

Campus-Wide Risk Management: Utilizing Board Policies, Contractual Risk Shifting, Liability Insurance and Tort Immunities to Protect Your Institution

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Campus-wide Risk Management: Utilizing Board Policies, Contractual Risk Shifting, Liability Insurance and Tort Immunities to Protect Your Institution

Webinar presented by Samuel B. Cavnar

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The Current Campus Landscape: Challenges and Uncertainties

1. Building confidence among administration, faculty, staff and students that campus is safe.
2. Understanding and applying public health guidance to your campus's unique characteristics and operations.
3. Managing personnel across a combination of remote and in-person scenarios.
4. Minimizing the possibility of a positive case or outbreak on campus or in the community.
5. Avoiding a COVID-contagion lawsuit.



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Balancing Competing Interests: Trends and Tradeoffs

Action Item	Risks	Benefits
Proceeding with campus construction projects.	Many additional third-party personnel on campus. Less control over contractor's COVID-protocols. Potential for positive case and an outbreak.	Utilize abnormally-low on-campus traffic to accelerate capital infrastructure projects. Reports of good competitive bid prices based on trends in construction industry.
Offering off-campus clinical programs to students.	Student or faculty contracts COVID as a result of participation. Possible claim.	Providing an attractive curriculum, boosting enrollment, accelerating students along career path.
Allowing facilities use by outside groups.	Properly staffing and monitoring event for compliance with health requirements. Possible COVID-contraction claim.	Supporting community through a difficult time. Providing opportunities to students. Drawing positive attention to campus.

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Using Policies and Procedures to Manage Risk

- Board Policy: a strategic framework; flexible; establishes guiding principles; provides oversight tools; delegates authority to Administration.
- Administrative Procedures: a procedural structure; linear and cyclical; establishes the processes and steps required or permitted to implement policy; provides specific controls to administrators and managers; provides clear rules and parameters to subordinates.



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Using Policies and Procedures to Manage Risk

Topic	Board Policy	Administrative Procedure
Use of Face Coverings on Campus	Face coverings shall be worn on campus, except...	<ul style="list-style-type: none"> - Delegation of authority to apply exceptions. - Establish process for obtaining medical exception. - Delegation of enforcement power.
Limitations on facilities use during COVID pandemic.	Nondiscriminatory limitations on facilities use are established. Limitations and prioritization of use is based on level of risk posed by event. The Board delegates authority to Administration.	<ul style="list-style-type: none"> - Identify facilities available for third party use. - Classify users into risk categories. - Establish priority and schedule for facilities use. - Utilize modified facilities use agreement.

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Contractual Risk Shifting: Key Considerations

- COVID-related risk shifting can occur in construction contracts, facilities use agreements, third party vendor agreements, and waiver / assumption of risk documents signed by activity participants.
- How does a contract shift risk?
 - Insurance: The college requires the contracting party to procure liability insurance and include the college as an "additional insured." If the college is sued, it tenders to the contracting party's insurer instead of its own.
 - Indemnification and Defense: If the college is sued by a third party because of an act or omission of the contracting party, the contracting party must pay the college's legal costs and any resulting judgment.
 - Termination / Suspension: If conditions change, the college can decrease risk by stopping or slowing the risky activity or condition.
 - Waiver / assumption of risk: The contracting party agrees in writing to waive and release the college from certain claims (i.e. COVID-contraction) and/or separately acknowledges and assumes the disclosed risks, such that the college would have a defense to a claim by that party (but not necessarily against third parties).

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Contagion Waivers: The Basics



1. The college identifies an abnormal risk arising from a specific activity (for example, a clinical program where nursing students are in close contact with COVID patients).
2. The college conditions participation in the clinical program on the student's execution of a waiver / assumption of risk agreement.
3. Generally, the parties have "freedom of contract," and the waiver or assumption of risk is an exculpatory agreement that will be enforced in court.
4. But, where the exculpatory agreement is contrary to public policy, it may not be enforceable. For example, the college cannot relieve itself of its statutory obligations (including the obligation to "admit all students qualified to complete any one of [its] programs...." 110 ILCS 805/3-17.)

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Liability Insurance and COVID-19: What To Know

- The college has the power (and duty) to procure property and liability insurance to protect itself. 110 ILCS 805/3-38.1.
- Generally, under the insuring agreement, the policy is triggered when there is *bodily injury* and/or *property damage* caused by an *occurrence*.
- However, we then look to numerous exclusions to determine if there is coverage. The Communicable Disease Exclusion provides that the policy does not cover bodily injury or property damage arising out of the actual or alleged transmission of a communicable disease.
- Relevant questions:
 1. Does the college's policy exclude communicable disease?
 2. Will coverage change in the next policy period?
 3. Can we extend coverage with an endorsement or a separate policy? At what cost?

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Tort Immunity
and
Communicable
Disease:
Basic
Considerations

Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, et seq. (the "TIA")

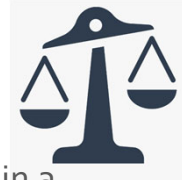
- It provides certain protections to public bodies *and* public employees.
- In some cases, it shields against negligence claims, and requires the higher standard of "willful and wanton conduct."
- In other cases, it provides *absolute immunity*.
- The TIA focuses on conditions, activities, and decisions.

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Tort Immunity
and
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Disease: Basic
Considerations

Basic Discretionary Immunity



Section 2-201: a public employee serving in a position involving the determination of policy or the exercise of discretion *is not liable* for an injury resulting from his *act or omission in determining policy when acting in the exercise of such discretion* even though abused.

Section 1-109: A local public entity (i.e. the college) is not liable for an injury resulting from an act or omission of its employee where the employee is not liable (under 2-201).

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Tort Immunity and Communicable Disease: Basic Considerations

Discretionary Immunity – Communicable Disease

Section 6-104:

(a) Neither a local public entity nor a public employee is liable for an injury resulting from the policy decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if such decision was the result of the exercise of discretion vested in the local public entity or the public employee, whether or not such discretion was abused.

(b) Neither a local public entity nor a public employee is liable for an injury caused by an act or omission in carrying out with due care a decision described in subdivision (a).

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A Risk Management Checklist for On-Campus Operations, Activities and Events

1. Does this action item align with Board Policy?
2. Have we established and followed all applicable administrative procedures?
3. Is this action item the subject of a written contract that appropriately distributes risk?
4. Is this action item covered by liability insurance if something goes wrong and the college is sued?
5. In pursuing this action item, have we fully leveraged the college's discretionary immunities (Section 2-201 and 6-104 of the Tort Immunity Act)?

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Questions?



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Samuel Cavnar represents school districts, community colleges, municipalities, and various other public entities, along with private clients including owners, developers, general contractors, subcontractors, and various other commercial interests. Sam is an experienced negotiator of commercial and construction-related contracts, and he regularly counsels clients in the areas of board governance, bidding, procurement, tort immunity and risk management. Sam has been appointed Special Assistant State's Attorney in several matters involving construction-related transactions and litigation. Sam has successfully prosecuted and defended numerous lawsuits related to defaults, delays, extras, liquidated damages, design and construction defects, performance issues, non-payment and other similar commercial claims.

AWARDS

Illinois "Rising Star", by Super Lawyers Magazine, in the area of Construction Litigation (2012-2017)

RECENT PUBLICATIONS

"How Public Sector Entities Can Protect Themselves in Premise Liability Cases," *Chicago Daily Law Bulletin* (2018)

"Property Tax Exemption for Charitable Remains Gray Area," *Chicago Daily Law Bulletin* (2017)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"School District and Zoning Exemptions," *Chicago Daily Law Bulletin* (2015)

RECENT PRESENTATIONS

Navigating the Public Bidding and Contract Process, IAPD/IPRA Soaring to New Heights Conference (January 2020)

Statutory Requirements and Ethical Considerations for Public Officials, Illinois GFOA Annual Conference (September 2019)

Public Procurement for Construction Projects, ICCCFD Conference (April 2018)

Public Procurement for Construction Projects, Cotter Consulting (January 2018)

Competitive Bidding and Contract Administration, IAPD/IPRA Soaring to New Heights Conference (January 2018)



PRACTICE AREAS

Commercial Transactions
Construction Law
Real Estate Development

EDUCATION

J.D., Wayne State
University Law School;
Managing Editor, *The
Wayne Law Review*

B.A., Michigan State
University

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

U.S. District Court for the
Eastern District of
Michigan

Supreme Court of Illinois

Supreme Court of
Michigan

Legal Considerations Related to Renewable Energy, Sustainability for PK-12 Schools, IASB/IASA/Illinois ASBO 85th Joint Annual Conference (November 2017)

Best Practices for Bidding and Contracting, Illinois Council of School Attorneys, In-House Counsel Networking Meeting (October 2017)

ORGANIZATIONS

American Bar Association, Forum on the Construction Industry

Chicago Bar Association

Illinois Association of School Business Officials