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**Kent County Statement on Pre-K-6 School Mask Public Health Order**

On Aug. 20, 2021, the Kent County Health Department issued a [public health order](#) requiring masks be worn by students inside pre-kindergarten through sixth grade schools. We have subsequently heard from thousands of concerned residents regarding the topic of masks in schools. At a recent Board of Commissioners work session, more than 150 community members provided comment on COVID-19, the value and concerns of facial coverings, the rights of parents, and the role of government.

Since this meeting, the Kent County Board of Commissioners has been working to further understand the authority of the Kent County Health Officer. Our in-house legal team engaged in exhaustive research into this question and provided a comprehensive opinion to the administration. Next, we took the extraordinary step of seeking a second opinion from outside counsel, Warner Norcross & Judd. **Both opinions concluded that neither the Kent County Board of Commissioners nor the County Administrator/Controller have the authority to intervene in the health officer’s performance of his statutory duties under Michigan’s Public Health Code.**

The Michigan Public Health Code was established by the Michigan State Legislature in 1978 for the protection and promotion of the public health. Specifically, the law states that health officers “may take actions and make determinations necessary or appropriate to carry out the local health department’s functions under this part or functions delegated under this part and to protect the public health and prevent disease.” [MCL 333.2428(2)].

Under his statutory *duties and authority* established by this law, Dr. Adam London issued a local public health order requiring masks be worn in pre-kindergarten through sixth grade educational settings. When the public health order was issued on Aug. 20, all epidemiologic measures of COVID-19 in our community were trending in the wrong direction and continue to do so.

Rates & New Cases	Week of July 4	Week of August 20	Week of August 30
<b>POSITIVITY RATES</b>	1.5 percent	10 percent	12 percent
<b>WEEKLY CASES</b> Total Cases	71	797	1,207
<b>WEEKLY CASES</b> Cases in children (ages 0-18)	15	163	304

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Additionally, local COVID-19 hospitalizations were trending and continue to trend in the wrong direction.

Local Hospitalization Rates	Week of July 11	Week of August 20	Week of August 30
<b>TOTAL COVID-19 HOSPITALIZATIONS</b> (adults & children)	19	77	114
<b>COVID-19 PATIENTS IN ICU</b>	3	22	33
<b>COVID-19 PATIENTS HOSPITALIZED AT HELEN DEVOS CHILDREN'S HOSPITAL</b> (ages 0-18)	1	3	6

The surge in positivity rates, new cases, and hospitalizations closely matched the early days of the Delta variant-related surge in other states. Therefore, Dr. London determined a school mask order was necessary to protect access to in-person learning for those students who do not yet have access to the vaccine, to slow the rate of transmission, and to keep students and teachers healthy.

Some members of the community have since called on the Kent County Board of Commissioners to rescind the public health order, remove our local health officer, or defund the health department. **However, the Board of Commissioners is prohibited by State law from taking any of these actions.** Our legal opinions concluded that:

- The Board *does not* have authority over local public health orders
- The Board *may not* remove a health officer for adopting a mask mandate
- The County Administration and Commissioners *may* face legal action if the Commissioners interfere in the public health order or remove the health director for issuing the public health order
- The Board of Commissioners *may not* defund the health department to change or negate a public health order
- If the Board defunds the health department, the State may take over the health department
- If a local health department fails to meet state requirements, the Michigan Department of Health and Human Services has the power to resume those functions itself, removing them from the local health department. Those requirements include:
  - Prevention and control of diseases
  - Prevention and control of health problems of particularly vulnerable population groups

Further, public health orders issued by local public health officers are not personal orders of the individual. Rather, the orders are issued in the Health Officer's official capacity and remain in effect even after the individual leaves the office.

A frequently-asked-questions document is attached. It provides additional information on these findings.

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**In conclusion, the local public health order requiring masks be worn in pre-K – 6<sup>th</sup> grade schools has the full force of law and the Kent County Board of Commissioners have no legal authority to intervene in this action.** Residents are encouraged to voice their concerns over the authorities granted to local public health officers under the Michigan Public Health Code to state lawmakers.

We appreciate all the comments we have received on this topic, and we trust this statement clarifies the role of the Kent County Board of Commissioners. We encourage everyone to remain steadfast in helping to keep our community healthy and in supporting the dedicated Kent County Health Department team that has worked diligently over the past 20 months to do the same.

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## PUBLIC HEALTH ORDERS FREQUENTLY ASKED QUESTIONS

(updated: 9/8/21)

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**Q: Who has the authority to issue a local public health order?**

A: The Local Health Officer has the authority to issue local public health orders under Michigan's Public Health Code. By law, the local Health Officer has the responsibility to safeguard public health.

**Q: What is the legal standard that must be met to issue a local public health order?**

A: There are two kinds of local public health orders that can be issued during a public health emergency.

- When the local Health Officer determines that an **imminent danger to health or life** exists in the community, he or she is required by law to issue an order to avoid, correct or remove the imminent danger. An "Imminent danger" means a condition or practice which could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.
- When the 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 the epidemic to insure continuation of essential public health services** and enforcement of health laws.

**Q: Can the Kent County Board of Commissioners or the County Administrator intervene in a local public health order?**

A: No. The Board of Commissioners may not intervene in the local Health Officer's performance of his duties. The Board of Commissioners has no authority to second guess, override, veto, rescind, amend, or modify a local public health order.

**Q: Can the Kent County Board of Commissioners remove its health officer for adopting a mask mandate?**

A: No. The Michigan Supreme Court has expressly ruled that a Board of Commissioners may not use its powers to negate a Public Health Officer's decision.

The local Health Officer acted within his statutory authority in issuing the limited school mask mandate and the public health order meets all statutory, constitutional, and legal requirements. On August 23, 2021, the Sixth Circuit Court of Appeals upheld the legal basis for the mask mandates in Michigan against all challenges asserted. The court ruled that the Michigan Department of Health and Human Services (MDHHS) school mask order did not violate the free exercise of religion, equal protection, or substantive due process rights. The Kent County local public health order regarding masks was issued under the same Michigan law as the MDHHS mandates.

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**Q: Can the Kent Board of Commissioners defund the health department because of the school mask mandate?**

A: No. The Michigan Supreme Court has expressly held that a Board of Commissioners may not use budgetary considerations or refusal to fund to overrule a public health officer.

**Q: If a health officer leaves office, will local health orders remain in place or rescinded?**

A: The orders remain in place. Local health orders are issued in the local Health Officer's official capacity and remain in effect even after the individual leaves the office. If a Local Health Officer leaves office, all Local Health Orders in place remain effective unless and until rescinded by the successor Local Health Officer.

**Q: Are masks a restraint prohibited by the school code?**

A: No. A face mask worn during a pandemic is not a "restraint" under the Code. In the Michigan School Code, "restraint" is physically holding or restraining students from moving their bodies. "Restraint" is an action that prevents or significantly restricts a student's physical movement. It does not include safety or medical equipment. "Restraint that negatively impacts breathing" means physically holding a student in a way that inhibits breathing or makes it difficult for the student to breathe. The statute states that its intent is to "encourage ...best practices to reduce the occurrence of challenging behaviors, eliminate the use of seclusion and restraint, and increase meaningful instructional time for all pupils." MCL 380.1307h. It addresses how schools may handle students who are extremely disruptive or a danger to themselves or others. The School Code's "restraint" regulation has no applicability to a use of a face mask used to help prevent a disease from spreading.

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