

Who Has Authority Over Health Issues?

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My pledge to you for today's discussion:

- I will not be yelling at you.
- I find no fault with a decision you made.
- I do not wish to speak during public comment.
- I am not threatening to pull my kids out of your school.
- I would not like out of my contract early.
- I will try to give you the information you need to help you in your role.
- **I, along with my colleagues at KASB, appreciate your service.**



Would you say there was tension at your last board meeting? I thought I noticed some.

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- There is no state of disaster emergency declared in Kansas unless your county or city has declared one locally.
 - This means there are no gubernatorial executive orders and no SB 40 applying to USDs.
 - SB 40 had two main provisions of interest to districts, one making COVID-19 related decisions pertaining to schools the board's sole responsibility and one allowing a method for individuals to challenge these board decisions.
 - However, the Kansas Supreme Court will be hearing a case on SB 40's constitutionality.

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K.S.A. 72-1138

- **(e)(1)** The board may transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop and operate local public schools.
- **(2)** The power granted by this subsection **shall not be construed to relieve a board from compliance with state law.**
- **The power granted by this subsection shall not be construed to relieve any other unit of government of its duties and responsibilities that are prescribed by law, nor to create any responsibility on the part of a school district to assume the duties or responsibilities that are required of another unit of government.**
- **(3)** The board shall exercise the power granted by this subsection by resolution of the board of education.



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What is a county's authority to tell us what to do in the school setting?

We believe the County Commissioners, sitting as the County Board of Health, have the authority to require schools to enforce a mask mandate, put limits on gatherings, etc. The school board's home rule powers do not supersede the county's authority, as it is expressly granted by statute.

We believe the district can impose a mask mandate or other safety protocol when a county has not, so the fact your county has not issued a mandate does not preclude the board from issuing a system-wide requirement if you so choose under your home rule authority.

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Here's why I say this...

- HB 2016
 - Section 35, Subsection (a), says:
 - K.S.A. 48-932 is amended to allow a state of local disaster emergency to be declared by the chairman of the board of county commissioners or by the mayor or chief executive officer of any city having a disaster emergency plan. These would continue not more than 7 days unless renewed or consented to by the board of county commissioners the declaration may be reviewed, amended, or revoked by the board of county commissioners or the governing body of the city, respectively, at a meeting of such governing body. Under (b), the county board of commissioners or city council could declare one in absence of their leader.
 - In Section 37, subsection (b), it provides:
 - **Any order issued by the local health officer**, including orders issued as a result of an executive order of the governor, **may be reviewed, amended or revoked by the board of county commissioners of the county affected by such order at a meeting of the board. Any order reviewed or amended by the board shall include an expiration date set by the board and may be amended or revoked at an earlier date by a majority vote of the board.**
 - Section 36, referring to K.S.A. 48-939, references how violations of the action could incur civil penalties of \$2,500 per violation.
 - Section 38, Subsection (c): (2) **Any order issued by the local health officer, including orders issued as a result of an executive order of the governor, on behalf of a county regarding the remediation of any infectious disease may be reviewed, amended or revoked by the board of county commissioners of any county affected by such order in the manner provided by K.S.A. 65- 201(b), and amendments thereto.**

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Here's why I say this, continued...

- In SB 40
 - Sec. 8. K.S.A. 2020 Supp. 48-932 is hereby amended to read as follows:
 - (a) A state of local disaster emergency may be declared by the chairperson of the board of county commissioners of any county, or by the mayor or other principal executive officer of each city of this state having a disaster emergency plan, upon a finding by such officer that a disaster has occurred or the threat thereof is imminent within such county or city. No state of local disaster emergency shall be continued for a period in excess of seven days or renewed, except with the consent of the board of county commissioners of such county or the governing body of such city.
 - (e) (1) Any party aggrieved by an action taken by a local unit of government pursuant to this section that has the effect of substantially burdening or inhibiting the gathering or movement of individuals or the operation of any religious, civic, business or commercial activity, whether for-profit or not-for-profit, may file a civil action in the district court of the county in which such action was taken within 30 days after such action is taken.

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- SB 40, Section 12, Subsection (b) (1) Except as provided in paragraph (2), any order issued by the local health officer, including orders issued as a result of an executive order of the governor, may be reviewed, amended or revoked by the board of county commissioners of the county affected by such order at a meeting of the board. Any order reviewed or amended by the board shall include an expiration date set by the board and may be amended or revoked at an earlier date by a majority vote of the board.
 - (2) **If a local health officer determines it is necessary to issue an order mandating the wearing of face masks, limiting the size of gatherings of individuals, curtailing the operation of business, controlling the movement of the population of the county or limiting religious gatherings, the local health officer shall propose such an order to the board of county commissioners. At the next regularly scheduled meeting of the board or at a special meeting of the board, the board shall review such proposed order and may take any action related to the proposed order the board determines is necessary.** The order shall become effective if approved by the board or, if the board is unable to meet, if approved by the chairperson of the board or the vice chairperson of the board in the chairperson's absence or disability...
- (d) (1) Any party aggrieved by an order issued pursuant to subsection (b)(2) may file a civil action in the district court of the county in which the order was issued within 30 days after such order is issued. Notwithstanding any order issued pursuant to K.S.A. 2020 Supp. 20-172(a), and amendments thereto, the court shall conduct a hearing within 72 hours after receipt of a petition in any such action. The court shall grant the request for relief unless the court finds such order is narrowly tailored to the purpose stated in the order and uses the least restrictive means to achieve such purpose. The court shall issue an order on such petition within seven days after the hearing is conducted. If the court does not issue an order on such petition within seven days, the relief requested in the petition shall be granted. (2) Relief under this section shall not include a stay or injunction concerning the contested action that applies beyond the county in which the action was taken. (3) The supreme court may adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including, but not limited to, rules for consolidation of similar hearings.
- New Sec. 14. The provisions of this act are severable. **If any portion of the act is declared unconstitutional or invalid, or the application of any portion of the act to any person or circumstance is held unconstitutional or invalid, the invalidity shall not affect other portions of the act that can be given effect without the invalid portion or application, and the applicability of such other portions of the act to any person or circumstance shall remain valid and enforceable.**

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So, what if we don't comply?



48-933. Duty of individuals during disaster emergencies; compensation for loss of property, exceptions; claims procedure.

(a) Each person within this state shall act and manage the affairs of such person and such person's property in any way which reasonably will assist and not detract from the ability of the state and the public successfully to meet disasters. This obligation includes appropriate personal service and use or restriction on the use of property during a declared state of disaster emergency under [K.S.A. 48-924](#), and amendments thereto, or a declared state of local disaster emergency under [K.S.A. 48-932](#), and amendments thereto. This act neither increases nor decreases these obligations, but recognizes their existence under the constitution and statutes and the common law of this state. Compensation for services or for the taking or use of property shall be only to the extent that obligations recognized in this subsection are exceeded in a particular case and then only to the extent that the claimant may not be deemed to have volunteered services or property without compensation.

48-935. Force and effect of municipal ordinances during disaster emergencies.

Any ordinance of any municipality authorizing the mayor or other persons to act during a state of disaster emergency proclaimed under [K.S.A. 48-924](#) or during a state of local disaster emergency declared under [K.S.A. 48-932](#), **shall be in full force and effect** except for the provisions of such ordinance which are in conflict with any provision of this act or of the state disaster emergency plan or of the applicable local and interjurisdictional disaster emergency plans in which case such conflicting provisions of such ordinance shall be null and void for all purposes.

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In Other News...



- Centers for Disease Control and Prevention
 - Given new evidence on the B.1.617.2 (Delta) variant, CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status. Children should return to full-time in-person learning in the fall with layered prevention strategies in place.
 - The CDC recommends that, especially in areas of substantial to high transmission, people who are not fully vaccinated wear a mask in crowded outdoor settings or during activities that involve sustained close contact with other people who are not fully vaccinated.

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In Other News...

- An order of the federal Department of Health and Human Services was issued January 29th.
 - [Mask-Order-CDC GMTF 01-29-21-p.pdf](#)
- Things to note:
 - Unlike President Biden's January 21st order, this one applies to "conveyance" which is defined in 42 CFR 70.1 as "an aircraft, train, road vehicle, vessel, or other means of transport, including military." No exclusion for school bus there. (Biden's order, [Executive Order on Promoting COVID-19 Safety in Domestic and International Travel | The White House](#)) refers to "all forms of public transportation as defined section 5302 of title 49, United States Code" which specifically exempts school bus services (14)(B)(iv)).
 - On May 12th, the TSA issued this update to a previous security directive [sd-1582-84-21-01a.pdf \(tsa.gov\)](#).
- As a result, KDHE and KSDE recommend you follow federal law, which requires wearing a mask while on the bus.

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What MUST we report about positive cases?

- Teachers, nurses, social workers, and school administrators are required to report each suspected case of COVID-19 to the Kansas Department of Health and Environment within 4 hours of knowledge of the suspected case. [K.A.R. 28-1-2(a)(13),(19)]
- They are to report the first and last names as well as middle initial, the full address, telephone number, date of birth, sex, race, ethnicity, pregnancy status, date of onset of symptoms, and the diagnosis in a manner specified by KDHE for such reports.

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What info do we provide about close contacts?

School officials are not contact tracers under Kansas law.

The law about compelled disclosure does not apply to those only suspected of having close contact with someone with COVID-19, although it is within the district's ability to share information with county health which will aid them in identifying close contacts.

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Can a school order a staff member or a student to quarantine?

Schools cannot order staff, students, or guests to quarantine. However, there are instances, such as when individuals are exhibiting symptoms, when they can be excluded temporarily.

In the case of students, the school may continue to provide educational services by providing access to homework during absences, by offering remote learning, or by getting students access to virtual school options. Similarly, districts need to continue services required by the child's individualized education program in accordance with federal and state law.

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The local health officer or the secretary of KDHE may:

- Issue an order requiring an individual who the local health officer or the secretary has reason to believe has been exposed to an infectious or contagious disease to seek appropriate and necessary evaluation and treatment, such as requiring an individual to get tested for COVID-19;
- When determined that it is medically necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease, they may order an individual or group of individuals to go to and remain in places of isolation or quarantine until the local health officer or the secretary determines that the individual no longer poses a substantial risk of transmitting the disease or condition to the public. [K.S.A. 65-129b]

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What if a person is ordered to quarantine but refuses?



- K.S.A. 65-122 provides that no person afflicted with an infectious or contagious disease dangerous to the public health shall be admitted into any public school. Similarly, it provides that parents, guardians, and principals or other persons in charge of any public school exclude from school any child or other person affected with a disease suspected of being infectious or contagious until the expiration of the prescribed period of isolation or quarantine for the particular infectious or contagious disease.
- LHD or the secretary have the authority to quarantine individuals both diagnosed as having COVID-19 and those that they have determined to be exposed to the disease. For the purposes of K.S.A. 65-122, we have interpreted all such individuals to be “affected” by the disease to implicate the school’s requirement to exclude students for the period of isolation or quarantine. Once such an order is made, the LHD and/or the secretary may also order any sheriff, deputy sheriff, or other law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order issued under this authority. [K.S.A. 65-129b] Any person violating, refusing or neglecting to obey any of the rules and regulations adopted by the secretary of health and environment for the protection, suppression and control of infectious or contagious diseases, or who violates quarantine or conceals a case of infectious or contagious disease is guilty of a Class C misdemeanor. [K.S.A. 65-129]

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Can a school board overrule or decide whether to follow those local health department directives?

- K.S.A. 72-1138(e)(1) provides that a school board may “transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop and operate the local public schools.”
- The board is able to adopt policy, reopening plans, and COVID-19 safety protocols as it deems necessary. However, this does not get the district out of compliance with law, including when they are given a lawful order by another authorized entity to do something.
- In the case of quarantine orders, districts have an obligation to exclude persons under these orders for the duration of the order as stated in state statute, and the board has no legal authority to usurp the power vested in LHD or the secretary to make these orders or to not exclude individuals in accordance with an effective order, as is their statutory responsibility.
- Of course, in the absence of a county mandate, a district can always use the board’s home rule authority to put in place the protocols it deems necessary to protect the public health and safety. Similarly, we believe districts could, unless a county order would preclude it, put in safety protocols above and beyond what the county is requiring through its home rule authority.

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Could we require students of age to receive the COVID-19 vaccine to get fully vaccinated prior to attending school or participating in school activities?



- The Kansas Department of Health and Environment maintains a list of immunizations that school aged children are required by law to receive prior to attending school, unless the child qualifies for an exemption. When a student has not received a required immunization, then K.S.A. 72-6265 provides that boards of education may, but are not required to, exclude students who have not completed the immunizations required for their age or grade level as designated by the Secretary.
- Vaccination for COVID-19 was not added to this list prior to this school year’s commencement.
- As Kansas law gives students residing in each district both a right to attend public K-12 schools and, in the case of compulsory school attendance law in K.S.A. 72-3120 et seq., an obligation to do so, excluding students from regular school attendance who are eligible for the vaccination and yet have not received it is not authorized by law.
- Although there is more flexibility in extra-curricular activities, we fear having such a policy would have a disparate impact on students with disabilities or conditions covered by Section 504.

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Could we require all district staff to get vaccinated for COVID-19?

The federal equal employment opportunity (“EEO”) laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII, the Americans with Disabilities Act (“ADA”), and other EEO considerations discussed below. In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer’s business.

The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) or for religion.

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Are there ways we can incentivize our employees to get vaccinated?

The EEOC has said that offering incentives to employees to voluntarily provide proof of vaccination is an acceptable practice. However, we must keep in mind that there are legitimate health and religious reasons why one may choose not to get vaccinated and consider the impact of those incentives on this population.

While recognizing incentives can be used, the EEOC cautions employers that certain incentives could violate present law or be seen as coercive. For example, a large financial or paid leave incentive could make employees feel pressured to disclose protected medical information regarding why they are not getting vaccinated. Therefore, it is recommended that any incentive policy does not discriminate against employees who decline to take the vaccine due to medical conditions or on religious grounds.



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Let's Talk Liability



- When liability is being determined, it generally matters:
 - What did you know?
 - When did you know about it?
 - What did you do with that info?
- We do not recommend ignoring orders of county health officials responding to the level of outbreak in your county.
- We encourage decisions regarding pandemic response in the school district be made only after consulting and carefully considering guidance that is made available by the CDC, the Kansas Department of Health and Environment, the Kansas State Department of Education, or other governmental agencies with specialized knowledge on these topics.
- Finally, the board should always avoid being deliberately indifferent in its actions or inaction to known risks.
 - Boards are generally found to be deliberately indifferent and, therefore more likely liable in negligence actions, if they show through how they conduct themselves that they knew of a significant danger to students or staff yet did not act as a reasonable person would to reduce risk of harm to those individuals.

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Are we protected from liability if we do testing for COVID-19 at school?

- No school insurance product on the market insures against contraction of contagious disease, and testing of this sort is not covered, either.
- Given there is no coverage from a district's insurance carrier if testing is done at the school, the Public Readiness and Emergency Preparedness (PREP) Act would provide immunity for liability regarding testing programs if one of two criteria is met.
 - The first way a district can be covered is to provide facilities for testing and/or vaccinations. In this role, the district is considered a "program planner", and the district and its employees can be immune from liability. In practical terms, this would mean reserving a space for the county health department or other entity to come in and do the testing within your facility, but your staff members would not conduct the testing themselves.
 - The second way to have liability protection is for the district to enter into an agreement with the local health department whereby the parties agree school nurses or other qualified personnel (which are limited to medical professionals generally) are acting under the direction of the health department to administer COVID testing and/or vaccines.

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Hang on. Things will get better. Let's focus on the upside.

This, too, shall pass. Last year was a dumpster fire, and you made it through with flying colors.

Perhaps it's a sign of positive change that your internal and external publics are worried less about imminent death by COVID-19 and more about what you are doing.

Hey, your schools were open for in-person attendance on time this year!

The whole world is better off now that Angie isn't at the helm of her children's remote education.



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