



OPENING JITTERS: UNDERSTANDING LEGAL CONCERNS OF NEW CASES IN REOPENED SCHOOLS

School districts are looking forward to reopening for the 2020-2021 school year, but are concerned that they might be sued if someone claims to have contracted COVID-19 at school. We believe that when school districts have taken due care to contain and slow the spread of diseases, there is little basis for a successful legal claim.

Having a solid, well-implemented re-entry protocol derived from best practices and recommendations is the best approach to preventing successful claims. We highly recommend the practices set forth in MSBA's recently published, "Pandemic Recovery Considerations: Re-Entry and Reopening of Schools" document on MSBA's COVID-19 Resources website. From that starting point, many school-specific measures can be evaluated and implemented. Many insurers provide clients with risk management consulting, which could be a valuable service to employ as to the building-specific details.

Several legal doctrines should protect districts from liability for claims arising in this situation.

Property Condition Claims and a Reasonable Re-Entry Plan

Public entities, such as schools, are protected from many legal claims based on the doctrine of sovereign immunity. However, sovereign immunity does *not* apply to, "Injuries caused by the condition of a public entity's property if the plaintiff establishes that the [1] property was in dangerous condition at the time of the injury, that [2] the injury directly resulted from the dangerous condition, that [3] the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that [4] either a negligent or wrongful act or omission of an employee of the public entity [5a] within the course of his employment created the dangerous condition or [5b] a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

To bring a claim based on this waiver, someone claiming they contracted COVID-19 at school would need to prove that the virus was located on school property. As society "opens," there is a growing set of places where transmission could have occurred. Tracing is further complicated by the incubation period, during which a person may be in a wide variety of settings with others.

Second, even if a virus could be traced to school property, a claimant would have to prove that the mere presence of a virus constituted a "dangerous condition" of school property. Generally, the idea of "dangerous condition" applies only to the physical condition of actual elements of property itself, but this can sometimes include foreign objects. Whether a tiny virus is a "foreign object" making property dangerous under this body of law is unknown, but appears unlikely.

Even if a virus is a danger-creating "foreign object," the district is only responsible for the *negligent* placement upon or failure to remove it from school property. That is, for not recognizing the risk and taking reasonable precautions. Thus, where a school district is following generally accepted re-entry protocols to manage the risk of contagion, it is difficult to see where isolated occurrences of COVID-19

presence could be considered to have been in place at the school due to “negligent ... failure to remove” a danger to users of the public property.

In addition, even if attempted claims occur, the district’s insurance policy should provide defense for claims under this approach.

Other Insured Claims

When a public entity purchases liability insurance, immunity is waived as to claims of injuries caused by the district (“torts”), to the extent of and for the specific purposes covered by the insurance purchased. As with the “property condition” discussion above, a claim based on contracting COVID-19 at school would appear to require showing *negligence* on the part of the district in taking measures to manage the risks. Implementing a recognized re-entry protocol should demonstrate that proper precautionary measures were in place and therefore that the district cannot be considered “negligent” about the risk. Even if such claims are asserted, they will be, by definition, within the scope of insurance coverage.

Personal Liability Issues

Plaintiffs occasionally attempt to add public officials and employees to their cases, in addition to the school itself. Missouri recognizes “Official Immunity.” This protects public officials from liability if they act within the course of their official duties and without malice. Courts say that society’s compelling interest in “vigorous and effective administration of public affairs requires that the law protect those individuals who, in the face of imperfect information and limited resources, must daily exercise their best judgment in conducting the public’s business.”

Missouri courts also recognize what is called the “Public Duty Doctrine,” i.e., that a public employee is not civilly liable for the breach of a duty owed to the general public, rather than a particular individual.

Caretaking of the school facilities, choosing and implementing a competent re-entry program, and decisions made in the course of doing so, all should easily fall within these doctrines. This protects the individual from personal responsibility, although an injury might still be pursued against the school itself *if* the type of claim is one where sovereign immunity has been waived by statute or by the presence of insurance. In other words, officials and employees need not fear personal legal liability from good faith exercise of their public positions in the face of COVID-19.

Proactive Response to Cases

Inevitably, as we presently understand the profile of COVID-19, future cases will emerge. Responding to cases or exposure scenarios can play a critical role in managing the risk of legal claims, to the extent that the district can prevent a deterioration of its relationship with students, parents, affected employees, or anyone else in the school community. Legal doctrines and insurance coverage aside, not provoking claims in the first place is always a wise practice, and much could be achieved in terms of reducing the strain on the educational process or employment relationship, by working cooperatively on incident management and harm mitigation strategies with affected people.