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August 9, 2021  
(Via Email Only)

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RE: Executive Order 2021-18, Updated ISBE/IDPH Guidance; Mask Rules

Dear Kathy:

Last week, you asked that I explain the Illinois State Board of Education ("ISBE") guidance on masks following Governor Pritzker's order requiring masks and defining quarantine rules for all individuals in Illinois schools issued today, as well as risks attendant to that guidance.

I remain as I have been, glad to defend the Board's decisions in any choice they make. I acknowledge that the moment is a difficult one for Board members – their decisions will be met with derision from some group, and it is difficult to fathom that there is an answer which will not be met with disdain from someone. The Board's unique task is to simultaneously protect children and staff, and yet make comfortable groups of people with divergent interests and beliefs. I cannot remember a more fractured period of time, and do not envy the difficulty of choices your members face.

Even still, in this instance the Board has only one viable "choice" – comply with directives of the state. Failure to comply with orders, guidance, and rules may result in difficult-to-control or cap liability, as well as potential personal liability for decision-makers. In any other scenario, you will likely confront both significant legal fees, loss of funding, and no insurance coverage for either.

A short summary of the analysis follows – I will narrate complete analysis with legal support for anyone who may be curious or concerned, below. I confess the analysis is dense, legally complex, and lengthy. I have tried to assist by clarifying important sections with highlighting and analysis that is clear. But be aware that, while community pressure may be high, the outcome of the law conferring authority on health officials to act is consistent, clear, and well-established. I provide the "proof" to aid your staff and Board members in their defense, both now

and in the event your Board is the unfortunate victim of a scurrilous challenge to their actions to comply with Executive Orders, guidance, and the law.

1. The Governor has authority to proclaim a disaster for 30 days at a time, which authority may be extended so long as a disaster exists, as Governors have done going back several administrations.

2. When the Governor proclaims a disaster, there are both inherent, constitutionally conferred and statutory state executive powers for management of the crisis, including direction of various agencies, bodies, and citizens in order to bring resolution to the crisis.

3. There have been numerous challenges during the COVID-19 disaster proclamation to the Governor's authority, all of which have failed.

4. The Governor has directed the Illinois Department of Public Health ("IDPH") and the Illinois State Board of Education ("ISBE") to require masks in schools, which they have done.

5. IDPH has directed schools to exclude (not quarantine) students IDPH directs to quarantine.

6. Schools risk breach of the tort immunity shield for refusal to comply with orders of the Governor.

7. School officials who obstruct IDPH or their local health department in their management of a crisis risk both personal criminal and civil liability for such obstruction.

## **Authorities**

1. Executive Order 2021-18;
2. ISBE/IDPH Part 5 Guidance (August 6, 2021);
3. 105 ILCS 5/10-20.12a *et seq.*;
4. 105 ILCS 5/27-8;
5. 20 ILCS 2305/2(a);
6. *Moore v. Lumpkin*, 196 Ill.Dec. 817, 258 Ill.App.3d 980, 630 N.E.2d 982 (Ill. App. 1<sup>st</sup> Dist. 1994), *appeal denied* 202 Ill.Dec. 923, 156 Ill.2d 559, 638 N.E.2d 1117;
7. 20 ILCS 2305/2(c);
8. *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 302 Ill. 422 (1922);
9. 1983 Op.Atty.Gen. No. 83-017, 1983 WL 41833;
10. 20 ILCS 2305/8.1;
11. 720 ILCS 5/31-9;
12. 20 ILCS 3305/11(a);
13. 20 ILCS 3305/7;
14. *Cassel v. Snyders*, 458 F. Supp. 3d 981, 999 (N.D. Ill 2020);
15. Ill. Const. art. V, § 8;
16. *Riley Craig et al v. Governor Jay Robert Pritzker*, 20-MR-589 (Sangamon County, Illinois) (case ongoing);
17. *Fox Fire Tavern, LLC v. Pritzker*, No. 2-20-0627 (IL App 2d 2020);
18. *Vill. of Orland Park v. Pritzker*, 475 F. Supp. 3d 866, 886 (N.D. Ill 2020);
19. 105 ILCS 5/2-3.25;
20. 23 Ill. Adm. Code 1.10 *et seq.*;

21. Public Act 101-633;
22. *Doe ex. rel. Ortega-Piron v. Chicago Bd. of Educ.*, 820 N.E.2d 418 (2004);
23. 745 ILCS 10/3-108;
24. 745 ILCS 10/2-201;
25. 745 ILCS 10/6-104;
26. *Harinek v. 161 N. Clark St. Ltd. P'ship*, 181 Ill.2d 335, 341 (1998);
27. *Snyder v. Curran Twp.*, 167 Ill.2d 466, 474 (1995);
28. 105 ILCS 5/10-20.20;
29. 745 ILCS 10/2-203;
30. 745 ILCS 10/2-302; and
31. *In re Estate of Stewart*, 2016 ILApp (2d) 151117 (appeal denied, 77 N.E.3d 82, Ill., Jan. 25, 2017).

### **Executive Order 2021-18, August 6, 2021 ISBE/IDPH Guidance, Face Masks**

First, the Order and attendant ISBE/IDPH guidance requiring masking for all individuals in the school, regardless of vaccination status, is mandatory. The Governor's Order is clear on the subject of masks:

**Section 1: School Mitigation Measures.** All public and nonpublic schools in Illinois serving pre-kindergarten through 12th grade students must follow the joint guidance issued by ISBE and IDPH and take proactive measures to ensure the safety of students, staff, and visitors, including, but not limited to:

- a. Requiring the indoor use of face coverings by students, staff, and visitors who are over age two and able to medically tolerate a face covering, regardless of vaccination status, consistent with CDC guidance; and,
- b. Implementing other layered prevention strategies (such as physical distancing, screening testing, ventilation, handwashing and respiratory etiquette, advising individuals to stay home when sick and get tested, contact tracing in combination with appropriate quarantine and isolation, and cleaning and disinfection) to the greatest extent possible and taking into consideration factors such as community transmission, vaccination coverage, screening testing, and occurrence of outbreaks, consistent with CDC guidance.

EO 2021-18 (emphasis added). The Illinois State Board of Education ("ISBE") issued joint guidance August 6, 2021 with the Illinois Department of Public Health ("IDPH"), which unambiguously requires school to require universal masking indoors:

**2. Require all teachers, staff, students, and visitors to P-12 schools to wear a mask while indoors, regardless of vaccination status.**

ISBE/IDPH Part 5 Guidance at p.11 (August 6, 2021) (emphasis in original). There are several relevant exceptions:

- When eating.
- If using a face shield when other methods of protection are not available or appropriate.
- For children while they are napping with close monitoring to ensure no child leaves their designated napping area without putting their face mask back on.
- For staff when alone in classrooms or offices with the door closed.
- For individuals who are younger than 2 years of age.
- For individuals who have trouble breathing; or those who are unconscious, incapacitated, or otherwise unable to remove the face mask without assistance.
- For persons with a disability who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (ADA, 42 U.S.C. 12101 et seq.), including:
  - A person with a disability who, for reasons related to the disability, would be physically unable to remove a mask without assistance if breathing becomes obstructed. Examples might include a person with impaired motor skills, quadriplegia, or limb restrictions.
  - A person with an intellectual, developmental, cognitive, or psychiatric disability that affects the person's ability to understand the need to remove a mask if breathing becomes obstructed.
- For individuals who have a condition or medical contraindication (e.g., difficulty breathing) that prevents them from wearing a face mask.
- For fully vaccinated staff when meeting with other fully vaccinated staff outside of settings where unvaccinated persons are present.
- For staff and students when they are outdoors. However, particularly in areas of substantial to high transmission, staff and students who are not fully vaccinated should wear a mask in crowded outdoor settings or during activities that involve sustained close contact with other people who are not fully vaccinated

*Id.* at pp.11-12. Face coverings (masks) are not optional, and cover individuals setting foot within a school building regardless of vaccination status. Medical contraindications require diagnosis, and schools should be aware that they retain some responsibility to reasonably assure they understand and accommodate diagnoses (a “note” by itself may not resolve fully the medical issue, and a school may have a responsibility to determine in each case the best way to accommodate a medical issue). Schools need to make such accommodation decisions on a case-by-case basis after interactive communication with the person presenting the request to be compliant with the law, and a blanket note issued by a physician with no reasoning or information will not immunize a District against liability if the individual later presents with illness and infects others in the school.

#### **IDPH Quarantine Authority**

Schools do not issue quarantine orders – the health department issues quarantine orders. Schools’ only obligation is to exclude a child as-directed by the Department of Health. Such exclusion is not, itself, an independent quarantine order (issued by a school). The exclusion from school is just that – an exclusion from school. Schools exclude children for much less than communicable disease – students are excluded for failure to present proof of residency<sup>1</sup>, failure to present proof of required inoculation<sup>2</sup>, and failure to acquire a dental exam<sup>3</sup>.

(a) The State Department of Public Health has general supervision of the interests of the health and lives of the people of the State. It has supreme authority in matters of quarantine and isolation, and may declare and enforce quarantine and isolation when none exists, and may modify or relax quarantine and isolation when it has been established. The Department may adopt, promulgate, repeal and amend rules and regulations and make such sanitary investigations and inspections as it may from time to time deem necessary for the preservation and improvement of the public health,

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All local boards of health, health authorities and officers, police officers, sheriffs and all other officers and employees of the state or any locality shall enforce the rules and regulations so adopted and orders issued by the Department pursuant to this Section.

\* \* \*

The Department of Public Health shall investigate the causes of dangerously contagious or infectious diseases, especially when existing in epidemic form, **and take means to restrict and suppress the same,** and whenever such disease becomes, or threatens to become epidemic, in any locality and the local board of health or local authorities neglect or refuse to enforce efficient measures for its **restriction or suppression or to act with sufficient promptness or efficiency,** or whenever the local board of health or local authorities neglect or refuse to promptly enforce efficient measures for the restriction or suppression of dangerously contagious or infectious diseases, **the Department of Public Health may enforce such measures as it deems necessary to protect the public health,** and all necessary expenses so incurred shall be paid by the locality for which services are rendered.

20 ILCS 2305/2(a) (emphasis added). The Health Department’s authority to implement restrictions pursuant to health emergencies has been held to be broad and enforceable pursuant to

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<sup>1</sup> 105 ILCS 5/10-20.12a *et seq.*

<sup>2</sup> 105 ILCS 5/27-8.1

<sup>3</sup> *Id.*

the State's police powers.<sup>4</sup> Quarantine orders are subject to certain restrictions in the Act, (some of which may be restricted during a declared emergency):

(c) ... The Department may, however, order a person or a group of persons to be quarantined or isolated or may order a place to be closed and made off limits to the public on an immediate basis without prior consent or court order if, in the reasonable judgment of the Department, immediate action is required to protect the public from a dangerously contagious or infectious disease. In the event of an immediate order issued without prior consent or court order, the Department shall, as soon as practical, within 48 hours after issuing the order, obtain the consent of the person or owner or file a petition requesting a court order authorizing the isolation or quarantine or closure. When exigent circumstances exist that cause the court system to be unavailable or that make it impossible to obtain consent or file a petition within 48 hours after issuance of an immediate order, the Department must obtain consent or file a petition requesting a court order as soon as reasonably possible. To obtain a court order, the Department, by clear and convincing evidence, must prove that the public's health and welfare are significantly endangered by a person or group of persons that has, that is suspected of having, that has been exposed to, or that is reasonably believed to have been exposed to a dangerously contagious or infectious disease including non-compliant tuberculosis patients or by a place where there is a significant amount of activity likely to spread a dangerously contagious or infectious disease. The Department must also prove that all other reasonable means of correcting the problem have been exhausted and no less restrictive alternative exists. For purposes of this subsection, in determining whether no less restrictive alternative exists, the court shall consider evidence showing that, under the circumstances presented by the case in which an order is sought, quarantine or isolation is the measure provided for in a rule of the Department or in guidelines issued by the Centers for Disease Control and Prevention or the World Health Organization. Persons who are or are about to be ordered to be isolated or quarantined and owners of places that are or are about to be closed and made off limits to the public shall have the right to counsel.

20 ILCS 2305/2(c), (in relevant part only, with emphasis added). While it may be tempting to read the foregoing to mean IDPH lacks authority for issuance of quarantine orders without court intervention, examination of the case law does not support such an interpretation. The Illinois Supreme Court has, for nearly a century, affirmed IDPH's authority to issue quarantine and isolation orders during a public health crisis. In *People ex rel. Barmore v. Robertson*, the state Supreme Court held that a quarantine order issued against a woman who was carrying typhoid and,

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<sup>4</sup> Governmental action to restrict and suppress spread of contagious disease falls within scope of state's police powers. *Moore v. Lumpkin*, App. 1 Dist.1994, 196 Ill.Dec. 817, 258 Ill.App.3d 980, 630 N.E.2d 982 (Ill. App. 1<sup>st</sup> Dist. 1994), *appeal denied* 202 Ill.Dec. 923, 156 Ill.2d 559, 638 N.E.2d 1117.

despite being asymptomatic, was forced by the Department of Public Health to quarantine.<sup>5</sup> According to the Court, “Where danger of an epidemic actually exists, health and quarantine regulations will always be sustained by the courts on the law of necessity.” *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 302 Ill. 422 (1922)<sup>6</sup>. While a quarantine cannot be founded on mere suspicion, a reasonable belief of presence of a contagion is sufficient to order quarantine. *Id.* In addition, the Attorney General of Illinois has found that the Department of Public Health has the authority to promulgate rules requiring the exclusion of all susceptible non-immunized children from school for a period of twenty-one days following an outbreak of measles in the school – no court order necessary. 1983 Op.Atty.Gen. No. 83-017, 1983 WL 41833. In it, Attorney General Neil Hartigan, pointed out that Illinois Courts have applied the balancing test for religious exemptions from immunization, finding it weighed in favor of permitting a 1918 quarantine for small pox because the state’s interest in eliminating the public health crisis outweighed the burden that the quarantine placed on families citing religious exemptions to the inoculation.

But the foregoing misses the point – **it is not the school that orders a quarantine.** It is the health department. The school is required to enforce rules the health department puts forth, which is, as above, the exclusive and “supreme” authority on health quarantines. The school lacks such authority as would be necessary to overturn or disregard the health department. Therefore, the law and the executive orders issued pursuant to the law compels compliance of school officials. Schools do not order quarantine – the only responsibility of the school is to exclude children as ordered by the Health Department. Beyond that, any restriction is the liability of the Health Department.

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<sup>5</sup> The court noted that the woman had been bringing in boarders, many of whom had become ill with typhoid. Students of history may recall the story of “Typhoid Mary” Mallon, who was the first person identified as an asymptomatic carrier of the disease, quarantined around the same time for the second time after she had allegedly infected perhaps 53 people, of whom 3 died. The subsequent epidemic resulted in multiple quarantines due to fears over transmission. [https://en.wikipedia.org/wiki/Mary\\_Mallon](https://en.wikipedia.org/wiki/Mary_Mallon)

<sup>6</sup> As above, Illinois Courts have repeatedly found the danger of the COVID-19 pandemic actually exists, and with 4.3 million worldwide deaths from the disease as of the date of this writing and cases spiking throughout the country, it seems highly unlikely a court will soon find otherwise, particularly in light of the limited standard of proof the executive must meet.

Further, obstruction or failure to comply with a health official in the carrying out of their duties is a potentially criminal offense. 20 ILCS 2305/8.1<sup>7</sup>, 720 ILCS 5/31-9<sup>8</sup>.

### **August 6, 2021 ISBE/IDPH Guidance, Vaccination Status Requests**

Requesting vaccination status is nothing new for Illinois schools. In fact, the law requires it. ISBE's latest guidance notes:

Schools that plan to request voluntary submission of documentation of COVID-19 vaccination status should use the same standard protocols that are used to collect and secure other immunization or health status information from students. For example, Illinois state law and administrative code requires children enrolled in child care or school to be immunized against certain preventable communicable diseases, including highly contagious viral illnesses such as measles, mumps, and varicella (chickenpox). Prior to entering any public, private, independent, or parochial school, every child in Illinois must provide the school with documentation from their health care provider that verifies their immunizations, with certain exceptions. Schools that request proof of vaccination for COVID-19 may use this existing infrastructure to document students' vaccination status

ISBE Part 5 guidance at p.10 (August 6, 2021), citing, among others, 105 ILCS 5/27-8.1, which reads, in relevant part,

(5) If a child does not submit proof of having had either the health examination or the immunization as required, then the child shall be examined or receive the immunization, as the case may be, and present proof by October 15 of the current school year, or by an earlier date of the current school year established by a school district. ... If a child does not comply by October 15, or by the earlier established date of the current school year, with the requirements of this subsection, then the local school authority shall exclude that child from school until such time as the child presents proof of having had the health examination as required and presents

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<sup>7</sup> “Whoever violates or refuses to obey any rule or regulation of the Department of Public Health shall be deemed guilty of a Class A misdemeanor. The Director of Public Health shall institute prosecutions and proceedings for violation of the rules and regulations adopted by the Department of Public Health, provided that he may designate a local board of health or local health officer to institute prosecutions or proceedings for violation of those rules and regulations adopted by the Department. Each State's Attorney shall prosecute all persons in his county violating or refusing to obey the rules and regulations of the Department of Public Health. All fines or judgments collected or received shall be paid to the County Treasurer of the county in which prosecution is conducted.”

<sup>8</sup> “A person who knowingly obstructs the performance by one known to the person to be an emergency management worker of any authorized act within his or her official capacity commits a Class A misdemeanor.”



proof of having received those required immunizations which are medically possible to receive immediately.

105 ILCS 5/27-8.1 (emphasis added). Although COVID-19 vaccinations are not yet mandated as a part of the regular vaccination course for Illinois students before entering school, there is a well-established process and precedent in Illinois schools to collect vaccination records. Additionally, the Illinois Comprehensive Automated Immunization Registry Exchange (“iCARE”) database provides access to records of vaccinations for all individuals to any professional nurse with access, including school nurses.<sup>9</sup> Therefore, schools may already have the information, even before seeking affirmative proof. Anecdotally, many schools are seeking voluntary provision of proof of vaccination status, because students and staff who provide proof will be incentivized by not having to quarantine if they show no symptoms.

### **Gubernatorial Authority**

The Governor’s power to declare an emergency and to issue proclamations and executive orders to address such emergency is well-established in the law. The Illinois Emergency Management Act at Section 7 permits the Governor to exercise emergency powers for 30 days if he has proclaimed the existence of a disaster. The precedent for such authority has been protected by Illinois Courts for nearly a century: “The duty to preserve public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender.” *People ex. Rel. Barmore v. Robertson*, 302 Ill. 422, 427 (1922). Indeed, the Illinois Constitution recognizes the Governor has inherent and independent authority to order immediate measures to protect the public health. The Governor has “the supreme executive power, and shall be responsible for the faithful execution of the laws.” Ill. Const. art. V, § 8.

There is a long history in Illinois of Governors issuing successive executive orders during emergencies while the emergencies continued to exist. In 2009, H1N1 virus caused Governor Pat Quinn to issue multiple successive orders while the disease remained a concern. In 2011, 2017, and 2019, multiple consecutive executive orders were issued by Governors Quinn and Rauner, respectively, during flooding emergencies.<sup>10</sup>

While there were, at one time, cases all over Illinois challenging whether the Governor had authority to issue successive orders, and thus whether ISBE had the authority to require masks and social distancing, the results were unanimous – **the Governor has authority to declare COVID-**

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<sup>9</sup> <https://dph.illinois.gov/topics-services/prevention-wellness/immunization/icare>

<sup>10</sup> Incidentally, there are legislative limitations on the extension of authority for executive declarations of an emergency, but such limitations were made only to local authorities (who are limited to 7 days without consent of the governing board of the political subdivision), not the Governor, whose restriction is only that he may issue orders by successive 30-day periods. 20 ILCS 3305/11(a), 20 ILCS 3305/7, respectively.

**19 a disaster, and compel compliance with ISBE and IDPH guidance and rules.**<sup>11</sup> Challenges have included arguments against the Constitutionality of the Governor’s order<sup>12</sup>, the legislative authority of the Governor’s order<sup>13</sup>, and the substantive seriousness of the crisis<sup>14</sup>. All such challenges have failed – the courts have unanimously held that COVID-19 constitutes the sort of extraordinary threat to public health and safety that warrants executive disaster declaration, and that such declaration permits the exercise of executive orders. In addition, gubernatorial orders need only meet the rational basis test (the lowest standard of substantive basis) to be valid going forward. *Cassel v. Snyders*, 458 F. Supp. 3d 981, 999 (N.D. Ill 2020).

Indeed, only two rulings in Illinois Courts from early in the pandemic ever found otherwise - Judge McHaney in a Clay County case held that the Governor had no authority to act under the Emergency Management Act - but simultaneously held the Illinois Department of Public Health (“IDPH”) **did** have authority to act. Incidentally, ISBE's guidance has always been joint with IDPH, and the Governor’s Order was immediately adopted with direction by IDPH. In *Fox Fire Tavern, LLC v. Pritzker*, a judge in Northern Illinois ruled that Governor Pritzker had exceeded his authority. That case was overturned on appeal (cited in the footnote below), and was remanded before being consolidated in Sangamon County with the Clay County case, along with ten (10) other cases before various Illinois courts. The Clay County Order was quickly vacated by the Illinois Supreme Court and remanded to Sangamon County. *Riley Craig et al v. Governor Jay Robert Pritzker*, 20-MR-589 (Sangamon County, Illinois) (case ongoing). While parts of the case relevant to Fox Fire Tavern are ongoing, review of rulings to date make clear a school’s reliance on the Governor’s apparent authority is the only viable and legal path forward.

The foregoing compels the conclusion that ISBE's guidance, joint with IDPH, is mandatory, not optional. There is no viable legal argument any longer that the Governor lacks authority to issue the order. Therefore, serious liability potential awaits any school district that is not compliant with the guidance – it is a gamble at best, and one which faces very poor odds.

### **ISBE Authority**

ISBE has authority pursuant to the Illinois School Code to dock funds for non-compliant schools on certain issues on a daily basis, and may eliminate funding through the recognition process for a school noncompliant with ISBE’s guidance. 105 ILCS 5/2-3.25, 23 Ill. Adm. Code 1.10 *et seq.* Historically, ISBE has threatened recognition against two schools for noncompliance, Hutsonville (which complied by requiring masks last year before the recognition process began),

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<sup>11</sup> Among many others, see *Fox Fire Tavern, LLC v. Pritzker*, No. 2-20-0627 (IL App 2d 2020), holding, in relevant part, the Illinois Emergency Management Act “plainly authorizes the Governor to issue successive disaster proclamations stemming from one ongoing disaster...”

<sup>12</sup> See, *Vill. of Orland Park v. Pritzker*, 475 F. Supp. 3d 866, 886 (N.D. Ill 2020); See also, *Cassel v. Snyders*, 458 F. Supp. 3d 981, 999 (N.D. Ill 2020).

<sup>13</sup> *Riley Craig et al v. Governor Jay Robert Pritzker*, 20-MR-589 (Sangamon County, Illinois) (case ongoing).

<sup>14</sup> *Vill. of Orland Park v. Pritzker*, 475 F. Supp. 3d 866, 886 (N.D. Ill 2020).

and Red Hill (which announced it would not require masks last year – ISBE brought Red Hill to hearing, but continued the hearing on its own authority the day before ISBE updated its guidance to provide for limited relief from masks for vaccinated individuals). Both Hutsonville and Red Hill were very public about their intent to be noncompliant with the rules. ISBE may be looking make an example of any District that wants to be the target, but the argument is a sideshow.

### **Basis for Liability – Effects of Tort Immunity Shield Breach**

The purpose of the Executive Order and guidance is to establish the basis of liability - schools that don't comply likely breach their tort immunity shield. A decision not to comply with the guidance is not likely to end in the arm of ISBE coming in to end your school. It will more likely end in liability owed to a person infected or a staff member subjected to risk at work.

Bearing in mind that the purpose of safety measures is not to protect the person who wears the mask but rather the protect the person he infects, failure to require compliance with the IDPH/ISBE guidance makes anyone infected and/or their kin a potential plaintiff. In other words, it's not the person who doesn't wear the mask that is your plaintiff – it's the person that person infects, and that is the person to whom you owe a duty of care.

The primary risk is not lost funding – it is the existence of the guidance in the first place. If a school is noncompliant a plaintiff's lawyer will cite the Order, the foregoing cases, and the existence of broad public attention to cases upholding such authority, and will likely conclude he can argue successfully that the school's tort immunity shield is breached.

The tort immunity shield protects a school from liability from most civil claims - to make a successful claim against a school, you have to prove both at law and in fact a school district was willful and wanton in disregard of safety or the rules. Put another way, a plaintiff would have to prove you were deliberately indifferent to a known risk. That bar is incredibly difficult for a plaintiff to climb over. But failing to comply with health department guidance, ISBE directives, and Executive Orders which are lawfully entered (as the Governor's Orders have been held to be) will likely compel a judge to at least let a jury hear the case, and may very well result in that shield being lost altogether. In other words, your liability defense will look a lot like any other business, but with a much bigger target and many more potential plaintiffs.

Moreover, the legislature passed and Governor Pritzker signed Public Act 101-633 last term, which established a rebuttable presumption that any COVID-19 infection occurred at work – in other words, plaintiffs need not prove they caught COVID-19 at work; the employer will need to prove they did *not* come into contact with COVID-19 at work. Such proof will be difficult or impossible to provide in an environment where the vast majority of the student body is ineligible to be vaccinated.

Additionally, most school districts have no coverage for infectious disease, and even those that do will lose that coverage if they disregard IDPH/ISBE guidance and the Governor's Order. Therefore, you will be on your own if someone gets sick or dies – it will be district general and

tort funds (care of District taxpayers) that will fund the estate of a plaintiff who challenges. Most importantly, that person is unlikely to be the person you can spot at the school or a person who chooses not to wear a mask. The purpose of masks and other layered prevention strategies is not self-preservation, but rather protection against the person with whom an infected person comes into contact. Therefore, the liability may result from a family member of an infected person, a claimant after they reach the age of majority, or the estate of the person who gets infected (*see, e.g., Estate of Evans v. Walmart*, 2020 L 3938 (Cook County)).

There are multiple sections of the Tort Immunity Act that protects schools. Only willful and wanton conduct is not protected by the immunity conferred in section 3-108. “To plead willful and wanton conduct, a plaintiff must allege either a deliberate intention to harm or an utter indifference to or conscious disregard for the welfare of the plaintiff.” *Doe ex. rel. Ortega-Piron v. Chicago Bd. of Educ.*, 820 N.E.2d 418 (2004). 745 ILCS 10/3-108. While 3-108 protects schools against liability for negligent supervision, it does not protect schools (thus the shield is breached) when the school knows of a risk and makes a conscious choice to ignore or disregard that risk.

The District may also assert immunity against a plaintiff’s negligence claims pursuant to Section 2-201 of the Tort Immunity Act. Section 2-201 provides:

Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-201. Another oft cited provision provides:

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

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

745 ILCS 10/6-104 (emphasis added). “[A]n employee may be granted immunity if he holds either a position involving the determination of policy or a position involving the exercise of discretion ... [but] immunity will not attach unless the plaintiff’s injury results from an act performed or omitted by the employee in determining policy *and* in exercising discretion.” *Harinek v. 161 N. Clark St. Ltd. P’ship*, 181 Ill.2d 335, 341 (1998) (emphasis in original). “[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority,

and without reference to the official's discretion as to the propriety of the act.” *Snyder v. Curran Twp.*, 167 Ill.2d 466, 474 (1995). Here, the issue is authority. The school board has only that is conferred by statute – which authority is to provide education to children. The school board has authority for management of infectious disease only to the extent that it is conferred by statute – such statutes require schools to exclude students not inoculated against infectious disease, exclude students exhibiting COVID-19 symptoms, and to follow directives of ISBE and IDPH. The Governor, ISBE, and IDPH all require schools to compel all individuals within the school to wear masks (subject to exemptions as above). Such statutes do not confer discretion for policy-making authority to make decisions about what is best to protect student health.

Put more simply – schools are not typically staffed by immunologists, epidemiologists, virologists, aerosols physicists, and other infectious disease experts. Such individuals are staffed with IDPH and it is that agency vested with exclusive authority to provide guidance to schools and citizens for maintenance of safety. Schools that disregard such guidance do so at their peril, for they have no discretionary authority except where such authority is conferred by IDPH itself. With murky discretionary authority on a matter, it is possible that disregard for recommendations may result in breach of the tort immunity shield.

Finally, it is noteworthy that breaching the tort immunity shield puts in jeopardy the shield which protects individual members and staff from liability for decisions. 10-20.20 of the School Code provides protection for school officials, and requires the school:

To indemnify and protect school districts, members of school boards, employees, volunteer personnel ... and student teachers against civil rights damage claims and suits, constitutional rights damage claims and suits and death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board or related to any mentoring services provided to certified staff of the school district. Such indemnification and protection shall extend to persons who were members of school boards, employees of school boards, authorized volunteer personnel, mentors of certified staff, or student teachers at the time of the incident from which a claim arises. No agent may be afforded indemnification or protection unless he was a member of a school board, an employee of a board, an authorized volunteer, a mentor of certified staff, or a student teacher at the time of the incident from which the claim arises.

105 ILCS 5/10-20.20. While the shield provides broad and significant protection for individuals acting within their employment or legislatively conferred official capacities, such protection only confers so long as the act under challenge is made under apparent authority, in good faith and without malice.<sup>15</sup> Schools, which are not liable for punitive or exemplary damages, may not

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<sup>15</sup> 745 ILCS 10/2-203.

indemnify or pay any portion of any judgment representing such an award, and may not defend a member who is accused of criminal misconduct.<sup>16</sup>

In short, if a school employee or official acts outside the scope of their duties, in bad faith, or without apparent authority to act, such action may not be defended by the school. Therefore, school officials could be *personally liable* for decisions undertaken as school board members and employees. By analogy, a school employee has no protection if a school board directs the employee to beat a student up – if the employee actually undertook such direction, clearly and intentionally harming a child (criminally so), the employee likely has no protection for the harm. School board members putting children in harm’s way lack insurance coverage for so-doing, lack authority for so-doing (there is no authority to refuse to exclude children subject to quarantine, no authority to refuse or “make optional” masking requirements, and there is no authority to refuse to check vaccination status of all individuals), and if they make the decision on political bases rather than pursuant to directives from health officials, they risk undertaking personal liability for the decision.

Asked to estimate the potential for damage, identifying a potential loss in the event of a lawsuit is speculative at best and very difficult to assess. Forum matters, as does judge, jury pool, and the specific facts involved. However, tort immunity shield breach cases where an injury results in death are rare in the school context. The most recent case that might shed light on jury thinking is *In re Estate of Stewart*, 2016 ILApp (2d) 151117 (appeal denied, 77 N.E.3d 82, Ill., Jan. 25, 2017). In the case, a jury awarded a family \$2.5 million when a teacher failed to call 911 when a student suffered an asthma attack the teacher thought was a seizure. The Appellate Court held that the school’s policy to call the nurse before calling 911 (which was a common policy for schools prior to 2016) was not reasonable and stood in deliberate indifference to student safety, which breached the tort immunity shield. In other words, the verdict stands.

I hope the foregoing is fully responsive to your requests. Please let me know should you have further questions or concerns.

Sincerely,

MILLER, TRACY, BRAUN, FUNK &  
MILLER, LTD.



By: J. Christian Miller

JCM/dms

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<sup>16</sup> 745 ILCS 10/2-302.