essential as Districts Implement COVID-19 Screening*, EDUCATIONDIVE (July 20, 2020), <https://www.educationdive.com/news/refreshing-staff-on-ferpa-essential-as-districts-implement-covid-19-screeni/581890/>.

⁵⁴ FLA. STAT. § 1002.225(1).

⁵⁵ *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 48 (Fla. Dist. Ct. App. 2004).

While a concussion-free varsity football season is possible, as maintained by officials for Sandalwood High School, Wekiva High School, Freedom High School, and Fort Pierce Central High School, a reminder to readers of this paper of concussion symptoms may prove more instructive. The CDC described the following:⁵⁶

1. One pupil larger than the other.
2. Drowsiness or inability to wake up.
3. A headache that gets worse and does not go away.
4. Slurred speech, weakness, numbness, or decreased coordination.
5. Repeated vomiting or nausea, convulsions or seizures (shaking or twitching).
6. Unusual behavior, increased confusion, restlessness, or agitation.
7. Loss of consciousness (passed out/knocked out).

Conclusion

Ultimately, variations in concussive reporting could follow incomplete recordkeeping, different perspectives on which traumas are reportable and overinvestment in football team wins (and the athletic eligibility of key playmakers). Recordkeeping discrepancies could also highlight the paradox of a not-for-profit with substantial discretion lacking the institutional and community pressure to timely dig for, publicize and resolve sport-related brain injuries at member schools. It is also possible that schools with socioeconomic advantages tap technological resources including brain-scanning machines and onsite-medical personnel to respond to and/or prevent injuries. Conversely, schools with fewer resources⁵⁷ could be less inclined to identify and report concussive activity.

In May 2018, researchers requested student-athlete concussion figures from the FHSAA.⁵⁸ FHSAA Associate Director for Athletic Services Justin Harrison said several schools contacted FHSAA “and told us they got our participation survey mixed up.” In a responsive email, Harrison said schools erroneously “listed the number of athletes competing in a sport as opposed to the number of concussions.” FHSAA Director of Membership and Contract Management J.A. Colasanti also emphasized “flawed data” as a barrier to assessing the number of student-athlete concussions.

⁵⁶ https://www.cdc.gov/headsup/basics/concussion_danger_signs.html.

⁵⁷ At Wekiva High School, 100 percent of students experience economic disadvantage.

<https://www.usnews.com/education/best-high-schools/florida/districts/orange/wekiva-high-5345>. At Fort Pierce Central High School, 60 percent of students experience economic disadvantage.

<https://www.usnews.com/education/best-high-schools/florida/districts/st-lucie/fort-pierce-central-high-school-5595> The average annual income in Fort Pierce is also notably lower than in other parts of Florida.

<https://www.usnews.com/education/best-high-schools/florida/districts/duval-county-public-schools/sandalwood-high-school-4972> At Jacksonville’s Sandalwood High School, 39 percent of students experience economic disadvantage.

⁵⁸ The FHSAA’s purpose includes “safeguard[ing] the physical, mental and moral welfare of the students of member schools and protect[ing] them from exploitation.” See Fla. Op. Att’y Gen.’l 98-42 (July 14, 1998) (describing purpose and structure of FSHAA for purposes of analyzing applicability of Florida sunshine laws).<http://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR1%5C2003%5C0722%5C80452018.Tif&documentNumber=704225>. The FHSAA’s purpose includes “safeguard[ing] the physical, mental and moral welfare of the students of member schools and protect[ing] them from exploitation.”

As *News4Jax* reported, securing student-athlete concussion numbers is fraught.⁵⁹ A Florida father—whose son played high school football and was concussed—expressed frustration with the FHSAA. “You have to at least have the data before you can even start talking whether your efforts to reduce concussions are effective,” Mike Johnson said. “They owe more than that to the parents of kids that are playing football.”⁶⁰

As detailed earlier in this article, Florida courts tend to defer to the FHSAA for regulation and oversight of student-athletics from middle school through high school. Yet, as association representatives have said, concussion data retention is incomplete. The FHSAA does require schools to maintain the AT-18s on-site, but that too is political. Officials may worry that reporting high numbers suggests their inability to protect students.⁶¹ Reporting unreasonably low numbers, or no numbers at all, may suggest untreated harms to student-athletes.⁶²

As the FHSAA is responsible for regulation and oversight of student-athletics, the organization should prioritize student-athlete health monitoring through documentation of concussions and other sport-related injuries and illnesses. Additional medical and academic resources may be acquired to address student-athlete health needs if ongoing monitoring of concussion data reveals high numbers.⁶³ Strategies to guide return to play and return to learn may enhance student-athlete health, however without an accurate reflection of the problem it is difficult to appreciate the impact of the Florida statute or gain support for these innovations.

Because student-athlete concussion concerns reflect a labyrinth of legal, medical, and cultural understandings, the solutions should be similarly dynamic. The FHSAA should work with member schools toward a better and more transparent concussion protocol system. Whether member schools make their concussive figures public or not, these schools should maintain the relevant documents on-site at member schools. The agency should regularly and transparently assess whether schools are keeping adequate concussive records and consider supervising certain schools where particularly risky concussive activity trends emerge.

Ultimately, the blame for brain injuries cannot be heaped solely on schools or the FHSAA. American society as a whole should destigmatize the acknowledgment of pain—especially for male youths and young people of color.⁶⁴ We can all benefit from a societal evolution toward appreciating contact sports—but not to the point that youth athletic competitions devolve into lucrative free-for-all events, at the expense of young people’s developing brains. After all, Dorton said, “You only get one brain.”

⁵⁹ Action News Jax Staff, *Action News Jax Investigates: Tracking Student Athletes’ Concussions* (Nov. 16, 2018), <https://www.actionnewsjax.com/news/investigates/action-news-jax-investigates-tracking-student-athletes-concussions/873375494/>.

⁶⁰ *Id.*

⁶¹ <https://www.newsobserver.com/article243059391.html>.

⁶² Per Green’s dissertation, *supra* n. 13 at 34, “A common theme among concussion-reporting literature was non-disclosure of symptoms among athletes to athletic trainer or coach at the time of injury.”

⁶³ Dan Kane, Langston Wertz Jr. & David Raynor, *Wake Forest High is a Force in Football, but Also Tops in Concussions*, NEWS & OBSERVER (June 25, 2020), <https://www.newsobserver.com/article243059391.html>. In North Carolina, Wake Forest High School, which boasted three football championships in a row, also reported 22 concussions in the 2018-2019 academic year. The nearly two dozen concussions made the school the leader in concussions in Wake County. The second highest number of reported concussions there was 10 at East Wake.

⁶⁴ Green’s dissertation addressed disparate clinical care following treatment of children’s traumatic brain injuries. Notably, “Hispanics were more likely to receive invasive diagnostic testing and treatment, experience longer wait times, and leave the ED before healthcare provider assessment when compared to non-Hispanic patients ... Hispanics and African Americans were less likely to receive attending physician evaluation or referral to a primary care physician.” Further, she reported, “African Americans were less likely to be referred for trauma rehabilitation services upon discharge.” See Green, *supra* note 13, at 40-41.