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Re: Michigan School Districts’ Legal Authority and Responsibility to Protect Students from COVID-19
Date: November 22, 2021

Introduction:

In Michigan, school districts and local health departments have separate and distinct, though overlapping, legal authority to protect students within their jurisdiction. There are separate laws, practical considerations, and liability risks that affect each entity and their decisions about whether, when, and how to take protective actions. A decidedly unhelpful strategy is to wait for another entity to act, since the existence of overlapping legal authority does not legally protect an entity that fails to act. As we saw during the Flint water crisis, deference that leads to inaction can tragically compromise the public’s health and trust and can lead to liability for entities and officials who fail to exercise their legal authority.

Questions:

- **What legal authority and responsibility do Michigan public school districts possess to protect students from COVID-19?**
- **What are the legal risks associated with a Michigan public school district’s failure to implement evidence-based COVID-19 prevention measures?**
- **How does a Michigan public school district’s authority intersect with a local health department’s authority to require masks or other COVID-19 prevention measures in schools?**

Summary:

Michigan public schools have independent legal authority and responsibility to protect students’ safety, health, and welfare. This includes ensuring that all children, including students with disabilities, have equal access to free and appropriate public education. Schools that fail to provide a safe environment for students to learn may face liability if they refuse to implement reasonable evidence-based protective measures such as mask requirements and social distancing. Moreover, schools may face added financial risks as some liability insurance coverage excludes coverage for communicable diseases, while other insurers have indicated that they will not cover claims arising from COVID-19.

Discussion:

Michigan public schools have legal authority and responsibility to protect students and staff from COVID-19. School districts should be particularly attuned to federal anti-discrimination laws and state tort laws that may expose the district to liability for failing to implement reasonable public health measures during a pandemic. Following are considerations for school districts seeking to protect the safety and wellbeing of students and staff, comply with civil rights laws, and limit their potential liability.

I. Michigan Public Schools Have Independent Legal Authority and Responsibility to Protect Students and Staff from COVID-19

Schools in Michigan have long played a crucial role in protecting their students' health, including by implementing measures to prevent the spread of communicable diseases. For example, schools have historically worked collaboratively with state and local health departments to monitor compliance with immunization requirements.¹ Additionally, Michigan's communicable disease rules expressly authorize school officials to exclude a student from school who they "reasonably suspect[]" has a communicable disease "for a period sufficient to obtain a determination by a physician or local health officer as to the presence of a communicable disease."²

In addition to their specific public health responsibilities, Michigan law further grants school districts general authority to protect students' health and safety. Specifically, Michigan's Revised School Code provides:

(3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as otherwise provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:

...

(b) Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity.³

¹ MCL 380.1177; Mich. Admin. Code R. 325.176.

² Mich. Admin. Code R. 325.175(2).

³ MCL 380.11a (applicable to general powers school districts). *See also* MCL 380.401a (applicable to first class school districts); MCL 380.601a (applicable to intermediate school districts); MCL 380.382 (applicable to community districts).

Courts have recognized that this statute grants school districts “very broad powers of self-governance”⁴ to adopt policies to protect student welfare, such as policies banning firearms at schools⁵ and banning peanut and tree-nut products due to a student’s allergies.⁶

School districts’ failure to use their legal authority to reasonably protect students from COVID-19 may expose them to legal action. For example, Wisconsin parents filed federal lawsuits in October 2021 against school districts alleging that the schools’ reckless failure to implement reasonable COVID precautions constitutes a violation of the Fourteenth Amendment and a public nuisance causing particularized harm to the plaintiffs.⁷ The plaintiffs seek injunctive relief, alleging that the school districts have an affirmative duty to protect students under the Fourteenth Amendment based on the state-created danger doctrine and the special relationship between students and school administration.⁸ The lawsuit further alleges that the school districts’ reckless conduct causes the spread of COVID-19 within schools which interferes with the general public’s right to be free from unnecessary exposure to infectious diseases. The cases are pending review. History provides some precedence for Constitutional claims as well; for instance, at least one state supreme court has found that religious exemptions to vaccination requirements violate the U.S. Constitution’s Fourteenth Amendment by denying equal protection of the laws to other children in the school community.⁹ School districts’ potential liability under federal civil rights laws and tort law is further discussed below.

In addition to protecting student safety, schools must also maintain safe workplaces for their employees. The Michigan Occupational Health and Safety Act creates a duty for employers to provide to all employees “a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee.”¹⁰ Violations of the Act may result in civil and/or criminal penalties.¹¹ The Michigan Occupational Safety and Health Administration encourages employers to follow the Centers for Disease Control and Prevention (CDC) recommendation to require face coverings for all employees and visitors when indoors, including those who are fully vaccinated in areas of substantial or high transmission.¹²

Beyond state law requirements, school districts must also comply with federal orders governing mask wearing on school buses. The CDC issued an Order on January 29, 2021,

⁴ Mich. Gun Owners, Inc. v. Ann Arbor Public Schools, 318 Mich. App. 338 (Mich. Ct. App. 2016).

⁵ Mich. Gun Owners Inc., 318 Mich. App. at 348-55; Mich. Open Carry Inc. v. Clio Area School District, 318 Mich. App. 356 (Mich. Ct. App. 2016).

⁶ Liebau v. Romeo Community Schools, 2013 WL 3942392 (Mich. Ct. App. 2013) (unpublished).

⁷ Kildahl v. School District of Fall Creek, et al., 2021 WL 4738238 (W.D.Wis.); Jensen v. Waukesha Board of Education et al., 2021 WL 4618709 (E.D.Wis.).

⁸ In general, the U.S. Constitution’s Fourteenth Amendment does not require state actors to take affirmative steps to protect individuals from harm. However, there are two exceptions to this rule: the state-created danger doctrine, which arises when a government official’s affirmative act created or increased the risk of harm to an individual or group and the official knew or should have known that those actions endangered the individual or group, and the special relationship exception, which arises when there is a special relationship between the state and an individual such as through incarceration or institutionalization. For further discussion of these exceptions, see Colleen Healy Boufides, *The Flint Water Crisis & Civil Litigation: A Closer Look at the State-Created Danger Doctrine*, Network for Public Health Law (July 19, 2016), <https://www.networkforphl.org/news-insights/the-flint-water-crisis-civil-litigation-a-closer-look-at-the-state-created-danger-doctrine/>. See also Colleen Healy Boufides, *Civil Litigation Arising from the Flint Water Crisis*, Network for Public Health Law (July 2016), <https://www.networkforphl.org/wp-content/uploads/2020/03/Flint-Litigation-Summary-Table.pdf>.

⁹ Brown v. Stone, 378 So.2d 218, 223 (Miss. 1979).

¹⁰ MCL 408.1011(a).

¹¹ MCL 408.1035 et seq.

¹² Mich. Dep’t of Labor and Econ. Opportunity, *MIOSHA Encourages Employers to Follow Updated CDC Guidance to Contain the Spread of COVID-19* (Aug. 12, 2021), https://www.michigan.gov/leo/0,5863,7-336-94422_11407-565839--,00.html.

requiring passengers and drivers to wear masks during transport.¹³ In an FAQ regarding the Order, the agency stated that passengers and drivers on public and private school buses must wear a mask.¹⁴ The Order remains in effect. Conveyance operators—including individuals who operate the vehicle and individuals and organizations who authorize the vehicle’s operation—must employ “best efforts” to assure compliance by all passengers.¹⁵

II. Schools Have Safety Obligations Under Federal Civil Rights Laws

Schools also have obligations under federal anti-discrimination laws to accommodate and include children with disabilities in educational settings. Section 504 of the Rehabilitation Act of 1973 guarantees access to a free appropriate public education for all students in schools that receive federal funding.¹⁶ The Americans with Disabilities Act requires that schools make programs accessible and provide equal opportunities to education for students with disabilities.¹⁷ Parents of children with disabilities have filed lawsuits against states, with school districts and school boards also named as defendants, alleging violations of federal disability laws because it is unsafe for their children to attend school without a mask mandate in place.¹⁸ Federal District Courts in Iowa and South Carolina have granted plaintiffs’ motions for a temporary restraining order and preliminary injunction, respectively, on the grounds that a state law prohibiting school mask mandates violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.¹⁹

Parents who oppose mask mandates have also filed lawsuits. However, although parents have the right to “determine and direct the care, teaching, and education of their children in public schools” under Michigan law,²⁰ these rights are not absolute and are in fact “subject to the school’s broad authority to provide for the safety and welfare of its students while at school.”²¹ Likewise, the U.S. Supreme Court has held that the “rights of parenthood” are not “beyond limitation,” noting that “parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children . . .”²²

¹³ Ctrs. for Disease Control and Prevention, *Order, Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs* (Jan. 29, 2021), https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf.

¹⁴ Ctrs. for Disease Control and Prevention, *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs* (Aug. 27, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html#faq>.

¹⁵ Ctrs. for Disease Control and Prevention, *Order, Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs* (Jan. 29, 2021), https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf.

¹⁶ 29 U.S.C. § 794; 34 C.F.R. § 104.33.

¹⁷ 42 U.S.C. § 12132.

¹⁸ *See, e.g.*, *Arc of Iowa v. Reynolds*, 2021 WL 4166728 (S.D. Iowa Sept. 13, 2021); *Complaint, Disability Rights South Carolina v. McMaster*, 2021 WL 3747924 (D.S.C. Aug. 24, 2021), <https://www.aclu.org/legal-document/disability-rights-south-carolina-v-mcmaster-complaint>.

¹⁹ *Arc of Iowa v. Reynolds*, 2021 WL 4166728 (S.D. Iowa Sept. 13, 2021); David Pitt, *Judge Temporary Order Allows Iowa Schools to Mandate Masks*, AP News (Sept. 13, 2021), <https://apnews.com/article/iowa-schools-mask-mandate-12fd7400ebe475ceb5eeded4c5f42e72>; *Disability Rights South Carolina v. McMaster*, 2021 WL 3747924 (D.S.C. Aug. 24, 2021); Jeffrey Collins, *Federal Judge Overturns South Carolina School Mask Ban*, AP News (Sept. 28, 2021), <https://apnews.com/article/coronavirus-pandemic-business-health-education-covid-19-pandemic-53b86af8a705b25c8e85dd5e04995c75>.

²⁰ MCL 380.10. *See also* *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (recognizing parents’ “fundamental right ... to make decisions concerning the care, custody, and control of their children” and “to direct the upbringing and education of children under their control”) (internal citations omitted).

²¹ *Liebau*, 2013 WL 3942392 at *6.

²² *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

Accordingly, federal courts have repeatedly upheld immunization requirements for school entry²³ and school policies such as dress codes.²⁴

U.S. Department of Education (DOE) Secretary Miguel Cardona has indicated that the DOE is taking necessary legal actions to ensure compliance with federal civil rights statutes and secure the safety of all students upon return to in-person instruction.²⁵ In a letter to the Florida Department of Education, the Office of Civil Rights noted that the state's "policy requiring public schools and school districts to allow parents to opt their children out of mask mandates may be preventing schools in Florida from meeting their legal obligations not to discriminate based on disability and from providing an equal educational opportunity to students with disabilities who are at heightened risk of severe illness from COVID-19."²⁶

III. Governmental Immunity Does Not Apply to Gross Negligence

Michigan public schools are generally immune from tort liability, but governmental liability protections do not apply when "gross negligence ... is the proximate cause of the injury or damage."²⁷ Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."²⁸ Accordingly, school districts should consider potential tort liability exposure. Given CDC, Michigan Department of Health and Human Services (MDHHS), and other state and federal agency guidance, an attorney representing a student infected with COVID-19 at school may argue that the school district was on notice of the foreseeability of harm from COVID-19 and failed to exercise reasonable care to prevent it. If a school district does not take reasonable evidence-based measures, such as implementing a mask mandate, to provide for the safety and welfare of students, its failure to act may be evidence of gross negligence.²⁹ Although proximate cause can be difficult to prove, the link between a school outbreak and a child's infection may be strong enough to encourage lawsuits by parents whose children are harmed.

Because schools have the authority to implement protective measures, they can take steps to potentially limit their exposure to liability by requiring masks to prevent foreseeable COVID-19 transmission in schools.³⁰ The CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.³¹ MDHHS also

²³ *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011) (unpublished). *See also Zucht v. King*, 260 U.S. 174 (1922).

²⁴ *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) ("The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.") (emphasis in original) (internal quotations omitted).

²⁵ U.S. Dep't of Educ., *Department of Education's Office for Civil Rights Opens Investigations in Five States Regarding Prohibitions of Universal Indoor Masking* (Aug. 30, 2021), <https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-opens-investigations-five-states-regarding-prohibitions-universal-indoor-masking>.

²⁶ U.S. Dep't of Educ., Letter from the Acting Assistant Secretary for Civil Rights to the Florida Commissioner of Education (Sept. 10, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/20210910-florida-doe.pdf>.

²⁷ MCL 691.1407(2)(c).

²⁸ MCL 691.1407(8)(a).

²⁹ *See, e.g., Wagenmaker & Oberly, School Mask Mandates - In Illinois and Beyond* (Aug. 13, 2021) <https://wagenmakerlaw.com/blog/school-mask-mandates-illinois-and-beyond>.

³⁰ For further discussion on COVID-19 liability issues, *see generally*, James G. Hodge, Jennifer Piatt, & Leila Barraza, *Legal Interventions to Counter COVID-19 Denialism* (Aug. 25, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911198.

³¹ Ctrs. for Disease Control and Prevention, *Guidance for COVID-19 Prevention in K-12 Schools* (updated Nov. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

recommends universal masking for students, staff, and visitors regardless of community transmission rate or vaccination status.³² A court might consider these recommendations in evaluating the reasonableness of a school's COVID-19 precautions or lack thereof.

School districts should consult their risk managers and legal counsel when determining which COVID-19 prevention measures to implement. They should also assess their liability insurance policies as some policies exclude communicable diseases from coverage and other insurers have indicated that they will not cover claims arising from COVID-19.³³ As such, school districts may be liable for legal costs and damages resulting from a civil lawsuit.³⁴ Furthermore, even if the school district is not ultimately held responsible for harm caused by a COVID-19 outbreak, it might still be responsible for attorney fees associated with its defense if not covered by insurance.

IV. Role of Local Health Departments

Local health departments have authority within their jurisdictions to prevent disease and promote the public health through regulations and orders, including emergency orders to prohibit gatherings and establish procedures to be followed (including by a local governmental entity) during the epidemic to insure continuation of essential public health services and enforcement of health laws.³⁵ In addition, a local health officer may exclude from school a student or individual who has or is suspected of having a communicable disease.³⁶ The Michigan Public Health Code grants local health departments considerable discretion in executing their duties.³⁷ Furthermore, if a local health department orders preventive measures that are more protective than those issued by a school, case law suggests that the local health department's orders would prevail.³⁸

Nevertheless, a local health department's authority and actions are independent of a school district's authority and actions. Were a student or staff member to sue a school district for injuries arising from school-based COVID-19 exposure, most likely, the school district could not squarely blame its failure to implement preventive measures on a local health department's failure to require them. Although local health departments may serve as valuable partners and advisors to school districts in responding to health threats—and, indeed, may require protective interventions—school districts remain responsible for executing their independent legal authority to protect students who are on school property or under school supervision and control. In the absence of an applicable local health department order, schools may consult a local health department for expertise on reasonable measures to protect the safety and welfare of students, but they do not need a health department order to act.

School districts' direct intervention is more important than ever given confusion arising from a new Michigan budget bill enacted on September 29, 2021. The bill includes provisions that purport to prohibit local health officers from implementing school mask mandates³⁹ and

³² Mich. Dep't of Health and Hum. Servs., *MDHHS updates school guidance and strongly recommends universal masking to prevent the spread of COVID-19* (Aug. 13, 2021), <https://www.michigan.gov/coronavirus/0,9753,7-406-98158-565926--,00.html>.

³³ Stephen Sawchuk, *Schools May Get Sued Over COVID-19. 7 Things to Know About Managing That Risk*, EducationWeek (Sept. 3, 2020), <https://www.edweek.org/leadership/schools-may-get-sued-over-covid-19-7-things-to-know-about-managing-that-risk/2020/09>.

³⁴ *Id.*

³⁵ MCL 333.2453(1).

³⁶ Mich. Admin. Code R. 325.175.

³⁷ MCL 333.2433, 333.2428, 333.1111.

³⁸ *People ex rel. Hill v. Bd. of Ed. of City of Lansing*, 224 Mich. 388 (1923).

³⁹ Mich. Pub. Acts 87 § 250 (2021).

withhold funding from a local health department that issues emergency epidemic orders without the support of its county board of commissioners.⁴⁰ The Governor's legal team⁴¹ and local health department legal counsel⁴² have asserted that the provisions are unconstitutional and therefore unenforceable, but the provisions have nevertheless had a chilling effect on local health department actions to protect students. Amidst this confusion, it is imperative that schools shoulder their unequivocal authority and responsibility to independently implement measures to protect student health.

The Network for Public Health Law provides information and technical assistance on issues related to public health. This document should not be considered legal advice or representation. For legal advice, please contact your attorney.

⁴⁰ Mich. Pub. Acts 87 § 1222(4) (2021).

⁴¹ Ottawa County Corporation Counsel, *Corporation Counsel's Statement Regarding State Appropriations Bill* (Oct. 1, 2021), <https://www.miottawa.org/Health/OCHD/pdf/Counsel-Statement-SB82.pdf>.

⁴² Governor Whitmer Letter to Michigan Legislature (Sept. 29, 2021), https://content.govdelivery.com/attachments/MIEOG/2021/09/29/file_attachments/1952005/Transmittal%20Letter%2009292021.pdf.