

## MEMORANDUM

TO: Mark Brainard and Amanda McAtee, JLOSC Analysts  
FROM: Bradley Layfield, Chairperson, DIAA Board of Directors  
DATE: February 22, 2021  
SUBJECT: Insurance

The topic of insurance was raised during the Joint Legislative Oversight and Sunset Committee's recommendations meeting on February 16, 2021. The purpose of this memorandum is to provide information on the topic and clarify the Delaware Interscholastic Athletic Association's ("DIAA") request for statutory authority to purchase insurance.

### **I. Purchasing insurance waives sovereign immunity up to the extent of available coverage.**

Article I, Section 9 of the Delaware Constitution provides for sovereign immunity for the State. By statute, DIAA is a unit of the Delaware Department of Education ("DDOE"), which is an agency in the executive branch of the State (14 *Del. C.* §§ 101 & 303(a)). Thus, DIAA has sovereign immunity.

Sovereign immunity is an absolute bar to liability claims against the State unless it is waived. *Turnbull v. Fink*, 668 A.2d 1370, 1374 (Del. 1995). Under Article I, Section 9 of the Delaware Constitution, sovereign immunity may be waived solely by a law enacted by the General Assembly. *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 74 (Del. 1962). *See also Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004).

The General Assembly created the State's Insurance Coverage Office, which provides "[c]entralized responsibility for the operation of the state insurance coverage program." 18 *Del. C.* § 6508(3). By statute, "[n]o other agency of this State . . . shall be authorized to place any insurance, any law to the contrary notwithstanding, and all insurance for such agencies shall be placed by and through the Insurance Coverage Office." 18 *Del. C.* § 6509. 18 *Del. C.* § 6511 provides that "[t]he defense of sovereignty is waived and cannot be asserted as to any risk or loss covered by the state insurance program, whether same be covered by commercially procured insurance or by self-insurance . . . ." The Delaware Supreme Court has held that by enacting 18 *Del. C.* § 6511, the General Assembly intended to waive sovereign immunity only to the extent that the State purchased commercial insurance to cover a loss or the State insurance coverage program was funded by direct appropriation (i.e., self-insurance). *Doe v. Cates*, 499 A.2d 1175, 1177 (Del. 1985). Under Delaware law, purchasing insurance waives the defense of sovereign immunity up to the extent of the available coverage. *Pauley v. Reinoehl*, 848 A.2d at 576.

### **II. DIAA's request for statutory authority to purchase insurance.**

#### **A. General Liability Insurance**

Currently, DIAA's governing statute (14 *Del. C.* Ch. 3) does not authorize it to purchase insurance for itself or on behalf of member schools. In order to host tournament events

at non-State venues, such as the University of Delaware’s Bob Carpenter Center and Frawley Stadium, the non-State venues require DIAA to carry general liability insurance coverage. Therefore, **DIAA requests that the General Assembly grant it the statutory authority to purchase general liability insurance coverage for itself for the sole purpose of hosting DIAA tournament events at non-State venues.** If the General Assembly grants such statutory authority and DIAA purchases the general liability insurance, DIAA would waive its sovereign immunity up to the extent of available coverage.

## **B. Student Accident Insurance**

Schools have an independent ability to insure and are covered under their own general liability and student accident insurance policies if they choose to purchase them. Public school districts are autonomous, political entities. *Beck v. Claymont Sch. Dist.*, 407 A.2d 226, 228-29 (Del. 1979). Under the Delaware Tort Claims Act, the General Assembly extended sovereign immunity protection to school districts and their officers and employees. 10 *Del. C.* § 4003. However, if a district chooses to carry insurance coverage for risks or losses, it acts as a waiver of sovereign immunity to the extent of the available coverage. *Smith v. Christina Sch. Dist.*, 2011 WL 5924393 (Del. Super. Nov. 28, 2011).

In addition, there are student accident policies that parents can purchase for their child. By regulation, the administrative head of a DIAA member school exercises general control over all interscholastic athletic matters, including “[u]rging all students competing on the school’s teams to obtain medical accident insurance which covers athletic participation.” 14 Del. Admin. C. § 1006-5.2.1.11.

DIAA had an estimated \$220,251.00 reduction in revenue as a result of the cancellation of several winter 2020 tournament events and the spring 2020 season due to the COVID-19 pandemic.<sup>1</sup> When preparing a draft of DIAA’s annual budget, the DIAA reviewed its expenditures. The DIAA Office confirmed that DIAA has not had any claims under the student accident insurance policy in the last five years.<sup>2</sup> The policy, for which DIAA was the named insured and paid a premium of \$50,000, had an excess policy rider and a \$50,000 deductible. Under the policy’s terms, any other insurance policies covering the injury would first need to be exhausted (i.e., member school-purchased and/or student-purchased insurance), then DIAA would have to pay \$50,000 out-of-pocket to meet the \$50,000 deductible and then the policy would kick in to cover eligible expenses between \$50,000 and \$6 million for a covered injury that results in a covered loss while participating in any DIAA sponsored and supervised student activities. The policy excluded “illness or disease” as a covered loss, so it did not provide coverage for a disease like COVID-19.

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<sup>1</sup> See DIAA 2020-21 Budget Explanation. Executive Director Donna Polk presented the document to the DIAA Board of Directors during its October 8, 2020 meeting.

<sup>2</sup> At the February 16, 2021 recommendations meeting, a committee member asked Executive Director Donna Polk how many claims have been filed. Ms. Polk responded that one claim has been filed in the past five years. To clarify, the claim that Ms. Polk referenced was made under the general liability insurance policy.

On October 12, 2020, member schools were notified that DIAA did not renew the student accident insurance policy.<sup>3</sup>

**DIAA does not request that the General Assembly grant it the statutory authority to purchase insurance coverage for student accidents** insofar as such authority would waive DIAA's sovereign immunity and expose DDOE and DIAA to liability that they normally would not have.

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<sup>3</sup> See Memorandum to DIAA Superintendents and Heads of Schools from Donna Polk (Oct. 12, 2020).



## Delaware Interscholastic Athletic Association

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### MEMO

To: DIAA Superintendents and Head of Schools

From: Donna J. Polk, DIAA Executive Director 

Date: October 12, 2020

Re: 2020-21 DIAA Member Schools Benefits

cc: DIAA Principals and Athletic Directors

We are writing to provide an update on DIAA member schools benefits for the 2020-2021 academic year. The DIAA Board of Directors met on October 8<sup>th</sup> where the 2020-21 DIAA budget was approved noting the revenue reduction due to COVID-19 pandemic during the winter/spring 2020 sport seasons. DIAA will credit member schools spring 2020 sport fees due to the cancellation of spring sports.

As of renewal on or after August 1, 2020, the student accident insurance will not be renewed for the 2020-2021 academic year. The advice of counsel was followed in the decision not to renew the student accident insurance policy.

DIAA remains committed to providing the following expense related benefits for member schools during the current health pandemic:

- Providing National Federation of State High School Associations (NFHS) publications and rules books for all sports for member school's head coaches and athletic directors;
- Providing the opportunity for professional development courses for member school's athletic director with annual DAAD membership;
- Conducting Rules Clinics for member schools' coaches;
- Providing DIAA State Rules Interpreters for each sport to assist DIAA with sport rules interpretations;
- Providing the opportunity to nominate students to receive DIAA Scholar Athlete Scholarships;
- Providing the opportunity to nominate students to attend the NFHS and DIAA Student Leadership Conferences;
- Providing the opportunity to participate in DIAA Sports and Rules Committees;
- Providing administrator and media credentials during the regular season; and

**DIAA 2020-21 Budget Explanation**

DIAA spending authority authorized by the General Assembly is 950,000.00. For the FY21, DIAA spending authority is 848,404.73 end of September 2020. The reduction in spending authority is due to decreased revenues FY20. The reduced revenues was a direct result of the COVID-19 pandemic. The health pandemic cancelled the 2020 basketball championships semi-finals, finals rounds, and spring sports championships. The lost revenues totals estimate 220,251.00.

Sport	Championship Rounds	Totals – estimates from FY19
Girls Basketball	Semi-Finals/Finals	23,976.00
Boys Basketball	Semi-Finals/Finals	62,368.00
All Spring Sports	All Rounds	133,907.00

**DIAA 3 Year Comparison**

Fiscal Year	Beginning Cash Balance	Revenue + interest	Expenses	Total	Ending Cash Balance
FY21	831,599.90				
FY20	991,984.58	502,569.70	689,110.14	-186,540.44	805,444.14
FY19	969,540.04	778,262.73	784,851.39	-6,588.66	962,951.38
FY18	981,847.32	826,967.21	874,032.14	-47,064.93	934,782.39

FY21 Estimate Revenue/Expenses without championship revenue  
 831,599.00 – 373,930.00 = 457,669.00

**Required Expenses FY21**

Description	Expense	Amount
	290,000.00	
Liability Insurance	25,000.00	
NFHS Rule Books/Preseason Guides	12,000.00	
Sportsmanship Banners	2500.00	
Harry Roberts Award	10,000.00	
State Interpreters	3500.00	
NFHS Dues	2500.00	
Board Fees	20,000.00	
EBoard Solutions	3425.00	
ArbiterSports	4410.00	
CSIET	595.00	
Officials Credit		3357.00
Member School Spring Sport Fee Credit		11,000.00
<b>Total - Estimate</b>	<b>373,930.00</b>	<b>16,357.00</b>

**COVID 2020-21 Sponsorship Loss = 20,000.00**

DIAA will be responsible for the following due to sponsorship loss due to COVID—19: (5770.00)

1. 270.00 - Harry Robert Scholar Athlete Award Plaques
2. 2500.00 - Pass Credential Event Tags/Lanyards
3. 3000.00 - Officials Patches

**DIAA 2020-21 Championships Revenue – Estimated FY19 (COVID-19 Gathering Limits may impact meeting these numbers)**

<b>Estimated Championship Revenue</b>	
Fall	247,000.00
Winter	286,000.00
Spring	130,000.00
<b>Total</b>	<b>663,000.00</b>

**Championships estimate expenses related to COVID-19: (\$50,000.00)**

1. Face Coverings – 9000.00 (Qty 3000 @ 2.99)
2. Electronic Whistles – 1800.00 (Qty 50 @ 36.00)
3. Mobile Disinfection Units – 5000.00
4. XC FAT Timing Scoring – 3900.00
5. Go-Fan Digital Ticketing Tablets – 10,000.00 (Qty 20 @ \$500)
6. Go-Fan Stylus – 180.00 (Qty 20 @ \$9)
7. Go-Fan Carry Tech bad for each tablet – 320.00 (Qty 20 @ \$10)
8. Go-Fan Sign Stands – for QR Code scanning/digital ticketing/championship event – 1000.00 (Qty 20 @ \$50)
9. Touchless thermometers – 900.00 (Qty 30 @ \$30)
10. Disinfectant supplies – 3980.00 (Qty 20 @ \$199)
11. PPE (Gloves)
12. Sanitizer



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- Conducting DIAA sport championships as deemed necessary during the health pandemic;

DIAA thanks all member schools for your commitment to conducting interscholastic athletic programs annually and wish member schools much success as we all navigate academics and athletics this upcoming year. If you have any questions, please contact the office for assistance.

Yours in Athletics.