

# Immunity legislation – a perspective from Massachusetts

By Rep. Jeffrey N. Roy, Chair, Joint Committee on Higher Education (D-Mass)

## A. H4569 and immunity for emergency aid

H4659 would protect institutions (both higher ed and secondary ed) that provide emergency aid in response to the coronavirus outbreak. In this section, you will find some real-life examples of where institutions are exposed to liability despite the recent passage of S2640, *An Act To Provide Liability Protections For Health Care Workers And Facilities During The Covid-19 Pandemic*, which was signed by Governor Baker on April 17, 2020.

As you know, many institutions, including our world class institutions of higher education and our vocational schools, have stepped up to provide emergency aid to the residents of the Commonwealth and most importantly to our brave first responder and front-line workers. They have been called upon to donate, supply and manufacture personal protective equipment and other emergency aid following the outbreak of COVID-19. They have also offered to house emergency aid workers and provide shelter for testing and potential patients suffering from the disease. Their charitable efforts are deserving of protection.

H4659 would protect institutions from any claim or lawsuit relative to the use of any Emergency aid offered or provided<sup>1</sup>. Under 42 U.S.C. 247d-6d (the federal Public Readiness and Emergency Preparedness Act or PREP Act), manufacturers and other covered persons get targeted liability protections for pandemic and epidemic products and security countermeasures provided in emergency situations. However, the PREP Act does not apply to colleges, universities, or secondary schools. H4659 bridges that gap and provides similar protections to those institutions that offer and provide Emergency Aid in response to the outbreak of the 2019 novel coronavirus, also known as COVID-19. The bill defines an institution as “any public or private nonprofit institution of higher or secondary education located in the commonwealth and authorized to grant degrees or diplomas under any general or special law, including its trustees, directors, officers, employees, students, volunteers, and other representatives or agents.” In pertinent part, it offers the following protection:

(b) Except in the case of intentional, willful, wanton or reckless misconduct, any Institution that, in good faith, offers or provides Emergency Aid shall be immune from suit and liability to any person, entity, or governmental body for any and all claims for loss or damages caused by, arising out of, relating to, or resulting from the administration to or the use by an individual or entity of any Emergency Aid, including, without limitation, any claim alleging a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase,

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<sup>1</sup> “Emergency Aid” means goods, services, facilities, products, donations, and any other form of assistance, including, but not limited to, support, assistance or relief, and access to, use or lease of land, structures, buildings, personnel, or equipment lawfully owned or controlled by the Institution, offered or provided at or below the Institution’s cost in response to the outbreak of the 2019 novel coronavirus, also known as COVID-19, and the governor’s March 10, 2020 declaration of a state of emergency.

donation, dispensing, prescribing, administration, licensing, or use of such Emergency Aid.

In contrast, S2640 only provides protects an institution from liability “occurring in or at the volunteer organization’s facility where the damage arises from use of the facility for the commonwealth’s response and activities related to the COVID-19 emergency.” With regard to use of facilities, S2640 is not clear that it would cover an initiative that did not come from the “commonwealth” or in support of the “commonwealth’s response and activities” to COVID-19. In a number of instances, institutions have provided assistance at the request of, or in collaboration with, other governmental entities, hospitals or other non-profit organizations. For example, some institutions are looking into letting a coalition of non-profits use their kitchens to store and repackage food so that they could be delivered to local food pantries and/or to those families who are in need of food. Also, such limitations could discourage a school from starting its own programs to provide services or products to our communities without any request or collaboration with the commonwealth. In that sense, limiting the immunity to those activities that are requested by governmental entities is too narrow.

Moreover, it is unclear whether the immunity protection would apply if the service/aid rendered was not for the use of “facilities.” The current language does not cover “services” that may be rendered by the institutions (for example, creating or fixing masks and shields). Here are several examples where this concern is clearly implicated and not covered by S2640:

- A professor at a research university in Boston was approached by a hospital to see if he could help with a problem. The masks that the hospital was using did not fit correctly due to a problem with clasps. The professor was able to use a 3D printer to produce a replacement clasp for the masks so that the masks fit better when in use by health care workers. Neither the professor nor the university should be subject to a lawsuit later if someone alleges that the 3D printed clasps were faulty. S2640 provides coverage to healthcare professionals in this context but does nothing to protect the professor who is simply volunteering to use his or her skills and expertise to provide help in an emergency.
- Similarly, MIT, through its MIT Project Manus (<https://project-manus.mit.edu/fs>) designed a three-dimensional face shield that can be fabricated using die cutting which enables production at a rate of over 2.5 million per week. MIT is providing the design at no cost and has licensed the design with restrictions that prevent price gouging. They are not covered persons under the federal PREP Act and thus are exposed to liability for potential claims alleging defects in the design.
- Several weeks ago, researchers at the University of Massachusetts Amherst, with engineers, nurses and other health care professionals, developed a design for protective plastic face shields. It will be made available to manufacturers to mass-produce personal protective equipment (PPE) for health care workers and others. A Southbridge, Mass., company,

K+K Thermoforming, is now producing the first order of 80,000 shields placed by the Face Shield COVID-19 Response Team at UMass Amherst. Shields will be distributed to medical facilities and other front-line responders in the region. The manufacturers are protected under the federal PREP Act and the healthcare professionals who use them are covered under S2640. But the designers from UMass who acted in good faith are exposed to liability and are deserving of the protections offered under H4659.

- In March, UMass supplied several thousand rain ponchos to Milford Regional Medical Center, a facility that was in desperate need of gowns to protect its hospital workers and medical professionals. If someone were to be injured or exposed to the virus because of lack of protection from the rain poncho, or if a contaminated poncho infected someone, a claim could be made against UMass, while the healthcare providers would be immune and protected under S2640.
- Finally, after Massachusetts schools closed in March to stem the spread of the coronavirus, 27 vocational schools joined together to donate over 13,000 masks, 140,000 gloves, and other valuable supplies to support first responders and medical professionals fighting on the front lines of the pandemic. Surgical masks, N95 masks, gloves, eye shields, hand sanitizer, disinfectant wipes, and gowns were donated from the schools' stockpiles, which normally use the supplies for career technical education programs when school is in session. There is the potential for claims to arise out of the use of this equipment. Again, while healthcare workers would get the protection under S2640, our vocational schools would be exposed to liability.

There are many more examples, but I think these illustrate the loopholes left by S2640 and the federal PREP Act and define the exposure to our institutions that have stepped up to the plate and acted in good faith under emergency conditions.

## **B. Institutional safe harbor and immunity for undertaking planning efforts**

As indicated in the Higher Ed Working Group report, our Massachusetts colleges and universities will likely seek a safe harbor from liability for those institutions that undertake the planning efforts we outline in this report. An editorial from the Washington Post on June 27, 2020 advocated for a shield from lawsuits could help our schools resume teaching and research:<sup>2</sup>

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<sup>2</sup> [https://www.washingtonpost.com/opinions/a-shield-from-lawsuits-could-help-our-schools-resume-teaching-and-research/2020/06/26/5fa22bc0-b638-11ea-a8da-693df3d7674a\\_story.html](https://www.washingtonpost.com/opinions/a-shield-from-lawsuits-could-help-our-schools-resume-teaching-and-research/2020/06/26/5fa22bc0-b638-11ea-a8da-693df3d7674a_story.html)

PUBLIC HEALTH measures to stop the novel coronavirus from spreading have forced necessary but disruptive changes on institutions across U.S. society, and nowhere has the adjustment been more dramatic than in higher education. From online classes to canceled commencement ceremonies, the spring semester of 2020 will long be remembered as a time that tested the resilience of colleges and universities as never before.

And schools are determined to resume in-person operations as safely as possible in the fall, both to fulfill their educational missions and to salvage their badly stressed finances. Of 1,035 institutions surveyed by the Chronicle of Higher Education, some 63 percent plan to bring students back. They are spending millions to supply masks, retrofit facilities for social distancing and step up testing, according to the Wall Street Journal. This is the price of short-term reopening — which is itself the precondition for long-term viability.

What institutions of higher education do not yet have is assurance that they will not be met with costly litigation if, as seems inevitable, someone gets sick on campus despite their best efforts. The issue extends well beyond students, faculty and staff to the broad range of people — maintenance contractors, performing artists, tourists — who may come onto college property on any given day. Given the importance of higher education, and the economic pressures it faces, there's a case for providing general protection that will shield schools making good-faith, scientifically sound safety efforts. Certainly if there is to be such protection for profit-making corporations, as Senate Majority Leader Mitch McConnell (R-Ky.) insists (and as may indeed be justified in some cases), it should be extended to these pillars of the nonprofit sector.

The best approach is probably not to legislate an exemption based on following some set of best practices. There is simply no prescription that would apply to the huge variety of institutions, large and small, rural and urban. Rather, the goal should be a requirement that plaintiffs prove they were harmed due to something more than mere negligence, the usual benchmark in tort law. How, exactly, to enact that heightened standard is also up for debate: Tort law is the province of the states, so, ultimately, they would have to decide. Congress could encourage them by conditioning aid to the states on it during the next economic stimulus package.

Liability protection is not a panacea; higher ed has other legal defenses without it, anyway, including the existing requirement that plaintiffs prove a causal link between a university's conduct and their alleged illness. Nor should there be any relaxation of other responsibilities institutions may have under health and safety laws enforced by regulation. Still, a shield from expensive and time-consuming lawsuits — temporary and narrowly targeted only to coronavirus-related complaints — would help our nation's institutions of higher learning resume teaching and research, to the maximum extent state and local governments permit.

This article from a law professor from Georgetown University sums up many of the reasons why we should not provide the immunity sought: *Colleges seek to escape liability* (by Heidi Li Feldman):<sup>3</sup>

When it comes to COVID-19, a college campus is like a cruise ship, a cinema multiplex and a restaurant all rolled into one.

Yet many U.S. institutions of higher education are forging ahead with on-campus, inperson classes and activities for fall terms, making campuses likely hotbeds of illness. Some students, faculty and staff will likely have permanent damage.

Some will probably die.

College administrators know this. These losses will arise from conditions they have created, and those who suffer them will no doubt sue schools for damages. Instead of following the lead of the California State University system and other schools whose fall semesters do not involve physical convening, many colleges are laying the groundwork to defeat liability arising from the illness and loss their decision is so likely to cause.

Whether compelled, pressured or lured into coming on campus, students and employees should explicitly inform relevant administrators that they are in no way surrendering their rights to hold schools accountable for sloppiness in safeguarding their health.

Schools are preparing to dodge even well-founded lawsuits — to assert that, in essence, students and employees who come to campuses thereby OK carelessness on the part of schools. The technical term for this sort of defense is “primary assumption of risk.”

Defendants who press it claim those they injured were aware of the risks the defendant created and that the victims voluntarily chose to encounter and assume these risks. When successful, this argument entirely defeats plaintiffs’ claims for recovery even when plaintiffs can prove the defendant failed to satisfy legal standards of care and thus caused injury.

Liability waivers are the most heavy-handed way universities are attempting to create the basis for later arguing that the school population consented to the risks of COVID-19 caused by being on-campus or by participating in school-sponsored offcampus activities. Ohio State, the University of Missouri and Southern Methodist University are among the schools requiring athletes to sign such waivers.

But colleges can set up arguments from consent without ever asking anybody to sign anything. They can claim that attendance itself proves consent. To pave the way, colleges and universities will try to make it seem as though those physically

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<sup>3</sup> <https://www.latimes.com/opinion/story/2020-06-25/op-ed-covid-colleges-fall-waivers>

returning to the school grounds are being given meaningful options other than coming to campus — and that those who do come are well-informed of the dangers of doing so. Many colleges, including USC, have announced “hybrid” operations for the fall term that create, at least on paper, the option of remote participation in classes for both faculty and students. These schools say they cannot guarantee safety or note that they will be operating only as safely as possible. It might seem like they are acting wholly benevolently.

But these schools can be expected to argue that hybrid schemes demonstrate that nobody was required to be on campus as a condition of participating in classes. They will claim that anybody who does come to campus and contracts the disease agreed to shoulder the associated risks — and so cannot get damages from the school, regardless of whether its carelessness caused illness, injury or death.

Students, faculty and staff should make it hard for schools to assert assumption of risk defenses. Individuals can document that although they may come to reopened campuses, they are not thereby voluntarily agreeing to risk of becoming infected with the new coronavirus and consequential illness, impairment or death. Under no circumstances should anyone sign a waiver for harms and losses inflicted by COVID-19 cases caused by their college’s policies. Schools that try to force the issue by requiring signed waivers as preconditions for enrollment or pay are obviously coercing people into surrendering their rights to sue. That alone should defeat claims that waivers demonstrate that students and school personnel knowingly and voluntarily assumed risk and relieved the school of its duty of care.

Beyond rejecting explicit waivers, any employee or student who plans to be on a campus this fall should also inform supervisors, deans, presidents, and in-house counsel in writing that showing up does not imply any release of the institution’s legal responsibility to take reasonable measures against causing illness, including COVID-19.

At schools running hybrid academic programs, some students and faculty may believe they will be downgraded if they participate remotely. They should state this concern when they inform administrators they are not consenting to risks of illness and death from the coronavirus.

Colleges have aligned themselves with big-business lobbies seeking wholesale federal immunity from COVID19-related civil liability. For the schools, assumption of risk defenses are the natural extension of this strategy, the private law alternative to legislatively created immunity.

It pains me to have to caution students, faculty and staff to protect themselves from legal tactics historically pressed by 19th century businesses seeking to foist risks of injury onto workers and customers. But by reopening campuses and encouraging physical gathering, universities are taking an adversarial and exploitative stance toward those who work and study under their auspices.

An alternative to providing legislative immunity would be for colleges and universities to ask students to sign waivers or releases upon arrival at campus. These waivers have been upheld by the Supreme Judicial Court (SJC). In fact, The SJC has clearly established that there is no general rule in Massachusetts preventing a party from validly contracting for exemption from liability for its own negligence and a right which has not yet arisen may be made the subject of a covenant not to sue or may be released. *Cormier v. Central Mass. Chapter of the Nat. Safety Council*, 416 Mass. 286, 288-89 (1993). Only waivers procured by fraud, duress, or deceit, or those which offend public policy, will subvert that general rule. See *Sharon v. City of Newton*, 437 Mass. 99, 103-104 (2002). Thus, our colleges can, under existing Massachusetts law, validly exempt themselves from liability which it might subsequently incur as a result of their own negligence. *Ortolano v. U-Dryvit Auto Rental Co. Inc.*, 296 Mass. 439 (1937). An agreement placing the risk of negligently caused injury on a person as a condition of that person's voluntary choice to engage in a potentially dangerous activity ordinarily contravenes no public policy of the Commonwealth. *Cormier v. Central Massachusetts Chapter of Nat. Safety Council*, 416 Mass. 286 (1993).

The response from the campuses has been that they are reluctant to introduce such a document to incoming students. Their reluctance to do so should not be translated into an obligation for the legislature to wade into this matter.

Another alternative would be for the Commonwealth of Massachusetts to approve plans implemented by colleges and universities in accordance with guidelines established by the state. These could be introduced as evidence of "reasonable care under the circumstances" against any claim brought against an institution.

It also should also be observed that it will be difficult for a student to prevail on a claim against the University or College because of causation issues. This is particularly true in the case where contact tracing efforts have been thwarted by students venturing outside of the campus environment, thus breaking any causal link.