



# k12 focus



EDUCATION LAW IS ALL WE DO.

July 24, 2020

## Liability, Immunity, and Insurance Coverage for COVID

There are many concerns about whether schools can be sued over COVID and whether these lawsuits will be covered by insurance. The short answer, of course, is that “it depends,” not just upon the facts of a particular situation, but upon the language of a particular insurance policy. But the longer answer is there are tort immunities that protect schools from claims for **failing to prevent the spread of disease** and for **failing to determine whether someone is carrying a hazardous disease**, such as COVID, and that the insurance issues are probably not as concerning as they seem at first blush.

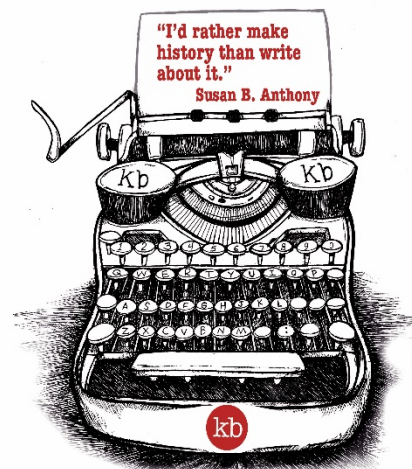
Section 6-104 of the Tort Immunity Act<sup>1</sup> provides immunity for failing to prevent the spread of disease. Critically, this immunity applies only to discretionary decisions made by local schools – meaning, for example, that to the extent that ISBE, IDPH, or other guidance limits your local discretion, then departures from the guidance could compromise this immunity. In general, though, this immunity offers critical protection to schools against claims that someone contracted COVID at school.

Section 6-105 provides immunity for failing to determine whether someone is carrying a hazardous disease. This immunity will probably come into play as we require self-certification from students and staff, screen students and staff for symptoms, make decisions about when to allow people into our school buildings, and so forth.

Any legal immunity will depend upon the facts of a particular situation, and it is important to understand that tort immunities are only defenses that help to win lawsuits – they certainly don’t prevent lawsuits from being filed in the first place. But it is also important to appreciate that these immunities operate **in addition to** other immunities with which you might be familiar, such as the *in loco parentis* doctrine in the School Code. These immunities all work together, and even if they are not watertight, they provide schools with strong, broad legal protections against claims that might arise out of COVID, or out of safety planning, or out of the myriad decisions that will need to be made during the upcoming school year.

<sup>1</sup> The full name of the statute is considerably longer. Contact us if you’re desperately curious.

There are also concerns that school insurance policies “don’t cover COVID” – which bears some truth in a literal sense, but is not nearly the cause for concern that it might seem. The issue is that some (now, pretty much all) insurance policies do not cover claims for “contamination” by “pathogens,” such as claims for exposure to a virus. These exclusions are not new – in the past, this issue might have been triggered by a local outbreak of meningitis, tuberculosis, etc. Insurance brokers and cooperatives working with schools have looked high and low trying to find policies without these exclusions, but they simply aren’t available in the marketplace during an actual pandemic.



There are two factors that mitigate this concern, though. First, the very same claims that are least likely to be insured – i.e., that someone contracted COVID at school – are also the very same claims that are most likely to be covered by the tort immunities for failing to prevent the spread of disease. That is, even if we are uninsured for these claims, we will often be protected by tort immunity instead. We cannot rule out some claims falling through the cracks, and it is certainly preferable to have \*both\* coverage \*and\* immunity; but a lack of insurance does not compromise your actual legal protections under the law.

Second, while our main concern is people getting sick at school, there are many other COVID issues (and potential claims) that are much more likely to remain covered by insurance. If you have a dispute with an employee over FMLA leave, for example, the fact that the employee needs the leave to care for a family member with COVID probably will not affect your coverage. If you have a dispute with a family concerning student discipline, the fact that the student was disciplined for violating COVID-related rules probably won't affect your coverage. Again, these issues are all highly sensitive to the facts of your situation and the language of your insurance policy; and while you cannot predict all the possible factual scenarios that might arise, you can definitely call your insurance broker or carrier to make sure you understand the scope and limitations of your coverage. These are important issues for you and your board to understand.











Overall, even though COVID does present some legal risk to schools, the legal risk is much lower than the real-world risks to the health of students, staff, and communities. In fact, the same decisions that you might make to help protect the health of your communities – especially your efforts to follow guidance from ISBE, the IDPH, the CDC, and your local health department – are probably the same decisions that will minimize your legal exposure on the front end, and maximize your tort immunity on the back end. It is important to have a good understanding of these issues, and to discuss them with your school boards, but in general those assessments should be a very small factor in your planning, and certainly should take a backseat to your concerns for your students, staff, and communities.

Please feel free to contact us to discuss any of these issues. You can also find a short (twenty minutes) video on our website from our partner, Rob Swain, discussing these issues in more detail.



2 TransAm Plaza Dr., Suite 450, Oakbrook Terrace, IL 60181  
3 Club Centre Ct., Suite D, Edwardsville, IL 62025  
krihaboucek.com • 630.394.3790

## Contact us!

b		<b>Cassie Black</b>	cassie@krihaboucek.com <i>Direct:</i> (630) 332-0469 <i>Cell:</i> (312) 848-0432
b		<b>Sara Boucek</b>	sara@krihaboucek.com <i>Direct:</i> (630) 394-3792 <i>Cell:</i> (217) 781-4877
g		<b>Kevin Gordon</b>	kevin@krihaboucek.com <i>Direct:</i> (630) 394-3784 <i>Cell:</i> (708) 522-6712
j		<b>Shane Jones</b>	shane@krihaboucek.com <i>Direct:</i> (618) 207-4820 <i>Cell:</i> (314) 303-3605
j		<b>Stephanie Jones</b>	stephanie@krihaboucek.com <i>Direct:</i> (630) 394-3786 <i>Cell:</i> (314) 503-1299
k		<b>Elizabeth Kelly</b>	elizabeth@krihaboucek.com <i>Direct:</i> (618) 215-2659 <i>Cell:</i> (217) 825-7128
k		<b>Laura Knittle</b>	laura@krihaboucek.com <i>Direct:</i> (630) 394-3783 <i>Cell:</i> (502) 599-7530
k		<b>Darcy Kriha</b>	darcy@krihaboucek.com <i>Direct:</i> (630) 394-3782 <i>Cell:</i> (708) 921-3410
l		<b>Mohammed Lakhani</b>	mohammed@krihaboucek.com <i>Direct:</i> (630) 394-3785 <i>Cell:</i> (630) 362-8115
s		<b>Rob Swain</b>	rob@krihaboucek.com <i>Direct:</i> (630) 394-3788 <i>Cell:</i> (630) 864-0278

*Kriha Boucek LLC is an education law firm representing boards of education, public school districts, special education cooperatives, charter schools, and private schools. This is attorney advertising and should not be taken as legal advice. Please contact an attorney for advice on specific legal issues.*