

August 29, 2013¹

Martin O'Malley,
Maryland Governor
(by email)

Maryland Board of Regents
(by email)

William E. Kirwin, Ph.D
Chancellor
University System of Maryland
(by email)

Nancy K. Kopp
Maryland Treasurer
(by email)

Peter V.R. Franchot
Maryland Controller
(by email)

Re: Please Discuss 2011 Frostburg Football Death at Tomorrow's BOR Meeting.
No Sign BOR Members are Aware That Derek Sheely Died or How

Dear Governor O'Malley, the Maryland Board of Regents, Dr. Kirwin, Treasurer Kopp, and Controller Franchot,

Tomorrow, the Maryland Board of Regents, which oversees the State's University System, will hold a meeting by conference call. On the agenda for discussion are (1) topics for the upcoming Board retreat; (2) topics for education forums at future Board meetings; and (3) the Board's process for reviewing the performance of the University presidents they supervise.² (The Board also has an undisclosed item to be decided in executive session.)

The Board needs to add to its agenda a discussion of Derek Sheely, the Frostburg State University student who died two years ago yesterday of head trauma sustained in football practice with the school's team. On August 22, 2013, Sheely's

¹ Updated August 30, 2013

² <http://www.usmd.edu/regents/agendas/fb083013p.php>

family filed a complaint in which they allege that his death stemmed from misconduct by Frostburg 's football coaches and an athletic trainer.³

The Sheely family alleged last week that the football coaches conducted dangerous helmet-to-helmet "Oklahoma-style" tackling drills over three days that caused Sheely to sustain a bleeding gash on his forehead and that the two football coaches and an athletic trainer named in the suit ignore concussion signs that he displayed before collapsing unconscious on the field. Each of these staff currently serves in these positions at Frostburg.

Is the Board of Regents Aware of Derek Sheely's Death?

It is not clear that members of the Board of Regents are aware of Sheely's death, of the suit his family has filed, or of the broader issues of concussions in college football and other sports. A review of the minutes of the Board of Regents' public meeting since August 2011 reflect no discussion of Sheely's death. The minutes also reflect no discussion of concussions in intercollegiate football.

There is no discussion in the Board's minutes of the long-term risk that repetitive head blows in football may lead to chronic traumatic encephalopathy (CTE) not only in retired NFL players but also in college football players, for example, Owen Thomas, a University of Pennsylvania football player who committed suicide in April 2010.⁴

There is also no discussion in the Board's minutes of the short term risks that repetitive head blows in football can lead to altered brain function, even in players who are not diagnosed to have sustained a concussion, and that such altered brain function can take months to return to baseline.⁵

Further, on September 28, 2012, 13 months after Sheely's death, the Board of Regents adopted Policy V 2.10, University System of Maryland Policy on Intercollegiate Athletics.⁶ The Policy requires a University president to report to the Board of Regents information about a school's intercollegiate athletics program such as student participants' academic performance and financial aspects of the program.

³ The Sheely family's complaint can be found at this link.
<http://nflconcussionlitigation.com/?p=1492>

⁴ <http://www.nytimes.com/2010/09/14/sports/14football.html?pagewanted=all& r=0>

⁵ <http://www.purdue.edu/newsroom/research/2012/120202NaumanFootball.html>

⁶ <http://www.scribd.com/doc/163929133/Md-s-Bd-of-Regents-Policy-V-2-10-Univ-System-of-Md-Policy-on-Intercollegiate-Athletics-Updated-9-28-2012>

The Board of Regents' Policy, however, requires no reporting on concussions or other injuries that students sustain from participating in intercollegiate athletics.⁷ The report filed by Frostburg State University for the 2010-2011 school year contains no information about concussions or other injuries.⁸ (No report by Frostburg State University is available at the Board of Regents website for the 2011-2012 school year, the year in which Sheely died.)

On September 28, 2012, the Board of Regents set up a Work Group on Intercollegiate Athletics. The minutes of the March 27, 2013 meeting (the only meeting for which minutes are available at the Board's website) of the Work Group reflect no discussion regarding Derek Sheely's death or of sports concussions or other sports safety issues.

The Board of Regents response to the issue of head injuries in intercollegiate sports compares poorly with the response by the Maryland State Board of Education, which sets policy for Maryland public elementary, middle, and high schools. In response to concerns that I raised in May 2012, the State Board of Education:

- scheduled an information briefing at the following board meeting,⁹
- adopted emergency regulations mandating sports concussions procedures for Maryland's public high schools,
- established a task force of experts, and
- issued recommendations requiring high schools to limit full contact football practices to no more than 2 per week.

The State Board of Education's energy on sports concussions was driven by now former Board members Kate Walsh and Ivan Walks, MD, MPH, the former Director of Public Health for the District of Columbia. Current MSBE board members James DeGraffenreidt and Donna Hill Staton were also strong voices on the issue. (Governor O'Malley should consider appointing Walsh (Baltimore County), Walks (Montgomery County), DeGraffenreidt (Baltimore City), and Hill Staton (Howard

⁷ Reports like this one which members of the Howard County Board of Education receive should be provided to the Board of Regents from the schools they oversee. <http://www.scribd.com/doc/121864839/Howard-County-Maryland-Public-Schools-Report-of-Injuries-in-High-School-Sports-Program-2006-2011>

⁸ <http://www.scribd.com/doc/163937253/Md-s-Frostburg-St-U-Ann-Report-to-Bd-of-Regents-on-Intercollegiate-Athletics-2010-2011-Submitted-June-2012>

⁹ At the link is an unofficial transcript of the State Board of Education's discussion of sports discussion on June 26, 2012 can be found at this link. <http://www.scribd.com/doc/163944135/Md-State-Bd-of-Ed-Meeting-on-06-26-12-Sports-Concussion-Discussion-Transcript-unofficial>.

County) to the Board of Regents to provide needed leadership on the sports concussion issue.)

Governor O'Malley, Treasurer Kopp, and Comptroller Franchot Should Attend Tomorrow's Board of Regents Meeting

By law, the Board of Regents is required to invite Governor O'Malley, Treasurer Nancy Kopp, and Comptroller Peter Franchot to attend each of its meetings.¹⁰ If you will recall, in 2011 Pennsylvania's Governor Tom Corbett exercised a similar role to lead the Board of Trustees for Penn State University to address the child abuse scandal related to Penn State football coach Jerry Sandusky.

I respectfully urge Governor O'Malley, Treasurer Kopp, and Comptroller Franchot to attend tomorrow's Board of Regents meeting and play a similar leadership role on the issue of the safety of students when they participate in intercollegiate athletics within the University System of Maryland.

Football at Frostburg: Is it Safe?

Most urgently, the Maryland Governor, Treasurer, and Comptroller need to learn why the Chancellor and the Board of Regents believe it is safe for the Frostburg football team to continue under the current leadership and whether competent athletic trainer staff are in place at the schools. The Board of Regents Policy V 2.10 requires Frostburg State to comply with investigations by the National Collegiate Athletic Association (NCAA) but the Sheely family allege that the NCAA has refused to investigate Derek's death.

Ultimately, it is the Board of Regents responsibility to investigate an issue like the death of a student in a school sponsored sports program to ensure the safety of students going forward.

Is Frostburg's President Overseeing Athletics?

Board of Regents Policy 2.10 provides,

Fundamental to the effective management of the intercollegiate athletics program is the commitment of the president of the institution to maintain regular oversight of the enterprise.

In a June 6, 2012 briefing memorandum to the Board's Committee on Education Policy and Student Affairs, it is reported that the athletics director for several USM institutions reports directly to the university president.

¹⁰ Code of Public Laws of Maryland, Education Article section 12-103(b)(2).

At Frostburg State, however, as of June 6, 2012, the athletics director reported to the school's Vice President for Administration and Finance.¹¹ Is this still the case? Does this represent responsible commitment by Frostburg's President to effective management of the school's intercollegiate athletics program?

Has the USM's Director of Internal Audit reviewed Sheely's death and Frostburg's commitment to safety of students who participate in the athletics program? Ultimately, the Board of Regents should consider whether an evaluation by an independent outside party is needed.

Football at Other USM Schools

The Board of Regents also need to determine whether the dangerous drills alleged in the complaint occurred in past and whether they are currently being administered by the Frostburg football coaches. A similar review should also take place immediately with respect to football programs at other schools in the University System of Maryland.

Limits on Full Contact Football Practices

Football accounts for over half of the concussions in college sports. Emerging research, however, shows that subconcussive blows to the head also pose a serious risk to the human brain. Studies have shown that college football players sustain an average of 650 subconcussive blows to the head in a season.

Among student athletes playing the offense or defensive line, the number of subconcussive hits per season can be as high as 2,200.¹²

Doctors believe that over time, these subconcussive blows can lead to an Alzheimer's-like brain disease called chronic traumatic encephalopathy or CTE. CTE has been confirmed in several deceased NFL players including NFL great Junior Seau's suicide last year. CTE has also been found in college aged football players,

¹¹ <http://www.scribd.com/doc/163948474/Md-Bd-of-Regents-SubComm-on-Ed-Policy-Student-Affairs-Memo-on-Intercollegiate-Athletics-June-6-2012>;
<http://www.scribd.com/doc/163937253/Md-s-Frostburg-St-U-Ann-Report-to-Bd-of-Regents-on-Intercollegiate-Athletics-2010-2011-Submitted-June-2012>

¹² Hit Count Proposal Press Release and White Paper, Sports Legacy Institute, February 2012. Dr. Robert Cantu of Boston University's recommendation for a reduction in subconcussive blows to the head in high school football. <http://www.sportslegacy.org/policy-2/hitcountwhitepaper/> ;
<http://www.scribd.com/doc/94905915/Sports-Legacy-Institute-SLI-Hit-Count-White-Paper-Feb-2012> ;
<http://www.scribd.com/doc/94905911/Sports-Legacy-Institute-SLI-Hit-Count-Press-Release-Final-02-03-12>

including Owen Thomas, a University of Pennsylvania football player who committed suicide in April 2010.¹³

Short term, repetitive head blows can alter brain function for many months. Scientists at Purdue University released a report in February 2012 of a study that had followed a high school football team for two seasons. Each player's helmet was outfitted with an accelerometer to measure impacts and each player's brain was given a functional MRI (fMRI) of his brain doing certain tasks both at the beginning of the season and at the end.

The Purdue Study's results show that even players who had not been identified as having sustained a concussion showed altered brain function on their fMRIs from the beginning of the season to the end. And it took months for the brain function to return to normal.

In light of this and similar research, what has been done? In 2011, NFL players negotiated that teams are permitted no more than one full-contact practice per week.

The NCAA still permits 5 full-contact practices per week and two-a-day practices. Over two years ago, however, the Ivy League imposed a 2 full-contact practice limit per week in football. The Ivy League also banned all two-a-day full padded football practices.¹⁴

The Ivy League took this action based on the leadership of two of their university presidents who are physicians. The Ivy League took this action on their own because their presidents felt that getting a consensus on such limits from the NCAA could take years and they thought it was too urgent to wait. That's what smart people do when faced with imperfect data about a serious health issue.

The PAC-12 conference recently also imposed limits on full contact football practice.¹⁵

¹³ <http://www.nytimes.com/2010/09/14/sports/14football.html?pagewanted=all&r=0>

¹⁴ July 2011 Press Release and Report of Ivy League Announcing a limit of full contact football practices to two per week and prohibiting two-a-day practices.
http://www.ivyleaguesports.com/sports/fball/2011-12/releases/Ivy_League_Presidents_Approve_Concussion-Curbing_Measures_for_Football
<http://www.scribd.com/doc/94905692/Ivy-League-Council-of-Presidents-Report-Re-Concussions-in-Football-July-2011>

¹⁵ <http://www.sbnation.com/college-football/2013/7/26/4560198/pac-12-football-rules-contact-concussions> .

The Big 10 Conference, to which the University of Maryland College Park will move, however, has indicated that it will not adopt such limits.¹⁶

In Howard County, a year ago they adopted the two practice per week limit in football. One coach, Kyle Schmitt, who started on the O-line at UMCP, only did one full contact practice per week.¹⁷ The Baltimore Sun reported:

Kyle Schmitt, the coach at Atholton High School, has an even more conservative approach to training and only has his kids wear full gear **once a week**. "We limit hitting. We just don't beat our kids up," he said. "We stress the mental portion of the game rather than knocking heads." (emphasis added)

Coach Schmitt recently moved to Archbishop Spalding High School. I reached out to him and asked whether he was going to follow a similar conservative practice. "No change," he said. "We are more interested in practicing smart not fast."

Wouldn't Coach Schmidt make a great coach for Frostburg?

The Board of Regents Needs To Adopt Ivy League Full Contact Practice Limits

The Board of Regents' deference to the NCAA on this issue amounts to an abdication of its responsibility to keep Maryland students safe when they participate in interscholastic sports. The Board or Regents should require the university presidents it supervises to adopt the limits the Ivy League has imposed. Now.

The Board of Regents should also instruct the university presidents it supervises that they should advocate for such limits, and vote for such limits, in all NCAA and Conference votes on the issue.

Sovereign Immunity for Intercollegiate Athletics

The Sheely family has not named Frostburg or the Board of Regents in lawsuit. Presumably, such claims are being addressed through the Maryland Tort Claim Act under the State Government Article. Generally, it is my understanding that the liability of Maryland may not exceed \$200,000.

State personnel appear to enjoy limited sovereign immunity so that they are only liable for misconduct related to their state job if it is malicious or gross negligence.¹⁸

¹⁶ http://espn.go.com/blog/bigten/post/_id/78630/b1g-not-following-pac-12-concussion-rules

¹⁷ <http://www.baltimoresun.com/news/maryland/education/bs-md-concussions-20120912,0,3746070.story>

¹⁸ Code of Public Laws of Maryland, State Government Article section 12-103(b)(2).

The Sheely family has alleged that the two Frostburg coaches as well as the athletic trainer acted with gross negligence. (No such allegations have been made regarding the athletic director or the president at Frostburg, nor the members of the Board of Regents, themselves, who also operate with limited sovereign immunity.)

The Board of Regents needs to consider whether the high risk of personal injury posed by some intercollegiate sports make it appropriate for such sports to be conducted by state employees operate with the current limited immunity.

One private sector discipline that gets lost by intercollegiate athletics being conducted by state employees is the discipline of liability insurance. If the University System of Maryland had to obtain insurance on the private market for the football program at Frostburg, would an insurer be willing to provide coverage? If so, would the premiums be affordable?

Would a private insurer condition coverage on the Board of Regents banning dangerous football tackling drills, Oklahoma drills, that the Sheely family allege caused their son's death?

Would a private insurer condition coverage on the Board of Regents having a policy in place to remove football coaches who conduct dangerous drills?

Do Sovereign Immunity Limits Create Perverse Financial Incentives?

The Board of Regents needs to ask whether the limited immunity has created perverse financial incentives for the universities it supervises. Football and other sports programs represent significant revenue source and an opportunity to market a school's "brand." If liability for a tragedy like Derek Sheely's death is capped at \$200,000, does this represent a small operating cost with no financial incentive for a University to correct dangerous conditions?

If such limited immunity continues, the Board of Regents needs to adopt appropriate controls.

Conclusion

These serious issues may be beyond the Board of Regents willingness to address.

That is why Governor O'Malley needs to step in. He is being talked about as a Presidential contender for 2016. If the Governor can't protect Maryland students from what some call the Football Industrial Complex, how can Americans expect him to protect them from Al-Qaida and other national threats?

Thank you for taking time to read my letter.

Sincerely,

/s/

Tom Hearn¹⁹

¹⁹ I am a Montgomery County resident and the father of two teenagers who I hope will one day attend college in the excellent University of Maryland System. After my son sustained a serious concussion playing high school football in 2011, I advocated before the Maryland State Board of Education for greater steps to keep high school students safe from concussions when participating in school-sponsored sports.

The views expressed here are my own. I met Mr. and Mrs. Sheely once at a concussion awareness event in 2012. However, I am not involved in their case and have not discussed this letter with them or any of their representatives.