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November 9, 2020

To: North Boone Community Unit School District 200,
Dr. Michael J. Greenlee; Superintendent
From: Klein, Thorpe & Jenkins
Re: Tort Immunity Act and COVID

Mike, you have asked whether the School District faces any specialized liabilities relative to the measures it does or does not take to implement certain safety measures related to the possible return to in-person instruction.

Under the Illinois Tort Immunity Act, a public official or entity is not “liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.” The statute further defines “willful and wanton conduct” as “a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.” Therefore, as a general principle, actions, or failure to act, will generally be immunized from suit unless an official was acting in a reckless manner. (745 ILL. COMP. STAT. 10/2–202 (2012); see *also* Murray v. Chi. Youth Ctr., 864 N.E.2d 176, 189 (Ill. 2007) (holding that “willful and wanton” includes, in addition to actual intent to harm, a “range of mental states” including the “utter indifference for the safety or property of others” and the “conscious disregard for the safety of others or their property”).

For a known risk, such as a highly infectious condition like coronavirus, the standard for determining what is “utter indifference or conscious disregard” for another’s safety would be based on knowledge of the risk (probability and severity) and the standard of care established for the reasonable management of such a condition. For coronavirus at this point the risk of infection for indoor or crowded spaces creating close proximity is generally accepted science and the consequences of infection, particularly for persons at high risk, can be debilitating or fatal.

The standard of care in Illinois for a public body like a school district is established in large part by those entities with regulatory authority over schools. In Illinois, all public school districts are subject to the oversight, supervision and direction of the Illinois State Board of Education. Similarly, the Illinois Department of Public Health has general jurisdiction and authority to address public health dangers and crises. The Office of the Governor under Illinois law has the authority to assume emergency powers based upon the declaration of emergency due to the pandemic. At the federal level, the CDC has legal authority (and by experience and expertise is relied upon for reliable science) to set health standards in general. Each of these entities has issued repeated guidance at this point relative to resuming school attendance calling for face coverings, social distancing, and implementation of safety precautions to recognize and promptly address symptomatic persons.

If a school district then with knowledge of a risk like this infectious condition were to decide not to, or fail to take steps to implement the common, repeated directives and recommendations of State and Federal agencies, the district would be vulnerable to any claims or lawsuits brought for the health effects or death of a student, parent or staff member who might contract this virus after exposure in the school setting. Under such circumstances the injured student, parent or staff member could assert that the school

district's failure to implement recommended safety measures renders the school district liable for the health consequences of the virus due to the school's alleged "knowledge of and conscious disregard of an excessive risk" to the safety of others by ignoring the directives and recommendations of the Illinois State Board of Education, the Illinois Department of Public Health, the Centers for Disease Control and the Office of the Governor of the State of Illinois. Further, for claims against public entities that are based on willful and wanton conduct the insurer (if the District can find an insurer that will cover COVID) for the public body ordinarily provides coverage for the public body against claims for negligence but can deny coverage of claims or damages for intentional or reckless misconduct by a public body.

If you have any further questions please feel free to contact me.

Sincerely,

KLEIN, THORPE & JENKINS, LTD.

A handwritten signature in blue ink, appearing to read "Scott E. Nemanich", with a long, sweeping horizontal line extending to the right.

Scott E. Nemanich