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Public schools need temporary grant of immunity from COVID-19 lawsuits

Public schools have been working hard to resume in-person instruction as the COVID-19 pandemic continues.

Their primary goal is to provide students with a quality education in a safe environment. During this pandemic, public school officials, who are not medical professionals, are doing their best to implement frequently vague and sometimes differing guidance from federal, state and local health authorities.

Yet, even if this guidance was followed to the letter, there is no guarantee that public schools can prevent any and all potential exposure to COVID-19 in school buildings or buses. They need enhanced protections during this time from frivolous or opportunistic lawsuits alleging exposure to the virus.

Exceptions to immunity protection expose schools to lawsuits

School districts are not asking for broad tort reform. Nor are they looking for a permanent change to the state's sovereign immunity law. What they need is a temporary grant of immunity for actual or potential COVID-19 exposure in the school setting, including on school district provided transportation, unless such exposure is the result of gross negligence or willful misconduct on the part of public schools or school officials.



Generally, public schools are immune from civil liability under the Political Subdivision Tort Claims Act (PSTCA). (42 Pa. C.S.A. § 8541.) However, there are two key exceptions to this immunity, the scope of which have been expanded by recent Pennsylvania Supreme Court decisions, that have public schools concerned as in-person instruction resumes while the COVID-19 pandemic lingers. First is the real estate exception, and second is the motor vehicle exception. (42 Pa. C.S.A. § 8542(b) (1) and (3).)

Real estate exception

Under the real estate exception, a public school may be liable for specific negligent acts, including the failure to act, with respect to the care, custody or control of real property of the school. The care of property contemplated in the PSTCA is broad and requires a school to give serious attention “both to possible dangers, mistakes, and pitfalls and to ways of minimizing those risks.”¹

Some associations have claimed that the real estate exception requires a material defect in the real estate to cause the injury and that public schools could not possibly be found liable because COVID-19 and the failure to clean properly are not material defects in school property. However, this is not consistent with the Pennsylvania Supreme Court’s ruling in *Brewington v. Philadelphia*, 199 A.3d 348 (Pa. 2018).

In *Brewington*, the Supreme Court held that the school district negligently failed to act regarding the care, custody or control of the school gym when it did not affix padding to a gym wall. In finding that the school district was liable for damages, the court stated that “the real property exception, by its express definitional terms, includes a failure to provide safety features in situations where such a duty otherwise exists.” The court also went on to say that “acts of a local agency which render a property unsafe for ‘the activities for which it is regularly used, for which it is intended to be used, or for which it may reasonably be foreseen to be used, are acts which make the local agency amenable to suit.’”

In the context of COVID-19 and the resumption of in-person instruction, the *Brewington* case causes significant concern for school leaders due

to the potential for lawsuits claiming that the school did not go far enough or do enough to alter its school buildings and classrooms to minimize the potential risk of exposure to COVID-19 in the school setting. School leaders are left wondering if their decisions not to put plexiglass around each student’s desk or to erect physical barriers in areas where students may congregate could expose them to liability under the *Brewington* standard.

Motor vehicle exception

Under the motor vehicle exception, a public school would be liable for damages if an injury were caused by the negligent operation of any motor vehicle in the possession or control of the public school. In *Balentine v. Chester Water Authority*, 191 A.3d 799 (Pa. 2018), the Pennsylvania Supreme Court expanded on what would be included as “operation” of a motor vehicle. Operation of a vehicle reflects a continuum of activity which entails a series of decisions and actions, taken together, which transport the individual from one place to another.

In *Balentine*, the Court stated that decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, are all part of the operation of a vehicle.

In the context of COVID-19 and the resumption of transporting students, the *Balentine* case, combined with the approach taken by the Court in *Brewington*, causes significant concern for school leaders and taxpayers due to the potential for costly judgements resulting from claims of negligence in making pandemic-related decisions regarding student transportation, such as the number of students that can safely be transported on a school bus while ensuring social distancing and what other protective measures are taken to make students and drivers safer.

Standard of proof

A party seeking to impose liability on a public school has the burden of showing that the school was negligent, and the negligent act(s) falls into one of the exceptions to governmental immunity enumerated in the PSTCA. Plaintiffs’ attorneys will

¹ *Brewington v. Philadelphia*, 199 A.3d 348 (Pa. 2018)



have no compunction about alleging that a student's or staff member's COVID-19 exposure was the result of some sort of negligence on the part of the school or school officials. Whether that is the failure to install plexiglass barriers around all desks, the physical space limitations that prevent strict adherence to 6-foot social distancing at all times, or including what they believe is too many students on a school vehicle, allegations of negligence will no doubt be made and public schools will be forced to spend time and taxpayer resources defending or settling them.

Further, as local and state health authorities conduct contact tracing for cases of COVID-19, plaintiffs' attorneys will have one of their most difficult tasks done for them – gathering evidence tending to show that their client's exposure to someone with COVID-19 happened in the school setting.

Schools face insurance coverage exclusions

As public schools return to the classroom amid the COVID-19 pandemic, many insurance carriers are becoming aware of the possibility that public schools could be exposed to liability because of COVID-19 exposure in the school setting. As a result, insurance carriers have begun to remove

or exclude coverage for any claims related to COVID-19 from their insurance policies, leaving school districts and taxpayers on the hook not only for any potential liability that may arise due to the pandemic, but also for the costs of defending against such claims.

Conclusion

No one can be certain how a court would rule on the issue of potential COVID-19 exposure in a school setting, particularly in light of various court decisions interpreting the PSTCA as limiting immunity. But there is ample support in case law for an ambitious attorney to use in support of an argument that a public school should be liable for a student's or staff member's potential exposure to COVID-19.

The contention that lawsuits against public schools alleging COVID-19 exposure would lose due to the PSTCA or difficulties proving causation is pure speculation at this point. The fact is that public schools will still incur the expense of having to defend those suits. Instead of spending years and hundreds of thousands of taxpayer dollars litigating this issue, the General Assembly is urged to step in and definitively establish that public schools are immune from damages arising from potential COVID-19 exposure in a school setting.



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