

CORONAVIRUS RESOURCE CENTER

Reopening Schools in the COVID-19 Climate: Legal Issues to Consider

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As summer begins, schools and universities across the country are facing the difficult decision about whether and how to reopen their institutions in the fall. As of this date, the majority of colleges and universities are stating that they plan to reopen in person, while a small number are reserving their decision, and a smaller number still, including the California State University system, have announced that they will be fully online this fall.¹ Some, like the University of Notre Dame, have already announced modifications to their calendar to minimize the risk of COVID-19 transmission on campus.² Boarding schools and day schools around the country are faced with the same difficult set of decisions.

In making decisions about how and when to reopen, schools will want to balance their desire to provide as high quality an education as possible, their need to keep enrollment and admissions steady, and the imperative to minimize the health risks for all constituencies within the institution. Doing so successfully will also involve a serious look at a number of legal issues. While COVID-19 presents a number of novel legal questions, there are three in particular for which schools need to be particularly prepared this fall. First, what can schools do to protect themselves from any potential negligence or recklessness claims by students and their families, faculty or other employees if there were a COVID-19 outbreak on campus? Second, what kinds of COVID-19 specific discrimination claims might students, faculty or other employees attempt to pursue? Finally, families requesting either full refunds or partial refunds will likely continue to be an issue in the 2020–21 school year. We have given some thought to these issues and want to share our thinking with you.

¹ Chronicle Staff, *Here's a List of Colleges' Plans for Reopening in the Fall*, The Chronicle of Higher Education (updated May 29, 2020), <https://www.chronicle.com/article/Here-s-a-List-of-Colleges-/248626>.

² Amanda Hartocollis & Dan Levin, *Notre Dame Plans to Reopen Its Campus in the Fall*, N.Y. Times (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/notre-dame-reopening-coronavirus.html>.

NEGLIGENCE CLAIMS

Schools can anticipate that, if there are exposure events upon reopening or, worse yet, a full-on outbreak of COVID-19 on their campuses, they might be subject to claims of negligence or even recklessness from both students' families and employees. Insurance coverage for these claims may be excluded as they may be deemed related to a pandemic exclusion in the policy. Recognizing this risk, some university and college presidents have asked both the federal and state governments for liability shields to protect them if they take "reasonable" precautions upon reopening. While no federal liability shield has yet been enacted, several states have passed laws recently that grant immunity from COVID-19-related negligence claims to all individuals and businesses.³

In the absence of a liability shield for schools, however, it is important to anticipate potential negligence claims. Among many other fact-specific questions that will determine the value and likely success of such claims, one will be whether the school exercised the appropriate standard of care in the policies and procedures it adopted prior to and upon reopening. While no one knows yet exactly what that standard of care will be, we have put together some guiding principles that might help schools navigate this unprecedented landscape.

Consult CDC, State and Local Guidelines

When considering whether to reopen, and the medical and legal hazards of doing so too early, schools should first consider local, state and city orders for the area in which they are located. If public schools remain closed, a private school that reopens may be more susceptible to potential claims of negligence or recklessness, depending upon the reasons the public system cites for failing to reopen. The public school might remain closed due to constraints that a private school does not face. If, for example, the public school system cites lack of space in their buildings or dormitories to ensure social distancing as the reason for remaining closed, a private institution may be able to show that they are not constrained in the same way and thus that their reopening is not unreasonable. This decision will likely be highly fact-specific, and vary tremendously from state to state, locality to locality (particularly, rural versus urban areas).

As of this date, states are beginning to release re-entry guidance plans. For example, Indiana's Department of Education recently released "Indiana's Considerations for

³ For example, Utah passed such a bill in May. See Taylor Stevens, *Utah Governor Signs Bill Shielding Businesses, Property Owners from Coronavirus-Related Lawsuits* (May 4, 2020), <https://www.sltrib.com/news/politics/2020/05/04/utah-governor-signs-bill/>. Oklahoma, too, has passed a broad waiver of liability for COVID-19 related negligence claims. See Paula Burke, *New Law Provides Immunity from Certain COVID-19 Liability Claims* (May 28, 2020), <https://oklahoman.com/article/5663280/new-law-provides-immunity-from-certain-covid-19-civil-liability-claims/>. Several other states have proposed similar legislation.

Learning and Safe Schools In-Class: COVID-19 Health and Safety Re-entry Guidance,” which provides a checklist of considerations for its public schools, as well as protocols around health issues, social distancing, extra-curricular and athletic programming, special education, and transportation.⁴ California’s recently published guidance recommends that schools consider both “active” temperature monitoring, where students’ and staff members’ temperatures are taken with contactless thermometers as they enter school buildings or buses, and “passive” monitoring, where families and staff members are asked to self-check and report.⁵ Virginia, too, has recently released a phased approach to reopening Virginia’s public and private schools designed to offer flexibility to education institutions based on their unique limitations; in the third phase, in-person instruction with strict social distancing will be offered to all students.⁶ Schools should closely monitor state guidance, as well as CDC guidelines, and adjust plans as necessary. Failure to do so could enable a potential plaintiff to more easily show that a school did not abide by the requisite standard of care.

Procedures and Policies to Put in Place Prior to Reopening

The CDC guidelines for schools⁷ and universities⁸ provide a primer on modifications that schools can and should make in light of what we know now about COVID-19. Careful consideration of all the issues highlighted in those guidelines—as well as the subsequent development of a coherent, well-developed, and well-communicated plan—will be an important component in a school’s demonstration that it has exercised a reasonable duty of care. We outline below a few of the modifications the CDC guidelines suggest.

First of all, given what we know thus far about COVID-19, schools should think creatively about the modification of existing spaces. How can they maintain a six-foot rule in what are often over-crowded classrooms? Are there seating configurations that distance students from each other and from faculty? Can dormitories be configured to offer more single rooms? Schools might consider Plexiglas barriers in reception areas and common spaces and avoid use of large communal spaces altogether. Schools should also consider either discontinuing lunch service or preparing prewrapped individual packaged lunches for students.

Secondly, schools will need to develop protocols for regular and increased hygiene practices on campus—such as the wearing of masks, regular handwashing, the use of

⁴ <https://www.doe.in.gov/sites/default/files/news/june-5-class-document.pdf>.

⁵ <https://www.cde.ca.gov/ls/he/hn/documents/strongertogether.pdf>.

⁶ Phase Guidance for Virginia Schools, <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final-Phase-Guidance-for-Virginia-Schools-6.9.20.pdf>.

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/index.html>.

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/index.html>.

disinfectant wipes on regularly used surfaces, and a decrease in the number of shared objects (building blocks, art supplies, lab equipment, to name a few). In addition, schools should have in place a clear and aggressive plan for regular disinfection and cleaning—one that balances the need for an aggressive cleaning protocol with the need to protect students and staff from exposure to toxins and/or unattended cleaning supplies.

Thirdly, schools should develop a plan to modify schedules to reduce the number of people entering and exiting the building simultaneously. This could take many forms, including staggered arrival and pick-up times (for day schools) or having in-person attendance on alternating days or halves of any given day.

Finally, schools will need to assess their medical needs. As part of that assessment, schools should determine whether they need to increase nursing and medical personnel, develop clear and simple protocols for isolating and transporting exposed or sick students or faculty members, and develop a plan for performing regular temperature checks. Schools should consider whether they have the capacity to perform “active” temperature checks—as each student and staff member enters a building or school bus, or “passive” ones, where families and staff are asked to self-check and accurately report on a daily basis.

Once a sick student or faculty member is identified, schools should be prepared to cooperate with local health departments on a contact tracing protocol in order to prevent an isolated case from turning into a full-fledged outbreak. As part of a school’s consideration for keeping sick or potentially exposed members of its community in isolation and out of classrooms, it must necessarily consider how those kept out of the classroom are able to continue learning and are not otherwise penalized for their absences. Schools also need to carefully consider possible limits on what they can say in the event they learn of a student or teacher/staff member’s illness. For example, the federal HIPAA law may come into play where a school is acting as a healthcare provider, while the Americans with Disabilities Act may limit what a school can disclose as an employer. Many states also have laws, not specific to healthcare, that generally restrict the public disclosure of private facts. Public health considerations will need to be weighed against such protections, but in general, the identification of any particular individual, as opposed to a more general notice about illness in a class, grade or dormitory floor, should be avoided in any public notice.

Careful consideration of each of the above issues—and any additional issues that the CDC, state and local guidance raises—as well as clear communication about the modifications it is undertaking, will help a school protect against claims of negligence or recklessness. Schools should also take care to remain flexible both in their policies and in the communication of those policies; the COVID-19 landscape is likely to be fluid and

require adaptability. Schools should therefore avoid unequivocal statements about their proposed modifications and regularly reassess whether additional or different modifications are required.

In addition, when thinking through these issues, schools should consider consulting with peer schools to develop shared protocols. If similarly situated schools implement similar policies, that may help undermine potential claims that a school's conduct fell below the reasonable standard of care.

Considerations of Waivers for Ordinary Negligence

Schools may want to consider having families, faculty and other employees sign a waiver for ordinary negligence, of the sort that families might sign before a field trip or trip abroad. Any school considering such a waiver, however, should be aware that the enforceability of such waivers varies widely from state to state and that the trend is against such waivers being enforceable; furthermore, there is no waiver that will protect against potential claims for gross negligence or recklessness.

While the state-wide variance is significant, if a school is considering a waiver of negligence, it will most likely be found enforceable if the waiver is unambiguous and clear that the family or faculty member releases the school from *claims arising from ordinary negligence*. A waiver that refers in broader language to injury, damage and the like without explicitly using the words "negligence," "standard of care" or "breach," for example, may not provide the protection a school intends.⁹ Put another way, will a reasonable family or faculty member understand by reading the waiver that he or she is releasing the school from liability for its possible future negligence?

Furthermore, the scope of the exculpatory waiver will be important. Courts will traditionally uphold such a waiver only where the activity in question is specifically contemplated in the waiver releasing liability. While this is more of an issue in school-sponsored trips than in on-site education, schools should still seek clear advice about how best to define the scope of the waiver. For example, if the school offers a bus service to transport students to and from school, a school would want to include language in any exculpatory clause that includes "transportation to and from school."

We thus advise schools considering such a waiver to seek legal advice and to craft the potential release with care, in order to maximize the chances of enforceability.

⁹ For instance, in *Munn v. Hotchkiss*, 933 F. Supp. 2d 343, 346–47 (D. Conn 2013), the court found a waiver unenforceable under Connecticut law for precisely this reason.

DISCRIMINATION

Other legal considerations a school may face upon re-opening include specific employer/employee-related challenges that COVID-19 poses. We have written a more general piece about employer issues [here](#).

We wanted to briefly highlight, however, the potential for discrimination claims that might arise out of policies designed to mitigate COVID-19 risks. For example, as we wrote earlier, policies that prevent older employees from returning to the workplace or requiring them to work under different conditions might lead to claims of unlawful disparate treatment. Conversely, schools should be ready and willing to grant reasonable accommodations to employees that are either elderly or have underlying health conditions and request such accommodations. Schools should pay close attention to guidance from the ADA about how to make appropriate medical inquiries of their employees who are absent from work. Along the same lines, schools will need to take care not to discriminate or retaliate against employees who have or are suspected to have COVID-19.

Moreover, if an institution allows individual faculty members to make determinations for their classes, teams, or other organizations based on a faculty member's comfort, schools should take care to make sure they do not run afoul of Title IX. Imagine, for example, a scenario in which the boys' basketball coach decides he feels comfortable traveling on a bus with his team, and the girls' basketball coach does not; a Title IX claim could arise. Thus, when considering what kind of autonomy to offer to faculty members and staff as they resume their duties, a school will need to be mindful of trends that could create different opportunities for its male and female students.

Similarly, if schools find they need to minimize the number of people in any given classroom, they will need to ensure that students that are entitled to reasonable accommodations based on either physical disabilities or learning disorders are not left without the support that they require.

COVID-19-RELATED REFUNDS

Earlier this spring, we wrote a short piece titled "[Legal Issues in School Decisions About COVID-19 Related Refunds](#)" (attached here). We anticipate that these issues will continue in the upcoming school year—as schools make necessary alterations to their programs, there may well be families who feel that the academic, athletic or extra-curricular experience their students are receiving falls short of the tuition they originally agreed to pay. Moreover, there are likely to be families who need or request refunds

because they are prevented from obtaining the necessary visas or traveling to the location of a school or university.

Requests for refunds based on transition to remote learning ignore that schools that were not created for online learning in the first instance incur rather than reduce costs by switching to a partially or fully online program in the interests of public health. Schools that have been online all along are not an appropriate comparator, not only because of differences in educational programs and quality, but because they are based on a cost structure that does not apply to schools adapting to the pandemic. Schools should carefully document the way their cost structure has been maintained and even increased in the wake of adaptations in response to the pandemic.

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For more information regarding the legal impacts of the coronavirus, please visit our [Coronavirus Resource Center](#).

We hope this piece is helpful as you continue to consider all options for reopening this fall. If you have any questions, please don't hesitate to reach out.

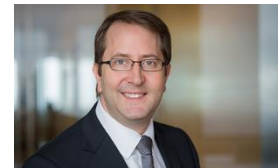
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