

## COVID-19 Fact Sheet

# Michigan School Districts' Legal Authority and Responsibility to Protect Students from COVID-19

## 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.<sup>1</sup> 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."<sup>2</sup>

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.<sup>3</sup>

Courts have recognized that this statute grants school districts "very broad powers of self-governance"<sup>4</sup> to adopt policies to protect student welfare, such as policies banning firearms at schools<sup>5</sup> and banning peanut and tree-nut products due to a student's allergies.<sup>6</sup>

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.<sup>7</sup> The plaintiffs sought 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.<sup>8</sup> The lawsuits further alleged that the school districts'



reckless conduct caused the spread of COVID-19 within schools which interfered with the general public's right to be free from unnecessary exposure to infectious diseases. The plaintiffs have since requested voluntary dismissal of their cases, apparently because of changed circumstances in COVID-19 conditions.<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup> Violations of the Act may result in civil and/or criminal penalties.<sup>12</sup> Even as many federal and state COVID-19 mandates end and guidance changes, employers remain subject to the Michigan Occupational Health and Safety Act and must continue to make reasonable efforts to protect employees from COVID-19 and other occupational health hazards.


Beyond state law requirements, school districts previously had to comply with federal orders requiring mask wearing on school buses. The CDC issued an Order on January 29, 2021, requiring passengers and drivers to wear masks during transport.<sup>13</sup> In an FAQ regarding the Order, the agency stated that the Order applied to passengers and drivers on public and private school buses.<sup>14</sup> Conveyance operators—including individuals who operate the vehicle and individuals and organizations who authorize the vehicle's operation—were required to employ "best efforts" to assure compliance by all passengers.<sup>15</sup> However, effective February 25, 2022, the CDC announced it would no longer enforce the Order against public or private school systems, stating instead that "school systems at their discretion may choose to require that people wear masks on buses or vans."<sup>16</sup> On April 18, 2022, the CDC announced it would not enforce the mask requirement at all after a federal district court declared the order unlawful.<sup>17</sup>

## **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.<sup>18</sup> The Americans with Disabilities Act requires that schools make programs accessible and provide equal opportunities to education for students with disabilities.<sup>19</sup> 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.<sup>20</sup>

For example, in Tennessee, federal district courts granted plaintiffs' motions for preliminary injunction, finding that a parental opt-out provision in a school mask mandate likely violates the rights of students with disabilities.<sup>21</sup> On the other hand, the Eighth Circuit Court of Appeals recently vacated a prior decision in which it found that "federal disability law requires mask wearing as a reasonable accommodation" to ensure a safe school environment, holding that changed conditions in the dangerousness of COVID-19 rendered the case moot.<sup>22</sup>

Parents who oppose mask mandates have also filed lawsuits.<sup>23</sup> However, although parents have the right to "determine and direct the care, teaching, and education of their children in public schools" under Michigan law,<sup>24</sup> 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.”<sup>25</sup> 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 . . .”<sup>26</sup> Accordingly, federal courts have repeatedly upheld immunization requirements for school entry<sup>27</sup> and school policies such as dress codes.<sup>28</sup> Furthermore, in recent months courts have upheld COVID-19 school mask mandates.<sup>29</sup>

U.S. Department of Education (DOE) Secretary Miguel Cardona indicated last fall that the DOE was 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.<sup>30</sup> In a September, 2021, letter to the Florida Department of Education, the DOE 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.”<sup>31</sup>

### **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.”<sup>32</sup> Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”<sup>33</sup> Accordingly, school districts should consider potential tort liability exposure.

Depending on the specific content of applicable state and federal agency guidance at the time of infection, 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.<sup>34</sup> 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. As federal and state COVID-19 guidance becomes less restrictive, school districts may conclude that their risk of liability has decreased.

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.<sup>35</sup> The CDC recommends indoor masking for everyone in communities with high transmission.<sup>36</sup> A court might consider CDC and MDHHS 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.<sup>37</sup> As such, school districts may be liable for legal costs and damages resulting from a civil lawsuit.<sup>38</sup> 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 an epidemic to insure continuation of essential public health services and enforcement of health laws.<sup>39</sup> In addition, a local health officer may exclude from school a student or individual who has or is suspected of having a communicable disease.<sup>40</sup> The Michigan Public Health Code grants local health departments considerable discretion in executing their duties.<sup>41</sup> 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.<sup>42</sup>

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. Indeed, federal courts have held that school districts may rely on health department recommendations to implement protective measures, even if they are not issued as an order.<sup>43</sup>

In communities where mask mandates are indicated, 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 mandates<sup>44</sup> and withhold funding from a local health department that issues emergency epidemic orders without the support of its county board of commissioners.<sup>45</sup> The Governor's legal team<sup>46</sup> and local health department legal counsel<sup>47</sup> 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.



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## Appendix: Case Summaries

This appendix provides brief summaries of the key cases cited in this fact sheet. It does not reflect an exhaustive review of all cases referenced in the fact sheet nor all potentially relevant cases.

### I. Michigan School Districts' Authority to Protect Health and Safety

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

A school implemented a ban on all peanut and tree-nut products at the school because a student had a severe, life-threatening allergy aggravated by airborne exposure to nuts. The allergy was considered a disability and the policy was implemented under Section 504 of the Rehabilitation Act. A parent opposed the policy and sought injunctive relief. The Court of Appeals affirmed the trial court's order granting defendant's motion for summary disposition, dismissing the plaintiff's complaint. The court recognized that the school's authority to implement the nut policy was based on MCL 380.11a, which "vests broad authority in school districts to adopt policies to ensure the safety and welfare of its students while at school."

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

A gun owners' association filed a lawsuit against a school district challenging the district's policy banning the possession of firearms in schools and at school-sponsored events. The court found in favor of the school district's policy, finding that the state legislature has broadly empowered school districts to provide for the safety and welfare of students in school under MCL 380.11a.


- *Mich. Open Carry Inc. v. Clio Area School District*, 318 Mich. App. 356 (Mich. Ct. App. 2016).

A gun rights group challenged a school district policy banning the possession of firearms in schools and at school-sponsored events. The court upheld the school policy, citing school districts' broad powers under MCL 380.11a and concluding that state law did not preempt the school district's policy.

### II. Disability Rights

- *Arc of Iowa v. Reynolds*, 2021 WL 4166728 (S.D. Iowa Sept. 13, 2021)

Parents of children with disabilities challenged an Iowa statute banning local school districts from implementing universal mask policies on school property. Plaintiffs demonstrated that they were likely to succeed on the



merits of their Americans with Disabilities Act and Section 504 of the Rehabilitation Act claims. The court granted plaintiffs' motion for a temporary restraining order.

- *Arc of Iowa v. Reynolds*, 2021 WL 4737902 (S.D. Iowa Oct. 8, 2021), *vacated*

After granting plaintiffs' motion for a temporary restraining order, the court then granted plaintiffs' request for a preliminary injunction. The district court enjoined the governor and schools from enforcing the Iowa statute banning universal mask policies.

- *Arc of Iowa v. Reynolds*, 24 F.4th 1162 (8th Cir. Jan. 25, 2022), *vacated and reh'g granted*

The Eighth Circuit narrowed the scope of the district court's preliminary injunction, holding that the preliminary injunction applies only to the schools and districts that the plaintiffs attend. The Circuit Court remanded the case to the district court.

- *Arc of Iowa v. Reynolds*, 2022 WL 898781 (8th Cir. Mar. 28, 2022)

On March 28, 2022, the Eighth Circuit vacated its January 25, 2022 decision and granted a panel rehearing.

- *Arc of Iowa v. Reynolds*, 33 F.4th 1042 (8th Cir. 2022)


On May 16, 2022, the Eighth Circuit vacated its January 25, 2022 decision and the district court's preliminary injunction. It held that the issues surrounding the preliminary injunction have been rendered moot because of changes in COVID-19 conditions, including widespread availability of vaccines and the lower transmission rates of the omicron variant. Nevertheless, the Circuit Court noted that, to the extent any state or federal law requires masks, the Iowa ban on mask mandates does not conflict. The Circuit Court remanded the case to the district court for further proceedings.

- *Disability Rights South Carolina v. McMaster*, 2021 WL 4444841 (D.S.C. Sept. 28, 2021), *vacated in part on other grounds*

A South Carolina law prohibited school districts from using appropriated or authorized funds to announce or enforce a mask mandate. Disability rights advocates and parents, on behalf of their children with disabilities, sought a preliminary injunction and a temporary restraining order, alleging violations of Title II of the Americans with Disabilities Act and the Rehabilitation Act. The court granted plaintiffs' motions finding that the advocates were likely to succeed on the merits and suffer irreparable harm in the absence of injunctive relief and that the balance of equities and public interest factors weighed in favor of injunction.

- *Disability Rights South Carolina v. McMaster*, 24 F.4th 893 (4th Cir. 2022)

The Fourth Circuit vacated the district court's order in part and remanded to the district court with instructions to dismiss the claims against the governor and attorney general for lack of standing, finding that the alleged injuries were not fairly traceable to the governor and attorney general and an injunction would not likely redress the alleged injuries.

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- *G.S. by & through Schwaigert v. Lee*, No. 21-CV-02552-SHL-ATC, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021)

Parents of students with disabilities brought an action against the governor and county alleging that an executive order providing an opt-out provision to a mask mandate denied students with disabilities their rights under the Americans with Disabilities Act and the Rehabilitation Act. The court granted plaintiffs' motion for preliminary injunction.

- *G.S. by & through Schwaigert v. Lee*, No. 21-5915, 2021 WL 5411218 (6th Cir. Nov. 19, 2021)

The Sixth Circuit denied the governor's motion for a stay pending appeal of the preliminary injunction.

- *R.K. by & through J.K. v. Lee*, No. 3:21-CV-00853, 2021 WL 5860924 (M.D. Tenn. Dec. 10, 2021)

Parents of children with disabilities sought a temporary restraining order and preliminary injunction in a challenge to a state statute prohibiting school districts, except in rare circumstances, from requiring individuals to wear face coverings on school property. The plaintiffs alleged violations of the Americans with Disabilities Act, the Rehabilitation Act, and the Supremacy Clause. The court granted plaintiffs' motions.

- *R.K. by & through J.K. v. Lee*, 2022 WL 1467651 (6th Cir. May 10, 2022)

The Sixth Circuit denied the governor's motion for a stay pending appeal of the preliminary Injunction.

- *S.B. by & through M.B. and L.H. v. Lee*, No. 3:21-CV-00317-JRG-DCP, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021)

Parents of students with disabilities filed a class action against the governor and the county board of education. Plaintiffs claimed that the governor's executive order providing an opt-out provision to a mask mandate denied students with disabilities their rights under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiffs further asserted that the county school board's decision to not renew a district-wide mask mandate likewise violated the Americans with Disabilities Act and the Rehabilitation Act. The court granted plaintiffs' motion for a preliminary injunction, ordering the county board of education to enforce the district-wide mask mandate that had previously been in place.

- *M.B., Parent of Minor S.B. v. Lee*, 2021 WL 6101486 (6th Cir. Dec. 20, 2021)


The Sixth Circuit denied the county board of education's motion for a stay pending appeal of the preliminary injunction.

### III. Constitutional Challenges

#### a. Substantive Due Process/Parental Rights

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





Prince violated a law regarding the employment of children. The court found that the rights of parenthood are not beyond limitation and that while parents can choose to become martyrs themselves, it does not follow that they are free “to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

- *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381(6th Cir. 2005)

A parent challenged a school district’s dress code alleging violations of the First Amendment free speech clause and the Fourteenth Amendment due process clause. The district court granted summary judgment for the school district. The Sixth Circuit affirmed on the grounds that the free speech clause did not protect the student from the dress code restrictions, rational basis review applied, the parent did not have a fundamental right to exempt his child from the school dress code, and the dress code did not violate the student’s or parent’s state constitutional rights to be free from arbitrary and capricious state action.

- *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App’x 348 (4th Cir. 2011) (unpublished)

A mother filed a civil rights action alleging that state and county officials violated her constitutional rights in refusing to admit her daughter to public school without immunizations required by state law. The district court granted summary judgment for the defendants. The Fourth Circuit affirmed on the grounds that the state had a compelling interest to require children to be vaccinated before attending public school and there was no violation of the mother’s due process rights, the mother’s right to freely exercise her religion, or the mother or minor child’s equal protection rights.

- *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333 (M.D. Pa. Sept. 30, 2021)


Parents challenged the constitutionality of a school district’s policy requiring students to wear masks while on school premises and buses. The court denied the parents’ motion for preliminary injunction on the grounds that the policy did not implicate a liberty or property interest, the parents were unlikely to succeed on the merits of their procedural due process claim, the policy survived rational basis review, the policy did not significantly burden students’ right to freely associate, the students were unlikely to suffer irreparable harm because of the mask mandate, and the public interest did not weigh in favor of issuance of a preliminary injunction.

#### **b. Equal Protection**

- *Zucht v. King*, 260 U.S. 174 (1922)

Public officials in San Antonio excluded a child from school because she did not have the required vaccinations. The Supreme Court held that it is within the police power of the state to provide for compulsory vaccination and that an ordinance excluding unvaccinated children from schools falls within the broad discretion required for the protection of public health. Furthermore, the ordinance “is not violative of the equal protection clause merely because it is not all-embracing.”

- *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App’x 348 (4th Cir. 2011) (unpublished)



As described under Part III-a above, a mother filed a civil rights action alleging that state and county officials violated her constitutional rights in refusing to admit her daughter to public school without immunizations required by state law. The district court granted summary judgment for the defendants. The Fourth Circuit affirmed on the grounds that the state had a compelling interest to require children to be vaccinated before attending public school and there was no violation of the mother's due process rights, the mother's right to freely exercise her religion, or the mother or minor child's equal protection rights.

- *W.S. by Sonderman v. Ragsdale*, 540 F.Supp.3d 1215 (N.D. Ga. 2021)

Students sued the school district superintendent alleging that a rule requiring students to wear face coverings violated their rights under the equal protection clauses of state and federal constitutions. The court applied rational basis review and found that the students were unlikely to succeed on the merits of their claims. The students also failed to show they would suffer irreparable harm without injunctive relief. Finally, the risk of harm to the opposing party and public interest factors weighed against granting injunctive relief.

- *Brown v. Stone*, 378 So.2d 218 (Miss. 1979)

The Mississippi Supreme Court held that a statute requiring immunization against certain diseases for school admission served an overriding and compelling public interest and was a reasonable exercise of the state's police power. The Court struck down a religious exception to the immunization requirement, finding that the exception violated the equal protection clause by discriminating against children whose parents do not have religious beliefs which conflict with immunization requirements.

### **c. First Amendment**

- *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381(6th Cir. 2005)

As described under Part III-a above, a parent challenged a school district's dress code alleging violations of the First Amendment free speech clause and the Fourteenth Amendment due process clause. The district court granted summary judgment for the school district. The Sixth Circuit affirmed on the grounds that the free speech clause did not protect the student from the dress code restrictions, rational basis review applied, the parent did not have a fundamental right to exempt his child from the school dress code, and the dress code did not violate the student's or parent's state constitutional rights to be free from arbitrary and capricious state action.

- *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011) (unpublished)

As described under Parts III-a and -b above, a mother filed a civil rights action alleging that state and county officials violated her constitutional rights in refusing to admit her daughter to public school without immunizations required by state law. The district court granted summary judgment for the defendants. The Fourth Circuit affirmed on the grounds that the state had a compelling interest to require children to be vaccinated before attending public school and there was no violation of the mother's due process rights, the mother's right to freely exercise her religion, or the mother or minor child's equal protection rights.



- *Resurrection School v. Hertel*

Plaintiffs sought temporary restraining orders and preliminary injunctions to prevent MDHHS and the Ingham County Health Department from enforcing face covering requirements in religious schools.


With regard to the MDHHS order (hereinafter “*Resurrection School Case 1*”), plaintiffs asserted that the state’s face covering requirement in schools interfered with sincerely held religious beliefs and violated their rights to free exercise of religion, family integrity, equal protection, freedom of speech, and freedom of association. They further argued that the order violates Michigan law. *Resurrection School v. Gordon*, 2020 WL 9396493 (W.D. Mich. Oct. 30, 2020) (seeking a temporary restraining order); *Resurrection School v. Gordon*, 507 F.Supp.3d 897 (W.D. Mich. 2020) (seeking a preliminary injunction).

With regard to the Ingham County Health Department order (hereinafter “*Resurrection School Case 2*”), plaintiffs again argued that the face covering requirement in schools interfered with sincerely held religious beliefs and violated their right to free exercise of religion. They further argued that the order targeted Catholic and private schools, failed strict scrutiny, and was not generally applicable because it applied only to schools rather than applying to all public spaces. *Resurrection School v. Hertel*, 2021 WL 4099573 (W.D. Mich. Sept. 3, 2021) (seeking a temporary restraining order); *Resurrection School v. Hertel*, 2021 WL 51211154 (W.D. Mich. Nov. 3, 2021) (seeking a preliminary injunction).

The District Court for the Western District of Michigan denied the plaintiffs’ requests for temporary restraining orders and preliminary injunctions in both cases.

In *Resurrection School Case 1*, the Sixth Circuit initially affirmed the district court’s decision. The Circuit Court applied rational basis review and held that the face covering orders were rationally related to a legitimate government interest. The court denied the defendants’ motion to dismiss the appeal as moot due to the rescission of the state’s orders, holding that the plaintiffs’ claims were not moot because it was not “absolutely clear” that the state would not reimpose a face covering requirement. *Resurrection School v. Hertel*, 11 F.4th 437 (6th Cir. 2021) (*Rehearing en Banc Granted, Vacated*). The Sixth Circuit subsequently vacated this opinion on November 10, 2021. *Resurrection School v. Hertel*, 16 F.4th 1215 (6th Cir. 2021). On May 25, 2022, the Sixth Circuit determined that plaintiffs’ claims were in fact moot because the state had rescinded its order and because circumstances had changed so significantly that reinstatement of the same order was unlikely. *Resurrection School v. Hertel*, 2022 WL 1656719 (6th Cir. May 25, 2022)

In *Resurrection School Case 2*, the Sixth Circuit vacated the district court’s decision and remanded the case. The Circuit Court noted that the district court’s decisions to deny the temporary restraining order and preliminary injunction relied on the now-vacated precedent in *Resurrection School Case 1*. In addition, two precedential opinions regarding free exercise, one in the Sixth Circuit (*Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477 (6th Cir. 2020)) and one at the Supreme Court (*Tandon v. Newsom*, 141 S. Ct. 1294 (2021)), were issued after the early *Resurrection School* decisions. The Sixth Circuit remanded to the district court for it to consider the case under current precedent. *Resurrection School v. Hertel*, 2022 WL 332400 (6th Cir. Jan. 11, 2022).

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- *Geerlings v. Tredyffrin/Easttown Sch. Dist.*, No. 21-CV-4024, 2021 WL 4399672 (E.D. Pa. Sept. 27, 2021)

Pennsylvania's Acting Secretary of Health ordered that all schools require face coverings for students except those with a medical exemption. Plaintiffs opposed the order for religious reasons and sought emergency injunctive relief. Plaintiffs' motion was denied on the grounds that they were unlikely to succeed on the merits.

- *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333 (M.D. Pa. Sept. 30, 2021)

As described under Part III-a above, parents challenged the constitutionality of a school district's policy requiring students to wear masks while on school premises and buses. The court denied the parents' motion for preliminary injunction on the grounds that the policy did not implicate a liberty or property interest, the parents were unlikely to succeed on the merits of their procedural due process claim, the policy survived rational basis review, the policy did not significantly burden students' First Amendment right to freely associate, the students were unlikely to suffer irreparable harm because of the mask mandate, and the public interest did not weigh in favor of issuance of a preliminary injunction.

- *L.T. v. Zucker*, No. 121CV1034LEKDJS, 2021 WL 4775215 (N.D.N.Y. Oct. 13, 2021)

Through their parents, plaintiff students sued the Commissioner of Health for New York State seeking to enjoin enforcement of a K-12 school mask mandate. The court found that the plaintiffs did not demonstrate a likelihood of success on the merits of their argument that the mask mandate violated the First Amendment.

#### IV. Relationship to Local Health Department

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

The city board of health required vaccination of students in the public schools as a condition of admission. The court held that the city board of health could require the board of education to enforce the regulation by excluding unvaccinated students from schools.

- *W.S. by Sonderman v. Ragsdale*, 540 F.Supp.3d 1215 (N.D. Ga. 2021)

As described further above in Part III-b, students sued the school district superintendent alleging that a rule requiring students to wear face coverings violated their rights under the equal protection clauses of state and federal constitutions. The court applied rational basis review and found that the students were unlikely to succeed on the merits of their claims. The court found that the school district has "a right to rely on the recommendations given by reputable public health authorities, such as the Centers for Disease Control and Prevention and the Georgia Department of Public Health, when deciding how to combat COVID-19."

- *L.T. v. Zucker*, No. 121CV1034LEKDJS, 2021 WL 4775215 (N.D.N.Y. Oct. 13, 2021)

As described further above in Part III-c, plaintiff students sued the Commissioner of Health for New York State seeking to enjoin enforcement of a K-12 school mask mandate. The court found that the plaintiffs did not demonstrate a likelihood of success on the merits of their argument that the mask mandate violated the First

Amendment. The court explained that, “[s]tate authorities must be allowed to rely on recommendations given by reputable public health authorities such as the CDC and WHO in the face of an ongoing pandemic.”

<sup>1</sup> MCL 380.1177; Mich. Admin. Code R. 325.176.

<sup>2</sup> Mich. Admin. Code R. 325.175(2).

<sup>3</sup> 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).

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

<sup>5</sup> 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).

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

<sup>7</sup> 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.).

<sup>8</sup> 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>.

<sup>9</sup> *See* Jensen v. Waukesha Sch. Dist., 2022 WL 844439 (Mar. 22, 2022) (dismissing case without prejudice for lack of subject matter jurisdiction); Lindsay Alowairdi, *Federal lawsuit against the Fall Creek School District dismissed*, WEAU 13 News (Mar. 17, 2022), <https://www.weau.com/2022/03/17/federal-lawsuit-against-fall-creek-school-district-dismissed/>.

<sup>10</sup> Brown v. Stone, 378 So.2d 218, 223 (Miss. 1979).

<sup>11</sup> MCL 408.1011(a).

<sup>12</sup> MCL 408.1035 et seq.

<sup>13</sup> 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](https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf).

<sup>14</sup> 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>.

<sup>15</sup> 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](https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf).

<sup>16</sup> Ctrs. for Disease Control and Prevention, *Mask Requirement – Summary of Recent Changes* (Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html>.

<sup>17</sup> Ctrs. for Disease Control and Prevention, *Order: Wearing of face masks while on conveyances and at transportation hubs* (last reviewed Apr. 18, 2022), <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>. *See also* Health Freedom Defense Fund, Inc. v. Biden, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022) (declaring the CDC’s mask mandate unlawful and vacating the mandate).

<sup>18</sup> 29 U.S.C. § 794; 34 C.F.R. § 104.33.

<sup>19</sup> 42 U.S.C. § 12132.



- 20 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>.
- 21 G.S. by & through *Schwaigert v. Lee*, No. 21-CV-02552-SHL-ATC, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021); R.K. by & through J.K. v. *Lee*, No. 3:21-CV-00853, 2021 WL 5860924 (M.D. Tenn. Dec. 10, 2021). See also G.S. by & through *Schwaigert v. Lee*, 2021 WL 5411218 (6th Cir. Nov. 19, 2021) (denying stay of preliminary injunction pending appeal); R.K. by & through J.K. v. *Lee*, 2022 WL 1467651 (6th Cir. May 10, 2022) (denying stay of preliminary injunction pending appeal); S.B. by & through M.B. and L.H. v. *Lee*, No. 3:21-CV-00317-JRG-DCP, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021).
- 22 *Arc of Iowa v. Reynolds*, 24 F.4th 1162 (8th Cir. 2022) (finding that federal disability law requires mask wearing as a reasonable accommodation but narrowing the scope of the district court’s preliminary injunction, noting that some schools in Iowa do not enroll students whose disabilities would require the school to make others wear masks), *vacated*, *Arc of Iowa v. Reynolds*, 2022 WL 1529614 (8th Cir. May 16, 2022). See also *Disability Rights South Carolina v. McMaster*, 2021 WL 4444841 (D.S.C. Sept. 28, 2021) (temporarily restraining and preliminarily enjoining enforcement of a provision which prohibited public schools from using appropriated or authorized funds to announce or enforce a mask mandate, finding that the provision violated Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act), *vacated in part on other grounds*, *Disability Rights South Carolina v. McMaster*, 24 F.4th 893 (4th Cir. 2022) (remanded with instructions to dismiss the claim against the governor and attorney general for lack of standing). *But see* E.T. v. *Paxton*, 19 F.4th 760, 771 (5th Cir. 2021) (granting Attorney General Paxton’s emergency motion for a stay pending appeal of a permanent injunction prohibiting him from enforcing the Texas governor’s Executive Order GA-38, which prohibits local governmental entities from imposing mask mandates).
- 23 See, e.g., *Resurrection School v. Hertel*, 2022 WL 1656719 (6th Cir. May 25, 2022) and related cases, discussed further in the Appendix to this document. The *Resurrection School* cases do not appear to affect Michigan public schools’ authority to implement schoolwide mask mandates, in part because they were not decided based on the individual freedom of religious expression, but rather based on governmental treatment of religious institutions as compared to secular institutions. Accordingly, the reasoning does not appear to be relevant. Furthermore, all potentially relevant decisions have been vacated. *Resurrection School v. Hertel*, 2022 WL 1656719 (6th Cir. May 25, 2022); *Resurrection School v. Hertel*, 2022 WL 332400 (6th Cir. Jan. 11, 2022).
- 24 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).
- 25 *Liebau*, 2013 WL 3942392 at \*6.
- 26 *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).
- 27 *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).
- 28 *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).
- 29 See, e.g., *W.S. by Sonderman v. Ragsdale*, 540 F.Supp.3d 1215, at \*3 (N.D. Ga. 2021); *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333, at \*11 (M.D. Pa. Sept. 30, 2021); *Geerlings v. Tredyffrin/Easttown Sch. Dist.*, No. 21-CV-4024, 2021 WL 4399672, at \*9 (E.D. Pa. Sept. 27, 2021).
- 30 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>.
- 31 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>.
- 32 MCL 691.1407(2)(c).
- 33 MCL 691.1407(8)(a).
- 34 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>.

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- <sup>35</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911198).
- <sup>36</sup> Ctrs. for Disease Control and Prevention, *K-12 Schools* (updated Jan. 13, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>; Ctrs. for Disease Control and Prevention, *COVID-19 Community Levels* (Mar. 24, 2022), [https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html#anchor\\_47145](https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html#anchor_47145).
- <sup>37</sup> 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>.
- <sup>38</sup> *Id.*
- <sup>39</sup> MCL 333.2453(1).
- <sup>40</sup> Mich. Admin. Code R. 325.175.
- <sup>41</sup> MCL 333.2433, 333.2428, 333.1111.
- <sup>42</sup> *People ex rel. Hill v. Bd. of Ed. of City of Lansing*, 224 Mich. 388 (1923).
- <sup>43</sup> *W.S. by Sonderman v. Ragsdale*, No. 1:21-CV-01560-TWT, 2021 WL 2024687, at \*3 (N.D. Ga. May 12, 2021) (“[A school district has] a right to rely on the recommendations given by reputable public health authorities, such as the Centers for Disease Control and Prevention and the Georgia Department of Public Health, when deciding how to combat COVID-19, which has caused the worst public health crisis in a century.”); *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333, at \*11 (M.D. Pa. Sept. 30, 2021) (holding that a school district has a right to rely on recommendations by reputable public health authorities and it is not in the best interest of the public to interfere with a health department’s masking order). See also *L.T. v. Zucker*, No. 121CV1034LEKDJS, 2021 WL 4775215, at \*11 (N.D.N.Y. Oct. 13, 2021) (“State authorities must be allowed to rely on recommendations given by reputable public health authorities such as the CDC and WHO in the face of an ongoing pandemic”).
- <sup>44</sup> Mich. Pub. Acts 87 § 250 (2021).
- <sup>45</sup> Mich. Pub. Acts 87 § 1222(4) (2021).
- <sup>46</sup> 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>.
- <sup>47</sup> 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](https://content.govdelivery.com/attachments/MIEOG/2021/09/29/file_attachments/1952005/Transmittal%20Letter%2009292021.pdf).