

THE IMPORTANCE OF UNDERSTANDING AND FULFILLING THE DUTY OF REASONABLE CARE WHEN REOPENING SCHOOL

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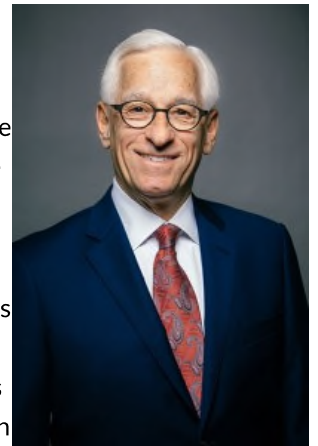
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Independent schools planning to have students return to school before there is a vaccine for the COVID-19 virus are understandably concerned about potential liability if a returning student becomes severely ill after contracting the virus at school. In many states, existing laws provide some form of limitation of liability for public schools, but not for private schools. In response to the pandemic, some state legislatures are enacting safe harbor legislation to protect private businesses that reopen during the pandemic from liability. However, not all states have passed such legislation and even those that have require businesses to follow specific guidelines to gain protection from liability.

Some independent schools are considering requiring parents to release the school from liability as a condition of enrollment. This option presents a number of issues that may make it unacceptable for many schools. First, requiring a release from liability may send the message that the school is not doing all it can to keep their child safe, thereby discouraging parents from sending their child back to school just when independent schools are concerned about declining enrollment due to the financial crisis. Second, requiring a release for reenrollment would, in effect, be an alteration to the enrollment agreement. For one party to change a material term of an existing contract, the other party must provide something of value in return. It is not clear what a school would offer in these circumstances. Third, if a school did offer a revised enrollment agreement with a release provision and a parent was unwilling to sign it, the school would likely not be able to enforce the previous agreement and would not be able to collect or retain tuition payments.

Regardless of whether independent schools obtain protections from liability through legislation or releases, they will not be immune from liability if they are found to be grossly negligent by being indifferent to protecting the safety of their students. In all circumstances, it remains axiomatic that to avoid liability schools must understand their legal obligations and fulfill them. It is well established that schools have a duty to exercise reasonable care to minimize foreseeable harm to students. In order to fulfill this duty, schools must provide parents with appropriate warnings about known risks and take reasonable protective measures to address them. What is reasonable and appropriate will depend on the circumstances. Schools are not required to be absolute guarantors of safety. The law recognizes that not all risks can be fully neutralized. When there is foreseeable risk, reasonable warnings and protections, appropriate for the circumstances, will be sufficient to fulfill the school's duty of care.

Returning to school in the midst of a pandemic is certainly a circumstance when the risk of harm to students cannot be eliminated. Indeed, this is a rare occurrence in which both the likelihood and the gravity of the potential harm are high. To fulfill their duty to warn parents, schools should alert parents that the risk of infection and serious illness in a pandemic are high and direct parents to state and federal websites for the most current information. Schools should advise parents to check with these websites



as knowledge about the spread of the virus and its impact evolves. Schools should retain copies of all such communications so that they can demonstrate, if needed, that they reasonably educated parents about the known risks.

To fulfill their duty to reasonably protect students, schools should implement policies and protocols that comply with state and federal guidelines for reopening schools. Ideally, schools should implement applicable guidance from national independent school organizations and infectious disease experts. These policies and protocols should be added to the student and community handbooks and communicated to parents. In addition to explaining the steps the school will take to mitigate the risk of spread of infection from the virus, schools should list expectations for students and their families. Parents and students should be provided an opportunity to raise questions and concerns. Parents should be asked to acknowledge that they have consulted the government websites and have reviewed the new return to school policies. All communications should be preserved so that the school can demonstrate that it took reasonable steps under the circumstances to mitigate the risk of contagion. The communications should also leave no doubt that the school took reasonable steps to educate the parents about the risk of contagion and illness so that the parents could make an informed decision whether to return their children to school.

Reopening schools in the midst of a pandemic will inevitably involve substantial risk of harm to students. Under the circumstances, no school can absolutely eliminate the risk of illness. Nonetheless, schools can substantially mitigate the risk of liability. Schools that meaningfully educate parents and students about the known risks and implement policies and protocols that meet appropriate guidelines will be able to demonstrate, if needed, that they reasonably and adequately fulfilled their duty of care to students and their families even if a student becomes ill.