

45 Ottawa Avenue SW
Suite 1100
P.O. Box 306
Grand Rapids, MI 49501-0306

 MERITAS LAW FIRMS WORLDWIDE

NATHAN D. PLANTINGA
Attorney at Law

616.831.1773
616.988.1773 fax
plantingan@millerjohnson.com

August 23, 2021

VIA EMAIL

Mike Langeland
School Board Vice President
Heritage Christian School
6340 Autumn Dr.
Hudsonville, MI 49426
mike@langelandsterenberg.com

Re: Legal Effect of Local Public Health Orders

Dear Mike:

Heritage Christian School (the "School") has asked for our opinion on the legal effect of any COVID-19 related Ottawa County Public Orders (the "Orders") on the School. Specifically, the School has asked whether:

1. The Ottawa County Public Health Department (the "County") has the authority to issue the August 20, 2021 Order, which requires educational institutions to ensure that "people in pre-kindergarten through grade six" and "all persons, regardless of vaccination status, providing service to any persons in pre-kindergarten through grade six" wear a facial covering while inside any enclosed building or structure of the institution, or any other Orders related to COVID-19 prevention in educational settings within Ottawa County¹; and, if so,
2. Whether the School has an obligation to comply with the August 20, 2021 Order or other related Orders.

In short, the County has broad statutory authority under Michigan law (in particular, Michigan's Public Health Code) to issue emergency orders to control an epidemic. It is likely that a court would uphold the Orders as within the statutory powers granted to the County.

Earlier this year, a state court upheld the emergency mask order that was previously issued by the Michigan Department of Health and Human Services (MDHHS),

¹ The County has also issued an Order related to isolation, quarantine, and notification requirements that is broadly applicable to various educational institutions and settings within the County. See August 6, 2021 Order, entitled "In the Matter of COVID-19 Prevention in Educational Settings within Ottawa County; Michigan," found at: https://www.mioffawa.org/Health/OCHD/pdf/COVID-19_PreventioninSchoolsOrder_080621.pdf

MILLER JOHNSON

Heritage Christian School
August 23, 2021
Page 2

holding that the order fell within MDHHS's statutory authority under the Public Health Code. Because the County has nearly identical statutory authority as MDHHS under the Public Health Code, a court would likely find that the County has the same power as MDHHS to issue such Orders.

Moreover, because the County's August 20, 2021 Order applies neutrally to all schools, public and private, any claim of constitutional defect would be unlikely to succeed. Accordingly, the School has an obligation to comply with the August 20, 2021 Order and any other similar Order that is generally applicable and neutral toward religion.

**Local Health Departments Have Broad Statutory Authority
To Prevent Disease and Protect The Public Health**

Under the Public Health Code, the Michigan Legislature vests local health departments with authority to prevent disease and protect the public health. Part 24 of the Public Health Code identifies the powers and duties of local health departments.

In the context of an epidemic, a local health department has the power to issue certain emergency orders to protect the public health:

If a local health officer determines that control of an epidemic is necessary to protect the public health, the local health officer may issue an emergency order to prohibit the gathering of people for any purpose and may establish procedures to be followed by persons, including a local governmental entity, during an epidemic to insure continuation of essential public health services and enforcement of health laws.

MCL 333.2453(1). This statute is substantively identical to MCL 333.2253, which grants authority to MDHHS to issue certain emergency epidemic orders.²

In any context, not just epidemics, the Public Health Code also grants authority for local health departments to address public health concerns. Relevant sections include:

- A local health department may adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination. MCL 333.2435(d).

² MCL 333.2253(1) provides that "[i]f the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws."

MILLER JOHNSON

Heritage Christian School

August 23, 2021

Page 3

- Upon a determination that an imminent danger to the health or lives of individuals exist in the area served by the local health department, the local health officer immediately shall inform the individuals affected by the imminent danger and issue an order which shall be delivered to a person authorized to avoid, correct, or remove the imminent danger. . . The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger. MCL 333.2451(1).

These statutory powers are bolstered by additional authority that MDHHS vests in the local health departments through administrative rules. In particular, Michigan Administrative Rule 325.175(4) indicates:

[w]hen a local health officer confirms or reasonably suspects that a student or individual attending school or a group program has a communicable disease, the health officer may, as a disease control measure, exclude from attendance any individuals lacking documentation of immunity or otherwise considered susceptible to the disease until such time as the health officer deems there to be no likely further risk of disease spread.

In sum, the Public Health Code and administrative rules give the local public health departments the power to issue Orders that would, for example, mandate masks, social distancing, and quarantine measures, in order to prevent the spread of COVID-19 in educational settings. At the present moment, the Michigan Legislature does not limit or alter that authority.³

Michigan Court Upholds MDHHS Mask Mandate
Based Upon Similar Statutory Authority

A court would likely determine that the Orders are a proper exercise of the County's statutory powers. The authority of a local public health department under MCL 333.2453(1) is substantively identical to MDHHS's authority under MCL 333.2253(1). In January 2021, in a case called *Semlow Peak Performance Chiropractic, PLLC v. Whitmer*, the Michigan Court of Claims upheld MDHHS's authority under the Public Health Code to issue an emergency order mandating masks.⁴ The court determined that "[t]he mask mandate is a

³ On August 17, 2021, Michigan Representative John Damoose introduced House Bill 5269, which would prohibit public schools from requiring that students wear a face mask to attend in-person learning. That bill has not become law. And it does not purport to limit the authority of the local public health departments or MDHHS; it would only limit the authority of public schools.

⁴ *Semlow Peak*, No. 20-000206-MZ, 2021 WL 433997, at *2 (Mich. Ct. Cl. Jan. 11, 2021). As of the present moment, the *Semlow Peak* decision has not been appealed.

MILLER JOHNSON

Heritage Christian School

August 23, 2021

Page 4

procedure that can be used to help reduce the spread of the coronavirus, and thus, it is one that can be implemented under the statute to help 'insure continuation of essential public health services.'" *Id.* Because MDHHS and the County have the same statutory authority, the reasoning applied by the court in *Semlow Peak* supports a finding that the County has the power to issue similar Orders.

The Michigan Supreme Court has not spoken on this issue. But a concurring opinion by Supreme Court Justice Viviano suggests that the Court would likely uphold the County's Orders. In *In re Certified Questions from the United States District Court*, 958 N.W.2d, 1 (Mich. Oct. 2, 2020), the case invalidating Governor Whitmer's COVID-19 related executive orders, Justice Viviano wrote separately to argue that the many provisions under the Public Health Code that authorize MDHHS and local health officers to protect against the spread of communicable disease demonstrate that epidemic-related emergency powers lie with the state and local health authorities, rather than with the Governor. As one Michigan federal court concluded, one "can infer from Justice Viviano's concurrence that the Michigan Public Health Code does provide some legal basis for executive action in response to COVID-19." *Michigan Restaurant & Lodging Assn. v. Gordon*, 501 F. Supp. 3d 460, 466 (W.D. Mich. 2020).

The August 20, 2021 Order Will Likely Withstand Constitutional Scrutiny

On August 20, 2021, the County issued an Order broadly requiring all educational institutions to ensure that "people in pre-kindergarten through grade six" and "all persons, regardless of vaccination status, providing service to any persons in pre-kindergarten through grade six" consistently and properly wear a facial covering while inside any enclosed building or structure of the institution.⁵ Because the August 20, 2021 applies generally and neutrally to all schools, public and private, any claim of constitutional defect would be unlikely to succeed.

I.

The state is permitted to impose reasonable regulations on non-public schools. As an example, immunization requirements in the Public Health Code generally apply to non-public schools. MCL §§ 333.9208, 333.9209, 333.9212, 333.9215. So long as the Orders are neutral and generally applicable, they are likely to withstand constitutional challenge. *Employment Div. v. Smith*, 494 U.S. 872 (1990); see also *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 510 (6th Cir. 2020) (religious institutions do not "enjoy a general immunity from secular laws").

⁵ See August 20, 2021 Order, entitled "In the Matter of COVID-19 Prevention in Educational Settings within Ottawa County, Michigan," found at: https://www.miottawa.org/Health/OCHD/pdf/Face-Masks-in-Educational-Settings-Order_082021.pdf