



STATE OF INDIANA

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March 30, 2022

OFFICIAL OPINION 2022-2

The Honorable David Abbott
Indiana House of Representatives
200 W. Washington Street
Indianapolis, IN 46204

RE: School liability for COVID policies

Dear Representative Abbott:

You requested an opinion regarding Indiana school liability for damages related to COVID-19.

QUESTION

Are schools liable for damages related to COVID-19?

BRIEF ANSWER

Generally, no. Senate Enrolled Act 1 (“SEA 1”) was passed in the 2021 legislative session and enacted into law by Ind. Code ch. 34-30-32. Ind. Code § 34-30-32-6 provides immunity from civil tort liability to a person for damages arising from COVID-19 on “premises owned or operated by the person.” “Person” is defined in Ind. Code § 34-30-32-4 to include a “body of government” or “any other organization or entity,” which the Office of the Attorney General (“OAG”) interprets to encompass public school corporations, private schools, and charter schools. The immunity is not absolute, however, as the chapter explicitly excludes from immunity a person whose action (or failure to act) constitutes gross negligence or willful or wanton misconduct.

ANALYSIS

There has been much discourse nationally and in our own state about what kind of measures, if any, should be taken in public spaces to protect ourselves against COVID-19. This includes practices such as social distancing, mandating vaccinations for employees and college students, virtual meetings or remote learning, and requiring masks to be worn in buildings and other places. Our elementary and secondary schools are not immune to this debate, as education officials and parents both seemingly want to do what is best for the children within their district.

Parents rightfully want the freedom to choose what is best and safest for their own families, while advocating in their child’s best interest. School officials struggle to balance individual student liberties with the responsibility of maintaining a safe in-person learning environment. This oftentimes creates discord, and school districts are left with little clarity and direction, as federal health officials frequently amend their advice on what measures should be taken by individuals, businesses, and schools to keep everyone safe and minimize the spread of COVID-19. Moreover, our own state health officials direct the school administrators and nurses to follow the federal Centers for Disease Control (“CDC”) guidance, which is seemingly ever-changing.¹ Naturally, school administrators and officials have grown increasingly concerned about potential liability for any decision they make regarding COVID-19 policies in their school districts. Therefore, you have asked if schools are liable for damages related to COVID-19 policies.

To begin, although there is no explicit statute requiring schools to maintain a “healthy” environment for children, one could argue it is inherent in well-established law and throughout the health and safety statutes found in Ind. Code ch. 20-34-3 that schools must keep children safe from disease and illness while on school grounds.² Notably, Ind. Code § 34-30-3-9 permits the principal of a school to send a child home who has a communicable disease, and the child may not return until the child has recovered from the illness. Other sections in the chapter pertain to immunization requirements, medical examinations, hearing and vision tests, lead poisoning tests, bleeding control programs, and diabetes and seizure management plans by the schools. This strongly indicates the general assembly intended to impose at least some duty on schools to provide a safe *and healthy* learning environment for its students.

This is not to say, however, that a school must take every possible precaution available. Schools have limited resources, and to require them to undertake herculean efforts that even private businesses cannot attain would be impractical. In the 2021 legislative session, SEA 1 enacted a new law, Ind. Code § 34-30-32-6, that provided immunity to a broad group of “persons” as defined in the bill for injuries or harms “arising from COVID-19,” likely to counteract concerns similar to what is described here. Ind. Code § 34-30-32-4 defines “person” to include a “body of government” or “any other organization or entity.” The OAG interprets “person” in this section to include public school corporations, private schools, and charter schools. Ind. Code § 34-6-2-49(a) defines “governmental entity” to include a charter school for purposes of Ind. Code chs. 34-13-2, -3, and -4; all these chapters are under Ind. Code art. 13, *Causes of Action: Claims Against the Government*. It seems logical, then, that at minimum, public schools and charter schools would be “governmental bodies” and covered as a “person” under Ind. Code § 34-30-32-4(10).

¹ A few examples of guidance documents for schools: <https://www.coronavirus.in.gov/files/Guidance-with-masks-1-28-22.pdf> (updated Jan. 28, 2022); <https://www.coronavirus.in.gov/files/Guidance-with-no-mask-requirement-1-28-22.pdf> (updated Jan. 28, 2022); <https://www.coronavirus.in.gov/files/COVID-19-Control-Measures-v.7-final.pdf> (updated Jan. 3, 2022). All are posted at <https://www.coronavirus.in.gov/public-resources/>.

² In addition to providing health and safety measures for students, as employers, the Occupational Safety and Health Administration (“OSHA”) also requires school corporations to provide its employees with a workplace free from serious hazards. 29 USC 654, Sec. 5. Federal regulations can be found at <https://www.osha.gov/laws-regs>. OSHA permits states to adopt their own OSHA-approved state plans, and Indiana has done so. Therefore, school corporations in Indiana must comply with the health and safety standards pursuant to Title 22 of the Indiana Code, and specifically Ind. Code ch. 22-8-1.1, the Indiana Occupational Health and Safety Act (“IOSHA”).

Consistent with the foregoing, the OAG also reads the definition to cover private schools as well, under the definition of “any other organization or entity.” Ind. Code § 34-30-32-4(12).

Ind. Code § 34-30-32-6 provides immunity from civil tort liability to a person for damages arising from COVID-19 on “premises owned or operated by the person.” However, that immunity is not absolute. Ind. Code § 34-30-32-7 excludes from immunity those whose actions (or failures to act) constitute gross negligence or willful or wanton misconduct. Indiana’s Supreme Court has defined gross misconduct as a “conscious, voluntary act or omission in reckless disregard of” consequences to another. *Northern Indiana Public Service Co. v. Sharp*, 790 N.E.2d 462, 465 (2003). Gross negligence is a higher bar than ordinary negligence (*Id.* at 466), and Ind. Code § 34-30-32-7 requires the conduct to be “proven by clear and convincing evidence.” Given the dearth of case law pertaining to COVID-19 and resulting liability, as well as the evolving landscape of medical advice, the OAG cannot predict what actions or inactions a court would determine constitute gross negligence regarding COVID-19 and declines to speculate. However, the OAG strongly encourages school corporations, private schools, and charter schools to consult with their attorneys when developing and enacting policies aimed at preventing or controlling the spread of COVID-19 on its premises. Schools must be mindful of students’ liberty interests and must balance these interests with those of health accordingly when implementing such policies.

CONCLUSION

Schools are not generally liable for damages related to COVID-19. Ind. Code § 34-30-32-6 provides broad immunity from civil tort liability to a person for damages arising from COVID-19 on “premises owned or operated by the person.” “Person” is defined in Ind. Code § 34-30-32-4 to include a “body of government” or “any other organization or entity,” which the Office of the Attorney General (“OAG”) interprets to encompass public school corporations, private schools, and charter schools. However, the chapter excludes from immunity a person whose actions constitute gross negligence or willful or wanton misconduct.

Sincerely,

A handwritten signature in black ink that reads "Todd Rokita". The signature is fluid and cursive, with the first name "Todd" being more prominent than the last name "Rokita".

Todd Rokita
Attorney General of Indiana

John Walls, Chief Counsel, Advisory
William H. Anthony, Asst. Chief Counsel, Advisory
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Hilari A. Sautbine, Senior Deputy Attorney General