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Mr. Jason Bauer, Superintendent
Pana Community Unit School District No. 8
14 West Main Street
Pana, Illinois 62557

RE: Opinion re: Health Protocols
Confidential Opinion Subject to Attorney-Client Privilege

Dear Mr. Bauer:

During our recent correspondence, you asked that I explain the Illinois State Board of Education ("ISBE") and Illinois Department of Public Health ("IDPH") guidance on masks and social distancing, as well as risks attendant to that guidance from a liability perspective.

Considering these issues from the liability perspective, setting aside other political considerations, it is our opinion that failure to comply with guidance and rules may result in difficult-to-control or cap liability. In such a scenario, you will likely confront both large legal fees, loss of funding, and no insurance coverage for either. In contrast, good faith adherence to these guidelines is likely to result in the District having immunity under the Illinois Tort Immunity Act for potential claims.

Insurance

As a threshold issue, we are hearing rumblings that some insurance carriers may not provide coverage in the event of a COVID-19 case. I do not know what the District's insurance policy is, but the carrier's possible lack of coverage could impact the duration and cost of litigation. It is imperative that the District understand the requirements of its insurance policies and insurance providers, including worker's compensation carriers, regarding these matters and ascertain the position of the insurance provider on these issues.

Non-Tort Claims

This opinion does not specifically address non-tort related cases that could arise, including bargaining-related claims brought under the Illinois Educational Labor Relations Act, other employee-related School Code rights (such as employee evaluations), or student-specific matters such as special education and the right to a free appropriate public education.

Willful and Wanton Conduct

In the event that a student, member of the public, or estate sues the school district after contracting COVID-19, it is likely that the claim will sound in tort. In other words, the student, member of the public, or estate will allege that the District: 1) had a duty to act reasonably and keep them safe, 2) failed to act reasonably or keep them safe, 3) the District's actions (or lack thereof) caused the member of the public or student to contract COVID-19, and 4) now the student or member of the public is sick/injured/dead.

The Illinois Tort Immunity Act provides some protection against tort claims. For example, Section 3-108 provides immunity against ordinary negligence claims when the student, member of the public, or estate is alleging that the District failed to adequately supervise an activity on or the use of District property. The Illinois Tort Immunity Act does not prevent individuals from filing lawsuits; however, it can provide immunity against some claims.

The District's ability to successfully use the Tort Immunity shield as a defense will be impacted by what the District does (or does not do) in response to the COVID-19 pandemic. In other words, the District is unlikely to be able to successfully use the Tort Immunity Act as a defense if it engages in conduct that is deemed to be willful and wanton conduct.

A recent case involving an Illinois school district and the application of the Tort Immunity Act, *In re Estate of Stewart v. Oswego Community Unit School District No. 308*, 2016 IL App (2d) 151117, that addresses what is considered to be willful and wanton conduct in a medical scenario. Willful and wanton conduct occurs when a party shows an actual or deliberate intention to cause harm, or that, if not intentional, shows an utter indifference to, or conscious disregard for, the safety of others or their property. 745 ILCS 10/1-210. It is an aggravated -- or more severe -- form of negligence. The court in *In re Estate of Stewart* determined that a school district engaged in willful and wanton conduct - and was therefore not entitled to immunity under the Illinois Tort Immunity Act -- when it a) deviated from standard operating procedures and violated District policy; b) exhibited an unjustifiably lengthy response time to the medical emergency; or c) had an inadequate response to a known danger. The Court rejected the school district's assertion that "taking *any* action in response to a known danger is sufficient to insulate a defendant from allegations of willful and wanton conduct." 2016 IL App (2d) 151117, ¶ 105 (emphasis in original). It clarified, "We must evaluate both the nature of the danger and the nature of the action taken in response, rather than merely allow any action taken in response to any danger to insulate a defendant from allegations of willful and wanton conduct" *Id.* The District was ordered to pay \$2.5 million to the student's estate due to its willful and wanton conduct.

We advise that the District follow ISBE and IDPH guidelines because the failure to do so could likely be deemed to be willful and wanton conduct. If the District is found to have engaged in willful and wanton conduct and the insurance carrier denies coverage, the District could be ordered to pay judgments similar in size to the *In re Estate of Stewart* case.

While there are cases all over Illinois challenging whether ISBE has authority to require masks and social distancing, the results have, at best, been mixed. Judge McHaney in the most recent Clay County case held that the Governor had no authority to act under the Emergency Management Act - but we have no idea where those cases will eventually land, but I suspect it will be a very long time before they are settled (and the settlement of them will not be instructive to schools seeking guidance in the meantime). Regardless, liability potential awaits any school district that is not compliant with the guidance – it's a gamble at best, and one with very poor odds. In our view, the liability question does not depend on whether or not the ISBE/IDPR guidance is legally-enforceable or whether the Governor's Executive Orders were legal.

The effective purpose of the guidance is to establish the basis of liability - schools that don't comply potentially breach their tort immunity shield. A decision not to comply with the guidance is not likely to end in the arm of ISBE coming in to regulate your school. It will end in liability owed to a person infected or a staff member subjected to risk at work.

Bearing in mind that the purpose of safety measures is not to protect the person who wears the mask but rather the protect the person he or she infects, failure to require compliance with the IDPH/ISBE guidance makes anyone infected and/or their kin a potential plaintiff. In other words, it's not the person who doesn't wear the mask that is your plaintiff – it's the person that person infects, and that is the person to whom you owe a duty of care.

The primary risk is not lost funding – it is the existence of the guidance in the first place. If a school is noncompliant, even if ISBE changed and/or pulled the guidance, a plaintiff's lawyer will find the guidance and will likely conclude he can argue successfully that the school's tort immunity shield is breached if the District intentionally failed to follow known guidelines for health and safety. The tort immunity shield protects a school from liability from most civil claims - to make a successful claim against a school, you have to prove both at law and in fact a school district was willful and wanton in disregard of safety or the rules. Put another way, a plaintiff would have to prove you were deliberately indifferent to a known risk. That bar is incredibly difficult for a plaintiff to climb over. But intentionally failing to comply with health department guidance will likely compel a judge to at least let a jury hear the case, and may very well result in that shield being lost altogether. Cases like *In re Estate of Stewart* have lowered that bar. In other words, your liability defense will look a lot like any other business, but with a much bigger target and many more potential plaintiffs.

Much more important is the fact that most school districts have no coverage for infectious disease, and even those that do will lose that coverage if they disregard IDPH/ISBE guidance. Therefore, you will be on your own if someone gets sick or dies – it will be district general and tort funds (care of District taxpayers) that will fund the estate of a plaintiff who challenges. Most

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importantly, that person is unlikely to be the person you can spot at the school or a person who chooses not to wear a mask. The purpose of masks and social distancing is not self-preservation, but rather protection against the person with whom an infected person comes into contact. Therefore, the liability likely results from the estate of the person who gets infected (*see, e.g., Estate of Evans v. Walmart*).

While it may be difficult to tie all infections to an individual event, a District should be alert to the fact that it is possible an outbreak may be introduced by a single individual. The best defense to liability will be compliance with safety measures as dictated by health officials, who, in Illinois, are represented by the state-wide Illinois Department of Public Health. In fact, for worker's compensation cases, the Illinois Worker's Compensation Commission specifically notes that among the evidence which can rebut the legal presumption that an employee contracted COVID-19 in the workplace is evidence showing that the employer was following current public health guidelines for two weeks prior to when the employee claims they contracted COVID-19. Again, failure to follow those public health guidelines subjects the District to potential liability.

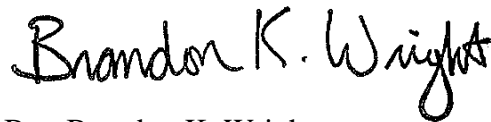
I recognize there are other avenues (suing ISBE arguing its authority is out of bounds, suing the governor, letters to ISBE, etc.), but I am concerned that doing so will make you a target for plaintiff's lawyers, give your insurance carrier good cause not to cover you, and do damage to a District's defense in the event of injury. Further, you will give up the ability to use ISBE and IDPH as co-defendants in any lawsuit that ultimately occurs. If you don't make the decisions (you just follow them), then if you get sued we will argue ISBE and IDPH are the correct defendants – not you. If you make the decision without cooperation of ISBE and IDPH, then the liability will befall you exclusively without a co-defendant against which to confer or share liability.

Again, it is our opinion that good faith adherence to these guidelines is likely to result in the District having immunity under the Illinois Tort Immunity Act for potential claims, and would put the District in the best possible position should such a claim arise.

I hope the foregoing is fully responsive to your requests. Please let me know should you have further questions or concerns.

Sincerely,

MILLER, TRACY, BRAUN, FUNK &
MILLER, LTD.



By: Brandon K. Wright

BKW/dms