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SURVIVING LEGAL AND OPERATIONAL OBSTACLES CAUSED BY COVID-19

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Disclaimers




- This webinar cannot substitute for personalized legal advice.
- Our advice can change tomorrow. Or an hour from now.
- With so many participants and so little time “live” questions are impossible, but we’ve designed this with your questions in mind.
- Follow up webinars are likely. We will have a separate workshop to cover special education and employment law issues related to COVID later this month. Feel free to email with other suggested follow up topics.
- Sign up for our legal alerts on our website:
www.mycharterlaw.com.
- Our attempts at humor (including Jerry’s singing) are not intended to minimize the gravity of the situation.

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What We Are Covering Today



1. School re-opening resolutions
2. Potential modifications to school safety plans and IIPPs
3. Facilities related issues likely to arise during pandemic
4. How to mitigate liability risks related to COVID-19
5. Waivers and assumption of risk notices
6. Lessons from COVID-19 litigation already filed
7. Review pending legislation on liability protection

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CTIONS ANSWERS

COVID Board Resolution Updates


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Should your Board adopt an updated COVID resolution?



Benefits:

Confirmation that your school leader has authority to make a wide range of decisions to respond to COVID-19:

- Prepare and implement re-opening plans and changes necessary to comply with guidance and directives
- Close school without prior Board approval if ordered
- Re-negotiation of contracts with vendors
- Adjust instructional program
- Hiring
- Cash flow financing
- Waiving school policies to comply with health orders
- Ability to exceed board approved budget authority as necessary to deal with emergency conditions

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School Safety Plans


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School Safety Plans




- AB 1747 (2018) changed the “Health and Safety” Element of a Charter Petition, requiring preparation of a School Safety Plan.
- Elements are specific to charter schools and more streamlined.
- Emphasizes importance of coordination with other public agencies:
 - County Office of Education
 - County Public Health Department
 - Emergency Medical Services
 - Police and Fire Departments
- Includes emergency preparedness procedures.
 - *Tip: Incorporate pandemic response protocol*


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School Safety Plans Contd.



- Requires safe ingress and egress of students, staff and parents.
 - *Tip: Address physical distancing at campus entrances/exits, staggered arrival and departure schedules, increased points of entry.*
 - *Tip: Ensure students and parents are not congregating at entrances/exits before and after school.*
 - *Tip: Clearly communicate drop-off and pick-up procedures to all stake-holders.*
- Requires maintenance of a safe and orderly environment conducive to learning at the school.
 - *Tip: Incorporate any health and safety policy the Board has adopted outlining reopening protocols.*
- Ensure plans are made in coordination with any co-located school.


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Illness and Injury Prevention Plans





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Injury Illness Prevention Plan




- Required by the Labor Code for all employers.
- All workplaces must be safe, healthy and free of hazards.
- Training must be provided, records must be kept, inspections must be performed.
- Schools must report serious injuries and illnesses:
 - Work-related
 - Hospitalization, amputation, loss of eye or death


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Injury Illness Prevention Plan Contd.



- You should amend your IIPP to address COVID-19-specific plans:
 - Perform a detailed risk assessment and create a site-specific protection plan.
 - Train employees on how to limit the spread of COVID-19. This includes how to screen themselves for symptoms and when to stay home.
 - Set up individual control measures and screenings.
 - Put disinfection protocols in place.
 - Establish physical distancing guidelines.


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Re-Opening Plans


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Re-Opening Plans



- These plans need to incorporate all of the operational and logistical issues that re-opening necessitates:
 - Transportation
 - Safe drop-off and pick-up
 - Cleaning, disinfecting and sanitation of facilities
 - Healthy Schools Act “Integrated Pest Management” Training Required
 - Use EPA-listed disinfectants (<https://www.epa.gov/coronavirus>)
 - Avoid asthma inducing chemicals

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Re-Opening Plans Contd.




- Requiring and supplying personal protective equipment
- Social distancing on campus
 - Classrooms, hallways, restrooms, outdoor spaces
- Food service and eating meals
- Maintaining cohorts
 - Elementary students remain in stable cohorts (mask wearing is less feasible)?
 - Middle and High School students wear masks (stable cohorts are less feasible)?
 - Masks may be required in any event
- Avoid in-person aerosol generating activities (choir, vocal cheerleading, etc.)

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Re-Opening Plans Contd.



- Recess and physical education
- How to avoid sharing supplies and equipment
- Protections for high needs populations
- Plans if there is a positive test on campus
- Isolation of sick individuals
- Communication of plans and expectations with the community
 - Training
- Coordination with authorizer and County health department
- Ensure compliance with charter and MOU

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Other Issues to Consider...

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Other Facilities-Related Issues in a Pandemic

- Opening when district schools are closed.
- Sharing space with district schools or the public – e.g. health protocols.
- Encroaching on public thoroughways at school entrances.
- HVAC and other systems issues.
- Restrooms – sharing and cleaning.
- Pivoting your facility from distance learning to in-person learning.
- Termination of existing leases/rent reductions or deferrals.
- Disputes with the district around reopening.
- Child care.

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Has Your County Issued Guidance?

- <https://edsources.org/2020/seeking-guidance-for-reopening-schools/633593>

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Liability and Assumption of Risk

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Liability Landscape for Claims Brought by Students / Families

- This is clearly a matter of first impression world-wide. But waivers are generally disfavored in California.
- Transparent safety and cleanliness protocols are crucial.
- Federal, state, county and local health and education directives should be monitored and followed.
- Without some form of qualified immunity, charter schools must defend themselves against COVID-19 suits.

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Assumption of Risk
Primary v. Secondary Assumption of Risk

- Primary assumption of risk:
 - Matter of law and policy: defendant owes no duty to protect a plaintiff from particular harms
 - Has barred negligence claims for alleged injuries resulting in students' participation in sports and other school activities
 - If school/employee increases the risk of harm it will not be barred
- Secondary assumption of risk:
 - Plaintiff's knowing and voluntary acceptance of the risk functions as a form of contributory negligence
- Application to Charter Schools:
 - Primary assumption of the risk defense: COVID-19 had inherent risks danger
 - Secondary assumption of the risk defense: Plaintiff knew of the risk and voluntarily confronted the risk of danger

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Assumption of Risk Voluntary Activities Only



- The doctrine of assumption of risk only applies to clearly **voluntary** activities.
- Courts are reluctant to find that it applies to circumstances where less or no choice is involved, or where participation is compulsory.
- **To have the best chance of a waiver being upheld, schools should offer a distance learning option and put all students and families on written notice of the risk of returning to campus for class or activities with clear and unambiguous language. Tricky interplay with the language in SB 98 that seems to favor site-based instruction but allows distance learning in certain circumstances.**

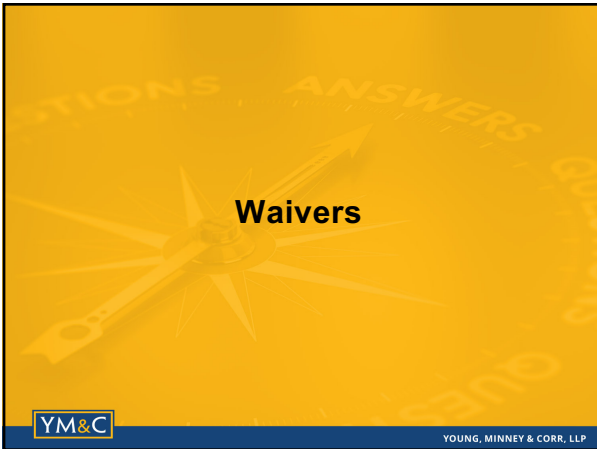

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Waivers

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Waivers of Liability Against the Public Interest?



Any waiver of liability contrary to public policy or *affects the public interest* will not be enforced. (*Tunkl v. Regents of the University of California* (1963) 60 Cal. 2d 92, 98-101.) In *Tunkl*, the Court established six factors to analyze whether it affects the public interest:

- 1) Agreement concerns a business of a type generally thought **suitable for public regulation**.
- 2) The party seeking exculpation is engaged in performing a **service of great importance to the public**, which is often a matter of practical necessity for some members of the public.
- 3) The party **holds himself out as willing to perform this service for any member of the public who seeks it**, or at least for any member coming within certain established standards.
- 4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation **possesses a decisive advantage of bargaining strength** against any member of the public who seeks his services.


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Waivers of Liability Against the Public Interest?



5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, **and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.**

6) Finally, as a result of the transaction, the person or property of the purchaser is **placed under the control of the seller**, subject to the risk of carelessness by the seller or his agents.


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Waivers of Liability Ordinary Negligence Only



- In California, there can be no waiver of liability for intentional, reckless, or grossly negligent conduct.
- “Ordinary negligence”—an unintentional tort—consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm.
- “Gross negligence” long has been defined in California and other jurisdictions as either a “want of even scant care” or “an extreme departure from the ordinary standard of conduct.”


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Waivers of Liability Essential Elements



- The waiver itself and how it is drafted is therefore critical in its enforceability.
- Three provisions are recommended:
 - 1) An exculpatory clause;
 - 2) Assumption of the risk notifications (as set forth above); and
 - 3) Health verifications (set forth below under comparative negligence)
- A requirement for enforceability of liability waivers is that they are drafted in a manner that guarantees the signatory understands the risks associated with the services, as well as the rights they intend to waive.
- "It is well established that a parent may execute a release on behalf of his or her child"


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Charter Schools Affecting the Public Interest?




- Because charter schools occupy a unique space in the public school system, the applicability of the public interest doctrine is unclear but concerning.
- It seems clear that charter schools affect the public interest, in that they are providing a public good and using public dollars, but they do not benefit from the qualified immunity protections extended to traditional public schools. Also they are schools of choice.
- **The use of waivers for COVID-19 claims may ultimately be considered by a court as being against public policy. Additionally, we believe that charter schools should balance the potential benefit of them against negative PR and potential claims of exclusion by students.**
- **If you want to discuss instituting a waiver, we have a sample we can tailor for your school.**

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Comparative Negligence




- Assumption of the risk provisions should recite the then-known symptoms of COVID-19 pursuant to CDC guidelines.
- A "health verification" requires an acknowledgement by the students/families that he or she has not exhibited those symptoms for a specified period of time.
- Temperature screening based on advice of the CDC and local health departments should be considered.
- This can be evidence in a lawsuit to demonstrate the school's diligent efforts to protect its students, but also can help shift a share of the blame from the school to the family.

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Summary of Best Practices to Minimize Liability Risks



All schools should:

- 1) Create clear procedures and guidelines related to safety and cleaning measures being employed for the reopening of physical classrooms.
- 2) Provide students and families with an easy-to-understand notice of the risks they are assuming by returning to school.
- 3) Although there is no guarantee of enforceability, waivers of liability might protect against ordinary negligence claims against the school, its board, officers, directors, employees, and volunteers.
- 4) Place affirmative obligations on guardians sending their children to school, such as notification of illness, temperature checks, and cleaning standards.

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AB 1384

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AB 1384

- Assembly Member O'Donnell (no friend of charter schools) is sponsoring AB 1384, which was gutted and amended to become a COVID-19 liability protection bill for all local education agencies, including charters.
- He may have included charters because this bill may be hard to move.
- Unclear when hearing will be held due to Assembly extending recess.
- Opposition expected from plaintiff lawyers. We need to unite behind this helpful legislation to give ourselves a better liability shield. Ask your legislator today to co-sponsor and vote to approve.
- We have worked with CCSA on some suggested amendments to make it better, but even in its current form it would be very helpful.

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AB 1384


- If approved and signed, it would require:
 - During the COVID-19 pandemic, a governing board of a local educational agency, or its designee, shall establish policies and procedures for operating programs and facilities in a manner consistent with applicable federal, state, and local legal and regulatory COVID-19-related requirements and that takes into consideration COVID-19-related guidelines from federal, state, and local government entities and public health agencies.
 - There shall be no monetary liability on the part of, and no cause of action for damage shall arise against, a local educational agency, or its officers or employees, that meets the requirements of subdivision (b) for injury relating to COVID-19 infection, any condition in existence because of the COVID-19 pandemic, or any act or omission by the local educational agency, its officers, or its employees in response to the COVID-19 pandemic, including, but not limited to, claims for injury, death, emotional distress, economic loss, or violation of civil liberties, notwithstanding any law that might impose that liability, including, but not limited to, any provision contained in Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, and Section 1708 of, and subdivision (a) of Section 1714 of, the Civil Code.

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AB 1384



- The law would apply to a cause of action for injury alleged to have been sustained during the COVID-19 pandemic or during the 12 months following the end of any state of emergency relating to COVID-19.
- The law would not apply to employee claims for injuries sustained in the course and scope of employment pursuant to Division 4 (commencing with Section 3200) of the Labor Code.
- The liability protections do not apply to claims for money or damages for gross negligence or for reckless, intentional, or willful and wanton misconduct.

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Insurance



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Insurance




- There has been a fair amount of confusion about what is covered and not covered under insurance relating to COVID-19. Some policies contain pandemic exclusions.
- We recommend that you speak with your carrier to see whether your D&O policies cover decisions your board makes about re-opening. In the midst of confusing/contradictory guidance by health authorities, is your board protected when it makes a decision like masks or no masks?
- We also recommend you speak with your carrier to see whether your liability policies will cover defense costs or liability based on COVID claims.

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Insurance




- If AB 1384 does not become law, then insurance protection is even more critical.
- For this reason, consider carefully risk mitigation guidance your insurance company provides regarding re-opening and operations.
- Do not behave recklessly and do not intentionally defy orders of county, state or federal officials.

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Zuniga v. Safeway




- Lawsuit filed by a woman whose husband died from COVID-19. He worked at Safeway's Tracy Distribution Center, where at least 51 workers tested positive for COVID-19. The complaint claims Safeway threatened to discipline Mr. Zuniga and his coworkers when they expressed concerns about safety issues, including the lack of PPE and how closely workers were forced to work. The company also allegedly failed to screen employees with COVID-19 symptoms, required longer work shifts, discouraged calling in sick and did not implement safety measures recommended by the state and federal government, such as providing sanitation stations, until after Mr. Zuniga's death.
- The complaint alleges negligence, gross negligence, state and federal OSHA violations, wrongful death, etc. and asks for an unspecified amount of damages.
- What parts of the claim are informative for charter schools as they plan for reopening?

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Zuniga v. Safeway



Key statutes that the Plaintiff alleges were violated by Safeway:

- Federal Occupational Safety and Health Act of 1970 (29 USC Section 654)
- California Occupational Safety and Health Act of 1973 (Labor Code Section 6400 et seq. and 8 CCR Section 3203)
- Fraudulent Concealment of Injury (Labor Code 3602(b)(2))

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Key Takeaways

- Carefully review all local, state and federal guidance and directives. If guidance is not clear, ask questions of the relevant agency.
- Develop policies and procedures in compliance with guidance and directives.
- Train all employees on your policies and procedures.
- Communicate with parents and students about your expectations of them.

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Key Takeaways

- Have employees, students and parents acknowledge your policies and procedures.
- When people complain about lack of compliance with school policies and procedures, follow up immediately.
- Consider liability waivers and assumption of risk notices.

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Deferral Cash Flow Financing Options

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Current State Deferrals

A State budget was passed and signed into law (6/30/20) that keeps educational funding mostly flat, but with:

- **\$8.67B*** of deferrals in 2020-21

Est. % of Monthly Payments Deferred:
 - 50% of February
 - 70% of March, April & May

* Does not include June 2020 deferral of \$1.85B that will be repaid on 7/15/20. The total deferral in 2020-21 may be reduced by the Governor from any future federal funding that may be received in 2020-21.

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CA State Deferral Financing Program (sponsored by CAM/Stifel)

- The California State Deferral Financing Program ("Program") enables charter schools to pre-qualify for either "factoring" or "RANs" using the same application
- Transparent pricing separately by CAM (factoring) and Stifel (RANs)
- Schools do not have to choose between "factoring" or "RANs" until more information is known from the State about the budget and the length of the deferrals
- RANs will be sold through the California School Finance Authority
- Anticipated closing by around mid-Feb. 2021

Go to www.statedeferral.com to begin the Application process.

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Thank you for attending this webinar.

Thank you for providing outstanding choices in public education for all California students!

More questions?
Please don't hesitate to shoot us an email or give us a call!

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