



**CLIENT ALERT**  
**August 21, 2020**

**Coronavirus (COVID-19)**

**Return to School and the Issue of Waivers**

Currently at the forefront of legislative issues in Pennsylvania is whether the Pennsylvania General Assembly or the Governor will take action to issue an order or pass legislation to address immunity from liability regarding the current COVID-19 pandemic.

The possibility exists that students or staff could contract COVID-19 on school property and, as such, suffer permanent bodily injury or worse, death.

The follow up concern is, if that happens, what are we going to do if a student, parent or staff member files a lawsuit against the School District alleging, among other things, the District or its staff were responsible for a student's family member or a staff member contracting COVID-19 as a result of exposure on school property.

**Pennsylvania Political Subdivision Tort Claims Act**

As a general rule, school entities in the Commonwealth of Pennsylvania along with their employees, are generally shielded from liability under the doctrine of qualified immunity under the Pennsylvania Political Subdivision Tort Claims Act. This would include Section 1983 claims, which would include claims of "state created danger."

"Qualified immunity" could best be described as shielding government employees from personal liability unless their conduct violates "*clearly established statutory or constitutional rights . . . which a reasonable person would have known.*"

Under Pennsylvania's Political Subdivision Tort Claims Act, there are exceptions. One of the exceptions is the real property exception states that acts relating to "*[t]he care, custody or control of real property in the possession of the local agency, by the local agency or any of its employees, may result in liability on the local agency.*" For the most part, Pennsylvania courts have not held school districts liable under a tort claim. In those cases where liability has been found, there must be a dangerous condition or defect in the real property that causes the injury. To the extent the defect merely facilitates an injury to be caused by the acts of other persons, the defect is generally not actionable. To that end, it appears on its face it would very difficult for any individual/potential plaintiff to prove that a dangerous condition or defect on district property was caused by a COVID-19 exposure.

**State Created Danger**

In Pennsylvania, an individual can sue a public school entity for injuries or diseases sustained as a result of a "state created danger." This legal theory has been recognized in the Third Circuit and other Circuits, although it has not been accepted by the United States Supreme Court.

In a state created danger case, federal courts have generally required plaintiffs to plead:

- (1) [that] "the harm ultimately caused was foreseeable and fairly direct;"
- (2) [that] a state actor acted with a degree of culpability that shocks the conscience;
- (3) [that] a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
- (4) [that] a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

**NOTE:** It is important to stress . . . that under the fourth element of a state-created danger claim, "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of exposure to danger." . . . It is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause.

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### Observations:

Whether you are looking at potential tort liability or a claim under state created danger, School Districts that are taking reasonable, evidence-based precautions to mitigate the spread of COVID-19 among students and staff by adhering to Executive Orders, mandates and guidance issued by the Pennsylvania Department of Health and/or the Centers for Disease Control are likely to be successful in asserting immunity defenses against claims of liability.

We do caution that even the strictest degree of compliance will not necessarily preclude individuals from asserting claims. However, where there is a greater degree of compliance with the directives and recommendations of these agencies undertaken by a School District, there will be a lesser degree of exposure of that School District to an adverse ruling in any such litigation that is pursued.

### Use of Waivers

Much has been stated relative to the Governor or the General Assembly trying to provide some relief in potential liability to schools as a result of student and staff returning for the 2020-2021 school year.

Early on in the reentry process, schools were addressing the issue of return to fall sports and waivers were put out relative to the participation in extracurricular activities. Now, with the return of school, there have been inquiries as to whether Districts should actually request written waivers from parents and students relative to the inherent dangers that could exist in returning to the classroom as it relates to the potential implications of contracting COVID-19.

It is self-evident that students have the right to attend a school and a right to return to the classroom to receive academics. Conditioning a student's return to the classroom on the signing of a waiver is unenforceable.

For the most part, under Pennsylvania law, parents do not "possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship." In addition, it is generally understood where a minor executes a contract, which includes a waiver from liability, the agreement or the waiver itself is voidable. This means that after the minor reaches the age of majority, the minor may disaffirm the contract rendering it a nullity.

We believe districts should not endeavor to secure a waiver as a general rule of returning to the regular education environment.

If Districts are concerned about this issue, they can put out a general Notice Regarding Return to School.

This general Notice Regarding Return to School can be treated much like the annual IDEA or FERPA notices that schools place in their handbooks, put on their websites, and in newspapers. This Notice Regarding Return to School, in and of itself, does not require any sign off but rather is just simply a notice like the IDEA and FERPA notices to say that the District is placing the public (parents, students and staff) on notice that there is always a possibility that someone could be exposed to or contract COVID-19 in returning to the school setting. The District cannot guarantee, even with best efforts to implement reasonable and recommended cleaning and other COVID-19 mitigation measures, that the student (staff or public) may not contract COVID-19 or alternatively, simply encounter an asymptomatic carrier bringing the virus home to the remainder of the family or the expanded family unit.

Attached to this Client Alert is a sample Notice Regarding Return to School that can be utilized and/or adapted for a school entity's use.

**As with all other Client Alerts, these guidelines/protocols/recommendations are subject to change on a daily or weekly basis depending on Orders from Governor Wolf, Secretary Rivera and Secretary Dr. Levine.**

*While the Beard Legal Group Client Alert is designed to provide information on topics of concern to Pennsylvania Public Schools, it is not legal advice and School Districts should contact their Solicitor, Labor of Special Counsel for advice related to their specific circumstances.*

## **Notice Regarding Return to School**

As the beginning of the academic year approaches, the \_\_\_\_\_ School District wishes to address the challenges associated with returning to in-person instruction for our District staff, students, and parents. The novel coronavirus, COVID-19, is extremely contagious and continues to remain a worldwide pandemic by the World Health Organization. COVID-19 is believed to spread mainly from person-to-person contact and has had severe consequences for those that are especially vulnerable, such as senior citizens and individuals with underlying medical conditions. As a result, federal, state, and local governments and federal and state health agencies have made numerous recommendations over the past months to fight the spread of infection, including increased handwashing and social distancing measures to limit contact with others.

The District has put in place preventative measures recommended by the Centers for Disease Control and Prevention, Governor Wolf's Executive Orders, the Pennsylvania Department of Health and other agencies, as more fully outlined in the District's Health and Safety Plan, to reduce the spread of COVID-19 and to allow students and parents to feel comfortable about returning to in-person instruction within the school setting. Even with preventative measures in place, there are inherent risks as the risk of infection for COVID-19 exists and is difficult to control.

We need families, parents and students to understand the contagious nature of COVID-19 and the risk of infection and injury associated with use of District transportation, in person instruction, and participation in District programs and activities. We cannot guarantee that you or your children will not become infected with COVID-19 as a result of the aggressive nature in which this virus may spread. Families, parents and students must understand the potential for infection, injury, or even death as a result of COVID-19 that exists when using District transportation or participating in District instructional programs and activities. An inherent risk of exposure to COVID-19 exists in any place where people are present.

We understand your concerns, and the School District has taken enhanced health and safety measures to create the safest environment feasibly possible during this pandemic. We require that all students and their families follow all posted instructions as provided by the School District's Health and Safety Plan for the health and well-being of all.

Parents that are uncomfortable with in person instruction should contact the Pandemic Coordinator to discuss available options for the academic year, such as virtual instruction through our District's cyber instruction platform.

Let's keep each other healthy and safe.