

Considerations and Resources for Reopening Catholic K-12 Schools

By Gabrielle Mercurio, Napa Legal Institute,ⁱ and [Michael Kenney](#), Director of the Catholic Identity Standards Project, [The Cardinal Newman Society](#)ⁱⁱ

Bottom Line:

- Schools must act with reasonable care to protect the health and safety of their students and staff. To meet this standard, schools should adhere to guidance issued by the [Centers for Disease Control and Prevention](#) (“CDC”) and state and local authorities and work closely with public health officials to develop and implement a written reopening plan that will minimize both the spread of COVID-19 and any related liability.
- Congress will consider liability protections that will shield schools from COVID-related lawsuits, so long as the school did not act with gross negligence. School administrators should stay informed of legislative developments in this area.
- Schools may consider the use of employee and student waivers, though the most important way to minimize liability is to comply with safety guidelines.
- Schools should review their insurance policies and determine whether their respective policies cover COVID-related incidents.
- Schools may screen students and staff for COVID-19 symptoms but must keep the information confidential.
- Teachers, staff, and volunteers should all be trained on CDC, state, and local safety guidelines.
- Ultimately, schools must demonstrate they are taking affirmative steps to mitigate the spread of COVID-19 and protect the safety of their students and staff. These steps should be documented in writing.
- A summary of resources can be found at the end of this paper.

1. What guidelines should schools follow when developing a reopening plan?

- Schools must take reasonable steps to mitigate the effect of COVID-19 on their school community and limit liability exposure for staff. What steps are reasonable will be fact-specific, but, in general, a reopening plan developed in compliance with federal, state, and local guidelines, such as the [CDC’s Reopening Guidance for Schools](#), and in consultation with local health officials will likely be reasonable. The CDC encourages that a [school’s](#)

[reopening plan](#) “should be guided by what is feasible, practical, acceptable, and tailored to the needs of each community.”¹

- The CDC provides a [decision tree](#) to help schools determine if they should reopen. The school administrators and board of directors should consider each factor in the decision tree and document in writing the basis for the school’s determination that the applicable circumstances and safeguards are met.
- Once a plan has been developed, schools should document the steps they will take to ensure a safe reopening and should communicate the plan to staff, students, and guardians of students.

2. Can schools be liable if staff or students are exposed to COVID during school programming?

- Schools must act with reasonable care and adhere to public health guidelines in order to minimize any liability related to COVID-19.
- The Occupational Safety and Health Act covers private schools either through the federal Occupational Safety and Health Administration (“OSHA”) or through OSHA-approved State Plans.² According to [OSHA’s Guidance on Preparing Workplaces for COVID-19](#), OSHA classifies schools as having a medium COVID-19 exposure risk and requires that schools develop a reopening plan in accordance with CDC guidelines.
- OSHA articulates that employers have a “[general duty](#)” to prevent the occupational exposure to COVID-19 by furnishing a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”³ Courts have interpreted this General Duty Clause as requiring employers to use reasonable care in protecting against known hazards.⁴ When determining if an employer has violated the General Duty Clause, OSHA may look to its own guidance documents as well as CDC guidance to identify the scope of an employer’s obligations to employees.⁵

¹ [Considerations for Schools](#), CENTERS FOR DISEASE CONTROL (last updated May 19, 2020).

² [OSHA Coverage, All About OSHA](#).

³ The General Duty Clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1).

⁴ See *St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm’n*, 647 F.2d 840, 847 (8th Cir. 1981); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984).

⁵ See *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 WL 2145350 (W.D. Mo. May 5, 2020) (concluding that OSHA may determine if a meat processing plant kept premises safe in accordance with OSHA and CDC guidance surrounding COVID-19); see also Sharlene A. Hunt, *Osha and Employee Safety*, N.J. Law., January/February 1989, at 32 (describing several instances of OSHA issuing General Duty Clause violations where healthcare facilities failed to follow CDC guidelines concerning HIV and Hepatitis B).

- Thus, schools could be subject to an OSHA citation⁶ for failing to follow OSHA and CDC guidance concerning COVID-19. In addition, the OSHA violation may be used as evidence that a school acted negligently and should be liable towards an employee for a COVID-related work injury.⁷ Conversely, compliance with OSHA guidance may be evidence that a school took reasonable steps to provide a safe work environment.⁸
- While the risk of exposure to COVID-19 cannot be reduced to zero in the short-term, schools can follow [OSHA's COVID-19 workplace guidance](#) and [CDC interim guidance for schools](#) to comply with their general duty requirement.
- Schools have a duty of ordinary care for their students where the student is in custody of the school. This duty requires that the school “act as would a careful prudent person under all of the circumstances.”⁹ A school is liable for a student’s injury caused by a dangerous condition of premises that the school failed to make reasonably safe. Courts have held that adhering to CDC guidelines supports a finding that a school took reasonable steps to eliminate a danger and keep students safe.¹⁰
- The doctrine of charitable immunity, which provides a defense to a charity being sued for an injury caused by negligence, has been abandoned by a majority of states. However, some states, such as Virginia and New Jersey, make the doctrine narrowly available to educational institutions.¹¹

3. Will Congress consider liability protections for schools in the near future?

- Congressional developments on liability protection legislation can be tracked on [Congress.Gov](#).
- The [American Council on Education](#) and other higher education associations called on Congress to implement liability protections concerning COVID-19 for schools, just as entities such as the [U.S. Chamber of Commerce](#) advocated for such protections for businesses.

⁶ 29 U.S.C. 658 § 9.

⁷ John P. Ludington, Annotation, *Violation of OSHA Regulation as Affecting Tort Liability*, 79 A.L.R.3d 962, §5 (1977).

⁸ *Id.*; see also Erin Mulvaney & Fatima Hussein, *Virus-Stricken Workers Face High Hurdles When Suing Employers*, BLOOMBERG LAW DAILY LABOR REPORT (April 21, 2020).

⁹ 68 Am. Jur. 2d *Schools* § 489, Westlaw (database updated May 2020).

¹⁰ See *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 176 (D. Conn. 2014), *aff'd*, 724 F. App'x 25 (2d Cir. 2018) (finding a school liable for failing to heed CDC warning about the risk of tick-borne encephalitis when a student became infected).

¹¹ 176 Am. Jur. *Proof of Facts* 3d 315, Westlaw (database updated Mar 2020).

- [Senator McConnell](#) already voiced intent to put forth liability legislation that will “create a legal safe harbor for businesses, nonprofits, governments, workers, and schools who are following public health guidelines to the best of their ability.” He noted that the protection is not blanket immunity, as schools and employers will remain liable in cases of gross negligence and intentional misconduct.
- Opponents of liability protections have concerns that immunity would create disincentives for employers to protect their workers.¹² In order to better insulate organizations from liability, some have suggested that institutions should implement a safety plan that takes into account employee feedback and approval.
- Some states have introduced legislation that will shield businesses and other entities. [Utah](#) and [Oklahoma](#) have already enacted bills providing immunity from civil liability for COVID-related suits.¹³ The National Conference of State Legislatures provides up-to-date tracking of COVID-19-related liability protections in state legislatures, which can be accessed [here](#).

4. Can or should schools require liability waivers related to COVID-exposure?

- Schools must recognize that no waiver can substitute the need to maintain a safe environment. Even if requiring a waiver, schools should comply with local orders, state regulations, and guidance from government agencies.
- The enforceability of waivers depends on the state or jurisdiction, but generally the waiver must be clear, unambiguous, and explicit in expressing the intent to release a party from liability for conduct resulting in personal injury.¹⁴ Some jurisdictions will rule a waiver unenforceable if it is contrary to public policy.¹⁵
- Waivers typically do not apply to gross negligence or willful, intentional, or wanton conduct. Gross negligence is a legal term with a meaning that varies by state but is commonly defined as failure to exercise even slight diligence.¹⁶ Factors that may suggest COVID-related gross negligence could include (1) failure to sanitize and disinfect facilities after known exposure to an infected

¹² Brett McDonnell & Matt Bodie, [To Reopen the Economy, Businesses Need a ‘Safe Haven’ Protocol to Avoid Liability](#), STARTRIBUNE (May 27, 2020).

¹³ S.B. 3007, 63rd Leg., 3rd Spec. Sess. (Ut. 2020) (enacted); S.B. 1946, 57th Leg., 2nd Sess. (Okla. 2020) (enacted).

¹⁴ Mero v. City Segway Tours, 962 F. Supp. 2d 92, 97 (D.D.C. 2013).

¹⁵ Kelly v. United States, 809 F. Supp. 2d 429, 434 (E.D.N.C. 2011).

¹⁶ 57A Am. Jur. 2d *Negligence* § 227, Westlaw (database updated May 2020).

- individual; and (2) failure to warn entrants that an infected person had recently been in the building.¹⁷
- To mitigate the risk of liability, schools may wish to consider two kinds of waivers: (1) employee waivers and (2) student waivers.
 - **Employee waivers** may reduce a school's liability concerning COVID-related suits by faculty or staff.
 - These waivers are limited by state workers' compensation statutes.
 - Although waiver agreements do not shield employers from OSHA complaints, President Trump recently issued an [executive order](#) directing federal agencies to decline enforcement for employers who attempt in good-faith to follow regulations related to COVID-19.¹⁸
 - Schools may also consider parent-signed **student waivers** of COVID-related liability.
 - Generally, a waiver signed by a minor is not binding on him or her.¹⁹ Moreover, many states have ruled that parents may not bind their children to pre-injury liability waivers by signing the waiver on their children's behalf in commercial contexts.²⁰ However, there are some jurisdictions that have allowed parent-signed liability waivers to shield a school from liability if the student is injured during school activities.²¹
 - As such, a student waiver signed by a guardian could potentially limit liability for an injury related to COVID-19. Similar to student waivers, customer waivers are already being introduced by businesses. For example, [Walt Disney World Resort](#) is warning patrons that by visiting the theme park, they “voluntarily assume all risks related to exposure to COVID-19.”²²
 - Importantly, whether employee and student waivers will truly insulate businesses and institutions from liability remains to be seen. Regardless, schools should follow guidance from CDC, state, and local health authorities to keep premises reasonably safe.
 - Regardless of whether a school is requiring liability waivers, schools should consider articulating for the public the affirmative steps taken to minimize the spread of COVID-19, even if publication of the plan is not required under applicable state or local rules.

¹⁷ See Complaint, *Hsu v. Princess Cruise Lines, Ltd.*, No. 2:20-cv-3488 (C.D. Cal. 2020); Complaint, *Jones v. Princess Cruise Lines, Ltd.*, No. 2:20-cv-2727 (C.D. Cal. 2020).

¹⁸ Exec. Order 13924, 85 FR 31353 (§ 5(b)) (May 19, 2020).

¹⁹ Restatement (Second) of Contracts § 14 (1981).

²⁰ *Kelly v. United States*, 809 F. Supp. 2d 429, 435 (E.D.N.C. 2011).

²¹ *Id.* at 436.

²² [Update on Walt Disney World Resort Operations — Including Theme Parks and Water Parks](#), WALT DISNEY WORLD (last visited June 12, 2020).

- For example, schools may decide to post clear and visible **notices** communicating information on how they are keeping premises safe.
- Schools also may decide to implement **questionnaires** asking entrants about whether they have any symptoms of COVID-19 or have been exposed to it. Based on responses, schools could send home sick people to protect the workplace. Depending on applicable state and local rules, these questionnaires may be voluntary and optional to assuage concerns over an individual's privacy.

5. Would insurance cover any COVID-related claims by program participants or staff?

- According to an article published by the [Nonprofit Risk Management Center](#), schools should review with their insurance broker to see if their organization's policies cover COVID-related claims.²³ Additionally, school leaders should understand what steps are needed to file a covered claim. Examples of policies which may provide COVID-related coverage include:
 - **Business Interruption.** According to [Allstate](#), business interruption insurance generally covers loss of income and other financial impacts due to physical damage to property.²⁴ Business interruption policy coverage varies widely, and some policies expressly exclude pandemics. A broker can assist your organization in determining whether your business policy would cover losses resulting from COVID-19 and the related government-mandated closures.
 - **Directors' and Officers' Liability.** Directors' and Officers' insurance generally protects directors and officers from liability for lawsuits alleging the directors and officers did not fulfill their duties to the organization.²⁵ Director and Officer insurance may cover COVID-19 related claims related the leadership's response to the risks of the disease, management of the resulting economic downturn, and implementation of government-mandated precautions.
 - **Workers' Compensation.** Workers' compensation coverage is a product of state law. A workers' compensation policy generally covers claims related to injuries to a worker resulting from his or her employment. When and if a COVID-related claim would be eligible for coverage will depend on the policy and the relevant state law. A community-spread illness that affects the

²³ [Are We Covered? Your Nonprofit's Insurance Policies and COVID-19 Claims](#), NONPROFIT RISK MANAGEMENT CENTER (last visited June 12, 2020).

²⁴ [What is Business Interruption Insurance?](#), ALLSTATE (last updated Nov. 2019)

²⁵ Brett Cohrs, [Types of Insurance Nonprofits Should Consider](#), THE BALANCE SMALL BUSINESS (last updated Feb. 23, 2020).

general public is typically not covered by workers compensation laws. Some states, such as [California](#), are extending coverage to COVID-19.²⁶

- **Event Cancellation.** Event cancellation insurance generally covers loss of income and increased expenses resulting from an event cancellation. As with other policies, whether an event cancellation policy will cover cancellations related to COVID-19 will vary by policy.²⁷
- **General Liability.** A general liability policy protects an organization from third-party claims of injury resulting from an act or omission of the organization.²⁸ Some general liability policies exclude injuries resulting from pandemics, but many do not.
- **Environmental insurance.** Environmental insurance covers injuries that result from pollution or contamination. Current policies do not explicitly identify COVID-19 as a pollutant, but some policies do not exclude the transmission of disease caused by the environment from coverage.²⁹
- **Civil Authority Closures.** A civil authority closure provision insures for business-income losses due to government actions that restrict access to property.³⁰ Coverage will depend on specific terms and conditions of the policy.

6. What types of screening are appropriate and legally permissible?

- The CDC states that schools are “not expected to screen children, students, or staff to identify cases of COVID-19.”³¹ If a school has positive cases of COVID-19, “local health authorities will help identify those individuals and follow up on next steps.”³²
- Still, if feasible, the CDC recommends conducting “health checks (e.g., temperature screening and/or symptom checking) of staff and students . . . safely, respectfully, and in accordance with any applicable privacy laws or regulations.”³³

²⁶ Governor Newsom Announces Workers’ Compensation Benefits for Workers who Contract COVID-19 During Stay at Home Order, OFFICE OF GOVERNOR GAVIN NEWSOME (May 6, 2020).

²⁷ Peter Andrew, [Nonprofit Insurance and COVID-19](#), NEW YORK COUNCIL ON NONPROFIT, INC. (Mar. 10, 2020).

²⁸ CIMA, [Insurance Basics for Nonprofit Organizations](#) (last updated July 2012).

²⁹ Grant Nichols, [Is Covid-19 a Covered Pollution Exposure? What to Look for in Your Policy Language](#), RISK & INSURANCE (Mar. 23, 2020).

³⁰ Larry P. Schiffer et al., [Civil Authority Orders and COVID-19 Coverage](#), THE NATIONAL LAW REVIEW (Mar. 20, 2020).

³¹ See “Should my school screen students for COVID-19?” on CDC webpage [FAQs for Administrators, Teachers, and Parents](#) (last updated June 3, 2020).

³² *Id.*

³³ See “Recognize Signs and Symptoms” on CDC webpage [Considerations for Schools](#) (last updated May 19, 2020).

- Given that schools have a duty to protect the health and safety of students, schools may perform health checks and send home students who exhibit signs of illness.³⁴ To ensure consistency of screenings, schools should document in writing the health reasons for sending a student home. Confidentiality of health screenings also must be maintained, in compliance with the Family Educational Rights and Privacy Act,³⁵ which protects the privacy of student education records, and the Health Insurance Portability and Accountability Act,³⁶ which protects the privacy of patients' health information.
- The CDC suggests school screenings that mirror the CDC's [General Business FAQs](#) for screening staff.³⁷ Several methods include:
 - (1) Employee takes his or her own temperature. Upon arrival at the workplace, employee confirms that his or her temperature is less than 100.4° F. and that he or she is not experiencing coughing or shortness of breath. Employer also visually inspects employee for signs of illness. No personal protective equipment (PPE) is needed if screening staff can maintain a distance of 6 feet.
 - (2) A trained screener wearing gloves stands behind a physical barrier to conduct a temperature check and visual inspection of the employee. The screener changes gloves and washes hands between each temperature check.
- COVID-19 screenings of staff must comply with the [Americans with Disabilities Act](#) (“ADA”) to avoid concerns over privacy and discrimination.³⁸
 - Generally, the ADA prohibits medical examinations during employment, unless the employee poses a “direct threat” due to a medical condition. As of March 2020, the COVID-19 pandemic meets the “direct threat” standard.
 - Employers may ask employees if they are experiencing influenza-like symptoms but must maintain all information as a confidential medical record.
 - An employer may not ask employees who do not have flu-like symptoms to disclose medical conditions that could make them vulnerable to COVID-19 complications.

³⁴ 67B Am. Jur. 2d Schools § 347.

³⁵ 20 U.S.C. § 1232g.

³⁶ Health Insurance Portability and Accountability Act, Pub.L. 104-191 (1996).

³⁷ See “Should we be screening employees for COVID-19 symptoms? What is the best way to do that?” on CDC webpage [FAQs for Businesses](#) (last updated May 3, 2020).

³⁸ U.S. Equal Emp. Opp. Comm’n, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (last updated Mar. 21, 2020).

- Employers can require employees to adopt infection-control practices, such as regular handwashing.
- Some re-opened schools administer temperature checks of students at the door. For example, a [small school in Montana that re-opened](#) in May for the last few weeks of the school year conducted temperature checks of all students at the school's entrance as a part of its safety procedures.³⁹

7. What type of training is needed for staff and volunteers?

- The CDC recommends that schools train all staff and volunteers in CDC safety actions and guidelines (listed on pages 42-44 of the [CDC Activities and Initiatives Supporting the COVID-19 Response](#)), including:
 - The promotion of healthy hygiene practices;
 - The intensification of cleaning, disinfection, and ventilation; and
 - The promotion of social distancing.
- Any new volunteer or staff member must be trained before beginning work at the school. Routine trainings should be held to keep staff and volunteers up-to-date on the latest COVID-19 information.
- If possible, schools should consider training virtually. If in-person, schools should ensure that social distancing is maintained throughout the training.
- The CDC provides a [checklist](#) to help teachers plan and prepare to promote healthy habits during the school year.
- Some states are recommending specific training curriculum. For example, in [California](#),⁴⁰ public school teachers must be trained on the following:
 - Checking for coronavirus symptoms;
 - Disinfecting and cleaning frequency;
 - Proper use of masks and other protective equipment; and
 - How to implement social distancing inside and outside of classrooms.
- If necessary, schools should offer trainings to teachers on how to transition from face-to-face lessons to online lessons to ensure continuity of education.
- Schools should also cross-train staff on critical functions and positions in the event of absenteeism to ensure continuity of operations.

8. What key issues should be addressed in a reopening plan?

- **Prioritize** health and well-being of students and staff while maintaining educational programming. Develop multiple plans based on the level of

³⁹ Matt Volz, [Tiny Montana School to be among First in US to Reopen](#), ABC NEWS (May 5, 2020).

⁴⁰ CAL. DEPT. OF EDUC., *Stronger Together, a Guidebook for the Safe Reopening of California's Public Schools*, at 10 (June 2020).

community transmission so that the school is ready for any COVID-19 situation, such as a positive COVID-19 case in the school.

- **Educate** staff, students, and guardians of students on healthy practices regarding [hygiene](#), [social distancing](#),⁴¹ [cleaning and disinfecting](#), and [how to wear face coverings](#). Train staff on all safety protocols and provide parents training materials and documents offered by the CDC or state/local health officials. Encourage talking to students and children about how they can also help prevent the spread of COVID-19.
- **Communicate** the reopening plan to students, staff, and guardians. Be transparent about the reasoning behind the school’s reopening plan and show that the school worked closely, and will continue to collaborate, with local health authorities to monitor the situation. Maintain regular communication by displaying CDC resource posters in classrooms and staff rooms, sending virtual reminders of everyday preventive actions, and updating school community members on any COVID-19 developments.
- **Implement strategies** to protect students at school. Encourage social distancing using approaches such as: turning desks to face the same direction, raising barriers between seats if 6-foot distancing is not feasible, limiting the use of shared items, grouping students in cohorts that remain in their classrooms, and closing large, shared facilities.⁴²
- **Tailor risk-mitigation measures** based on [OSHA guidance](#)’s classification of employees. For example, most schools have (1) teachers, (2) front office workers, and (3) building staff. The school should profile the risks of each and develop appropriate protocols. For example:
 - (1) **Teachers**. Require and provide teachers PPE such as cloth masks since they will be in constant proximity to students. Have teachers and students avoid mingling in common spaces.
 - (2) **Front office workers**. Add barriers, so visitors maintain a safe distance from office staff. If available, allow office workers and teachers to use side doors to avoid high-touch areas.
 - (3) **Building workers**. Create work shifts to reduce exposure within the team.
- Consider showing how schools elsewhere have successfully reopened by implementing similar safety precautions as listed by the CDC. Denmark, for

⁴¹ See “When there is minimal to moderate community transmission” on CDC webpage [Guidance for Schools & Child Care](#) (last visited June 12, 2020).

⁴² *Id.*

example, reopened schools in April and adhered to prevention strategies;⁴³ data suggests that doing so did not worsen the outbreak.⁴⁴

Conclusion

- Schools must consider and address several areas to protect the health and safety of school community members while ensuring continuous education. Schools face no small task as they look to re-open this fall, but following government-issued guidance and working with local public health officials should make that task achievable.
- While this paper is meant to provide schools with practical and legal information as they develop their reopening plans for the fall, it does not constitute legal advice. Schools should consult their attorney as they make decisions regarding reopening.
- A summary of resources can be found after this conclusion. Please note that all resources listed are subject to change. As new information about COVID-19 is published frequently, schools should review resources for any updates.

⁴³ Patrick Kingsley, *In Denmark, the Rarest of Sights: Classrooms Full of Students*, N.Y. TIMES (Apr. 17, 2020).

⁴⁴ Andreas Mortensen & Nikolaj Skydsgaard, *Reopening Schools in Denmark did not Worsen Outbreak, Data Shows*, REUTERS (May 28, 2020).

Summary of Resources

CDC and OSHA Guidance

- CDC [Reopening Guidance for Schools & Child Care](#)
- CDC [Activities and Initiatives Supporting the COVID-19 Response](#)
- CDC [Considerations for Schools](#)
- CDC [Reopening Decision Tree](#)
- CDC [FAQs for Administrators, Teachers, and Parents](#)
- CDC [FAQs for Businesses](#)
- OSHA [Guidance on Preparing Workplaces for COVID-19](#)

Legislative Tracking

- [Congress.Gov](#)
- [The National Conference on State Legislatures](#)

Other CDC resources for schools

- CDC's [health communication resources](#)
- CDC information on [stigma and COVID-19](#)
- CDC information on [COVID-19 and children](#)
- CDC information on [Cleaning and Disinfecting Community Facilities](#)
- CDC information on [Cloth Face Coverings](#)
- CDC provides free handwashing resources that include [health promotion materials](#) and information on [proper handwashing technique](#).
- CDC suggests resources from other health and education professional organizations, such as the [American Academy of Pediatrics](#)
- CDC's information on [helping children cope with emergencies](#) and [Stigma prevention and facts about COVID-19](#)

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