

Reducing liability during the COVID-19 Pandemic

By the New York State
Association of School Attorneys

Assuming students return to school in the fall, one concern of school districts should be avoiding liability related to COVID-19 infections. If a student or employee contracts the virus and believes the infection occurred in school due to the negligence of school officials, this could become the subject of a lawsuit or threat of legal action. For instance, an immunocompromised student could claim the district failed to provide adequate supervision despite the student being vulnerable to COVID-19.

This article will provide an overview of several challenges that school districts should consider and address, as necessary, upon a return of in-person or hybrid instruction to reduce potential liability.

The concept of *in loco parentis*

Schools have a duty of care toward students because they act “*in loco parentis*,” which is Latin for “in the place of a parent.” Stated another way, schools effectively take the place of parents and guardians while students are in their physical custody and control.

This standard would apply to a question of liability involving COVID-19. Suppose a high school requires all students to wear masks but this rule is routinely ignored by students and teachers. Student A coughs on Student B, and both subsequently test positive for the coronavirus. If Student B sues the school district alleging negligence and inadequate supervision, a court would consider whether the district met its duty of acting *in loco parentis*.

The legal standards are well established. While courts in New York have said that schools are not “insurers of safety” and “cannot be reasonably expected to continuously supervise and control all movements and activities of students,” they are required to act with the same care as a reasonably prudent parent would under the same circumstances.

Schools have a duty to adequately supervise students and can be held liable for “foreseeable injuries” related to an absence of such supervision, according to court rulings including *Garcia v City of N.Y.* In that 1996 case, a jury found that a teacher in New York City breached her duty of care by permitting a kindergartener to go to the bathroom unaccompanied. Furthermore, the court found that her decision was the proximate cause of the injuries the five-year-old boy suffered when he was sexually assaulted by an individual believed to be an older student at the school. A principal’s testimony indicated an awareness of risks to unescorted students in school corridors and bathrooms.

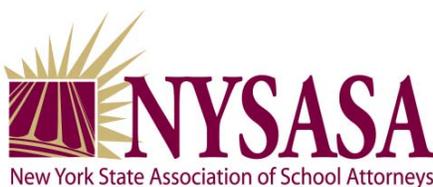
As in *Garcia*, courts will consider several factors to determine liability, including whether school officials took reasonable steps to discourage or prevent an incident and whether any failure to do so resulted in harm to the student.

Past court decisions offer clues as to how an allegation of inadequate supervision involving coronavirus transmission would be analyzed. For instance, courts have ruled that a school’s alleged lapse in supervision is not a proximate cause of an accident or harm when it occurs in so short a span of time that even the most intense supervision could not have prevented it.

“To establish a breach of the duty to provide adequate supervision in a case involving injuries caused by the acts of fellow students, a plaintiff must show that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated,” the Second Department ruled in *Doe v. Dept. of Educ. of City of N.Y.* (2008).

Also, courts will look at whether a school – pursuant to its duty to maintain school premises in a reasonably safe condition – adhered to its own health and safety protocols.

Schools generally will not be held liable for the unanticipated or impulsive acts of one student against



another absent proof of prior conduct “that would have put a reasonable person on notice to protect against the injury-causing act.” (*Armellino v. Thomase*, 2010)

So, in our hypothetical case of Student A coughing on Student B, one legal question would be whether a teacher, paraprofessional or other individual acting in a supervisory role toward students would have been unable to stop Student A from spontaneously coughing upon or in the direction of Student B or otherwise unexpectedly transmitting the virus to another individual.

To minimize the risk of liability, school districts must act reasonably and mitigate risk where and when possible. For instance, districts should inform and require school staff to be proactive by warning students often and consistently educating them about the dangers or consequences of behaving in inappropriate, unsafe or reckless ways.

If the district is aware that a student has a particular disability or health condition that may make him or her more susceptible to harm or injury, extra attention should be paid. Often times, this requires diligent planning and clear communication among school administrators, staff and parents.

Setting clear expectations for behavior

As long as COVID-19 remains a threat, schools will have to follow the recommendations of health authorities regarding social distancing, face-covering and other ways of minimizing potential spread of the virus. It is essential to have clearly understood expectations for behavior. To minimize liability, districts need to: (1) establish clear policy and procedures, (2) adhere to those policies and procedures, and (3) continually communicate about and reinforce its policies and procedures.

It is important that both students and staff understand the rationale for the district’s rules. Consider giving your school psychologist and other mental health professionals a forum to clearly explain to students the importance of safety, health and welfare of all in the school community.

The procedures followed by school staff when students violate health protocols should be considered. For instance, how will your district address the inevitable problem of students of various ages violating social distancing protocols or failing to wear a face covering or mask? Furthermore, parents may question whether a given teacher or principal or the school itself has the authority to, say, require a student to wear a mask. Districts should be prepared for such objections.

Likely scenarios of student misbehavior should be considered. For instance, deliberately coughing on another student or a teacher takes on a new significance during a pandemic. Stating that another student has COVID-19 could be bullying, or it could be a socially responsible act, depending on the facts.

Various forms of student misconduct during the COVID-19 emergency will generally fall under the umbrella of existing prohibited student conduct in the Code of Conduct. Schools typically seek signed acknowledgements from students and parents/guardians in which they acknowledge their receipt, review and understanding of behavioral expectations and consequences for violating the code of conduct. The wording used could be particularly important during a pandemic.

As part of its annual review of the district’s code of conduct, your school board should ask your school attorney if there is adequate verbiage to address COVID-19.

Transmission of Covid-19 from school to home

One of the most frequently discussed concerns is whether and to what extent a school district may be liable if a student contracts the coronavirus while at school and transmits it to a family member who is immunocompromised or otherwise susceptible. A district’s best defense if confronted with such a claim would be that it followed and clearly communicated all relevant federal, state and local guidance.

While schools cannot quarantine students or families, it can establish procedures involving individuals who report feeling ill while at school, including keeping sick children separate from well students until their parents can retrieve them. Also, the district should be actively monitoring absenteeism rates in both students and staff.

Of course, schools should actively encourage students and employees to remain home when sick and to coordinate their return to the school environment with their health care provider and/or the local health department.

When in doubt, schools should contact the local health department. Schools should avoid independently making medical decisions to the extent practicable. In this way, schools can minimize the disruption to learning and teaching while reasonably managing the known risks of the coronavirus in accordance with current official guidance.

What’s next?

Schools should closely review and adhere to the guidance issued by federal, state and local public health agencies, with the understanding – and expectation – that such guidance is subject to change at any time. For instance, the U.S. Centers for Disease Control and Prevention recommends that schools reopen with plans to routinely clean and disinfect surfaces and objects that are frequently touched, stagger arrival and dismissal times for students, avoid mixing students in common areas, and increase the space between desks.

Many items are left to the discretion of local school districts. Some actions to consider are:

- Post appropriate signage throughout school buildings and offices reminding the school community to social distance, wash their hands and practice respiratory etiquette.
- Consider prohibiting or restricting access to volunteers and visitors in the school buildings to further reduce risk.
- Devise a transportation plan that meets health guidelines for reducing infections while expanding the training of transportation staff.
- Provide mental health services to students while making sure that workspaces meet social distancing recommendations.
- Stay vigilant and continuously monitor implementation of safety procedures as well as the wellness of students and staff prior to and during in-person instruction.
- Continue to review and advise parents/guardians of required immunizations for school enrollment and continued attendance.

Finally, be vigilant about cybersecurity. Be sure your district is complying with New York Education Law Section 2-d and the federal Family Educational Rights and Privacy Act. Ascertain what information is being shared with third-party contractors, including service providers hired to help cope with issues related to the pandemic.

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