



**Nicole M. Donovan**

Partner  
Columbus  
614.227.4866  
[ndonovsky@bricker.com](mailto:ndonovsky@bricker.com)

## Potential liability and defenses related to COVID-19 for public educational institutions

August 26, 2020

With the 2020-2021 school year about to begin, some consideration needs to be given by public educational institutions to potential liability. Summarized in this article are some of the potential claims that may be asserted by students, employees and community members, related to COVID-19, as well as potential immunity that may apply.

### Potential claims by students

There are two primary causes of action that might be raised by students and their families. The first is if the student contracts COVID-19, the student may allege this occurred at school or at an athletic activity, due to one or more employees not enforcing social distancing or other recommendations and requirements. Normally, a suit identifying a violation of a recommendation would be insufficient to create civil liability. However, due to the strength of the recommendations being provided, a court may treat the recommendations more like a requirement. Therefore, it is important to take note of both.

The second potential claim that a student and their family could raise is a federal constitutional right to be free from wearing a facial covering. Such a claim is based on the Fourteenth Amendment where the individual claims bodily autonomy stemming

from the right to life and liberty. At present, there is no clear case law that addresses the requirement to wear a mask in a situation such as COVID-19.

#### Potential claims by employees

Similar to students, employees might allege a claim related to contracting COVID-19 at school. However, employee injuries and conditions are usually remedied through the Ohio Bureau of Workers' Compensation. If employees return to in-person working situations in the fall, worker's compensation claims involving COVID-19 related injuries will likely rise. These claims are examined on a case-by-case basis, but for COVID-19 related claims, a positive test result is a minimum requirement. Even if employees are working remotely, workers' compensation claims may arise if an employee is injured in their dedicated remote-working space. Policies on remote working should be drafted in an effort to limit liability for any injuries that may occur since they are compensable injuries.

In addition to traditional workers' compensation claims, there is a special type of claim that falls under the jurisdiction of the Bureau of Workers' Compensation called a Public Employment Risk Reduction Plan (PERRP) claim. PERRP claims are very likely to rise in the coming months. If an employee feels unsafe, the employee can simply refuse to work, which can be detrimental to the school. However, following the guidelines from governmental entities will go a long way to protect the school from these types of claims.

Beyond workers' compensation claims, an employee may also initiate a lawsuit if the employee alleges that they were harmed as a result of intentional conduct by the entity or fellow employee.

#### Potential claims by visitors

Similar to students and employees, a community member who contracts COVID-19 may allege that contraction occurred on school property, due to failure to enforce social distances and related recommendations and requirements.

Community members may also become upset if an entity prohibits visitors from coming on school property, whether as a volunteer at a school or spectator at a sporting event. The viability of such claims is unknown at this time. However, school buildings are public property, and governmental interest in maintaining the health and safety of the employee and students should be a compelling enough interest to counter such allegations.

#### Available defenses

Currently, school boards and employees have significant statutory immunity available to them for conduct that occurs during the course of employment under Ohio Revised Code Sections 2744.02 and 2744.03, for claims in state court. However, conduct that occurs with "malicious purpose, in bad faith, or in a wanton or reckless

manner” are exceptions to statutory immunity. The lowest form of conduct on this list is reckless conduct. In any claim lodged against a district’s employee, the question will be whether the conduct (e.g., failure to enforce recommendations or requirements of the entities set forth in this article) falls within these buckets. The answer to that question will be up to our courts to decide. Judges and juries may have varying opinions on the issue and we may see different results from different courts.

If an individual also asserts a claim under federal law, qualified immunity may apply. Qualified immunity is available if a public employee’s actions do not violate a clearly existing right of an individual. COVID-19 and potential facial covering claims are a new phenomenon, so hopefully courts will apply qualified immunity, finding there is currently no clearly existing right being violated.

What steps should a school district take?

- Check with the district’s liability carrier regarding coverage for these types of claims.
- Monitor federal, state and local requirements and recommendations, including orders and guidance from the White House, CDC, Ohio Department of Health, Governor of the State of Ohio, Ohio Department of Education, local department(s) of health with jurisdiction in the school district and any ordinances adopted by local government.
- Consider these requirements and recommendations and determine how much risk and exposure exists.
- Develop policies and procedures that mirror the board’s expectations.
- Provide training to all employees and students related to the board’s expectations.
- Monitor and enforce compliance with the board’s expectations.