



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

August 11, 2020

ATTORNEY GENERAL OPINION NO. 2020- 8

Hon. Kristey Williams
State Representative, 77th District
506 Stone Lake Court
Augusta, KS 67010

Hon. Renee Erickson
State Representative, 87th District
26 N. Cypress Dr.
Wichita, KS 67206

Hon. Ty Masterson
State Senator, 16th District
P.O. Box 424
Andover, KS 67002

Hon. Cheryl Helmer
State Representative, 79th District
1066 E. 130th N.
Mulvane, KS 67110

Hon. Tory Marie Arnberger
State Representative, 112th District
PO Box 103
Great Bend, KS 67530

Hon. Kyle Hoffman
State Representative, 116th District
1318 Avenue T
Coldwater, KS 67029

Hon. Emil Bergquist
State Representative, 91st District
6430 N. Hydraulic
Park City, KS 67219

Hon. Steve Huebert
State Representative, 90th District
619 North Birch
Valley Center, KS 67147

Hon. Blake Carpenter
State Representative, 81st District
1300 E Meadowlark Blvd Apt 2203
Derby, KS 67037

Hon. Susan Humphries
State Representative, 99th District
8 Sagebrush St.
Wichita, KS 67230

Hon. Leo Delperdang
State Representative, 94th District
2103 N. Pintail
Wichita, KS 67203

Hon. Brenda Landwehr
State Representative, 105th District
2611 N. Bayside Ct.
Wichita, KS 67205

Senator Masterson and Representatives Williams, Arnberger, Bergquist, Carpenter, Delperdang, Erickson, Helmer, Hoffman, Huebert, Humphries, Landwehr, Mason, Owens, Rhiley, Seiwert, A. Smith, Tarwater, Thimesch, Thomas, Waggoner, and Wasinger
Page 2

Hon. Les Mason
State Representative, 73rd District
108 Arcadian Court
McPherson, KS 67460

Hon. Sean Tarwater
State Representative, 27th District
16006 Meadow Lane
Stilwell, KS 66085

Hon. Stephen Owens
State Representative, 74th District
P.O. Box 606
Hesston, KS 67062

Hon. Jack Thimesch
State Representative, 114th District
11716 SW 80th Street
Spivey, KS 67142

Hon. Bill Rhiley
State Representative, 80th District
403 S. West Road
Wellington, KS 67152

Hon. Adam Thomas
State Representative, 26th District
16272 S. Sunset St.
Olathe, KS 66062

Hon. Joe Seiwert
State Representative, 101st District
1111 East Boundary Road
Pretty Prairie, KS 67570

Hon. Paul Waggoner
State Representative, 104th District
600 E. 73rd
Hutchinson, KS 67502

Hon. Adam Smith
State Representative, 120th District
1970 RD 3
Weskan, KS 67762

Hon. Barbara Wasinger
State Representative, 111th District
P.O. Box 522
Hays, KS 67601

Re: Militia, Defense and Public Safety—Emergency Preparedness for Disasters—Disasters; Responsibilities of Governor; State of Disaster Emergency; Powers of Governor During State of Disaster Emergency; Orders and Proclamations

Synopsis: Because Executive Order 20-59 is a statewide order relating to public health, boards of county commissioners have statutory authority under L. 2020 Special Session, Ch. 1, § 33 to issue an order relating to public health that is less stringent than the provisions of Executive Order 20-59, if the required statutory findings are made. Boards of county commissioners, acting as a county board of health, also have authority under L. 2020 Special Session, Ch. 1, §§ 37 and 38, to review, amend, or revoke any orders issued by a local health officer as a result of an executive order of the governor. In addition, local public schools also may obtain such flexibility from their local school boards, which ordinarily have statutory and constitutional authority to adopt local policies governing matters such as wearing masks, social distancing, washing hands, and temperature taking in local schools, and Executive Order 20-59 has not displaced that preexisting local authority. Cited herein: K.S.A.

19-212; K.S.A. 2019 Supp. 48-925; K.S.A. 65-201; 65-202; 72-516; K.S.A. 2019 Supp. 72-1138; K.S.A. 75-3708; L. 2020 Special Session, Ch. 1, §§ 5, 7, 25, 33, 34, 36, 37, 38; Kan. Const. Art. 6, §§ 2, 5.

* * *

Dear Senator Masterson and Representatives Williams, Arnberger, Bergquist, Carpenter, Delperdang, Erickson, Helmer, Hoffman, Huebert, Humphries, Landwehr, Mason, Owens, Rhiley, Seiwert, A. Smith, Tarwater, Thimesch, Thomas, Waggoner, and Wasinger:

As State Senator and State Representatives for your respective districts, you request our opinion on the legal authority and flexibility of two types of local government entities regarding the governor's Executive Order 20-59¹ ("Requiring COVID-19 mitigation procedures in K-12 schools") and proposed Executive Order 20-58² ("Delaying the 2020-2021 K-12 school year") had it become effective. First, you inquire about the legal authority of boards of county commissioners to adopt public health orders that are less stringent than provisions of those two executive orders. Second, you ask about the authority of local school boards in governing the subject matter covered by those two executive orders in ways that may differ from the provisions of those orders. Because the State Board of Education did not affirm³ delaying the 2020-2021 school year for grades K-12 as stated in the proposed Executive Order 20-58⁴ and that order is not in effect, we consider questions about it moot and will address your questions only as they apply to Executive Order 20-59.⁵

We note what should be obvious: We provide our legal opinion on the relative legal authorities of the governor, boards of county commissioners and local school boards and express no opinion about the wisdom or advisability of whatever policy decisions any of

¹ Executive Order No. 20-59, *Kansas Register*, Vol. 39, No. 30, pg. 986, July 23, 2020, https://sos.ks.gov/publications/register/2020/Vol_39_No_30_July_23_2020_pages_967-992.pdf (last accessed August 2, 2020).

² Executive Order No. 20-58, (unsigned), <https://kslib.info/DocumentCenter/View/8445/EO-20-58> (last accessed August 3, 2020).

³ The law provides that the governor shall not issue an executive order pursuant to the Kansas Emergency Management Act "that has the effect of closing public or private school attendance centers in [Kansas] unless and until such [proposed executive order] is affirmed" by a resolution adopted by a majority of the State Board of Education members. The "best interest of the students" standard is to be used by the State Board of Education to determine whether to affirm a proposed executive order. L. 2020 Special Session, Ch. 1, § 7.

⁴ Summary of the July 22, 2020 State Board of Education Special Meeting, <https://www.ksde.org/Portals/0/Board/Documents/Bd%20Summary%20for%20July%2022%202020%20Sp%20Mtg.pdf?ver=2020-07-30-092652-653> (last accessed August 1, 2020).

⁵ In general, we think the legal analysis under the Kansas Emergency Management Act (KEMA) for Executive Order 20-58 would be similar to that for Executive Order 20-59 but would be complicated by the role of the Kansas State Board of Education in orders that have the effect of closing school attendance centers. For example, if the State Board of Education were to vote to affirm such an order issued by the governor under authority of the KEMA, it would be necessary also to analyze the effect, if any, of the Kansas Constitution's grant to the State Board of Education of general supervisory authority over local public schools, educational institutions and all the educational interests of the state. See Kan. Const. Art. 6, § 2.

those entities may make. Before addressing your questions, we provide some background that may be helpful in understanding the context in which your questions arise.

Background

During the 2020 Special Session of the legislature, the legislature enacted HB 2016⁶ in response to the 2020 COVID-19 pandemic in Kansas and the governor signed the bill into law. The following provisions of the new law are relevant to this opinion. First, the law ratified and continued from March 12, 2020, through September 15, 2020, the COVID-19-related state of disaster emergency proclaimed by the governor.⁷ However, the new law restricts the scope of authority granted to the governor pursuant to this extended state of disaster emergency⁸ and also prohibits the governor from declaring any new COVID-19-related states of disaster emergency during 2020 (while the legislature is not in Session) unless the governor makes an application to the State Finance Council and such action is approved by a vote of at least six of the eight legislative members⁹ of the State Finance Council.¹⁰

Second, until January 26, 2021,¹¹ the law specifically limits the scope of authority granted to the governor by K.S.A. 2019 Supp. 48-925(c)(11), which is a sort of catchall delegation to exercise emergency powers, duties and functions. The statute now specifies that this catchall authority may be exercised only in conformity with the Constitution of the State of Kansas, the Bill of Rights, and with the statutes of the State of Kansas, except any

⁶ L. 2020 Special Session, Ch. 1, §§ 1 through 43 was approved by the governor on June 8, 2020, and effective upon publication in the *Kansas Register* on June 9, 2020. See *Kansas Register*, Vol. 39, No. 23A, pgs. 755-771, July 23, 2020, https://sos.ks.gov/publications/register/2020/Vol_39_No_23A_June_9_2020_pages_753-776.pdf (last accessed August 1, 2020).

⁷ Specifically, the law ratified and continued the COVID-19-related state of disaster emergency proclaimed by the governor on March 12, 2020, that was ratified and continued by 2020 House Concurrent Resolution 5025 through May 1, 2020; the COVID-19-related state of disaster emergency proclaimed by the governor on April 30, 2020, that was extended and continued by the State Finance Council through May 26, 2020; and ratified and continued the COVID-19-related state of disaster emergency proclaimed by the governor on May 26, 2020. L. 2020 Special Session, Ch. 1, New § 5(a).

⁸ The governor does not have the power or authority to restrict businesses from operating, to restrict the movement or gathering of individuals, or to alter or modify any provisions of the elections laws. L. 2020 Special Session, Ch. 1, § 33(e), and (f).

⁹ K.S.A. 75-3708 provides, in pertinent part, "There is hereby created the state finance council consisting of nine members. The members of the finance council shall be (1) the governor, (2) the president of the senate, (3) the speaker of the house of representatives, (4) the majority floor leader of the senate, (5) the minority floor leader of the senate, (6) the chairperson of the senate committee on ways and means, (7) the majority floor leader of the house of representatives, (8) the minority floor leader of the house of representatives, and (9) the chairperson of the house of representatives committee on appropriations."

¹⁰ L. 2020 Special Session, Ch. 1, New § 5(b).

¹¹ L. 2020 Special Session, Ch. 1, § 34 provides that on January 26, 2021, K.S.A. 2019 Supp. 48-925 reverts to the law as it was prior to the amendments by 2020 Special Session, Ch. 1, § 33. Put simply, the amendments made in § 33 are temporary and only in effect until January 26, 2021.

regulatory statute specifically suspended under the Kansas Emergency Management Act (KEMA).¹²

Third, until January 26, 2021, the law authorizes the board of county commissioners of any county to issue an order relating to public health that contains provisions that are less stringent than the provisions of a statewide executive order issued by the governor.¹³ Any board of county commissioners issuing such an order shall make the following specific findings and include them in the order: 1) the Board has consulted with the local health officer or other local health officials regarding the governor's executive order; 2) following such consultation, implementation of the full scope of provisions in the governor's executive order is not necessary to protect the public health and safety of the county; and 3) all other relevant findings to support the Board's decision.¹⁴

Fourth, the law amends K.S.A. 65-201 to require any board of county commissioners to act as the county board of health.¹⁵ It also provides that any board of county commissioners may review, amend, or revoke any order issued by the local health officer, including orders issued as a result of an executive order of the governor.¹⁶ Similarly, the law amends K.S.A. 65-202(c) to authorize the board of county commissioners of any county affected by any order issued by its local health officer regarding remediation of any infectious disease, including orders issued as a result of an executive order of the governor, to review, amend or revoke such order.¹⁷ Counties are prohibited from exempting themselves from or effecting changes in K.S.A. 65-201 and K.S.A. 65-202, and amendments thereto.¹⁸

Analysis

With this background firmly in mind, we turn to your specific questions regarding Executive Order 20-59. On July 20, 2020, the governor issued Executive Order 20-59, which outlines procedures "to ensure that K-12 schools can operate as safely as possible and mitigate the spread of COVID-19."¹⁹ We will address whether boards of county commissioners are authorized to adopt less stringent requirements than the provisions of Executive Order 20-59. We will also address whether local public school boards have flexibility to deviate from those provisions.

¹² L. 2020 Special Session, Ch. 1, § 33(c)(11).

¹³ This new specific authority is consistent with the general authority of boards of county commissioners to "perform such other duties as are or may be prescribed by law." K.S.A. 19-212.

¹⁴ L. 2020 Special Session, Ch. 1, § 33(h)(1), (2), and (3). See also FN 11.

¹⁵ L. 2020 Special Session, Ch. 1, § 37(a).

¹⁶ L. 2020 Special Session, Ch. 1, § 37(b).

¹⁷ L. 2020 Special Session, Ch. 1, § 38(c)(2).

¹⁸ L. 2020 Special Session, Ch. 1, §25(a)(39).

¹⁹ See FN 1.

Authority of Boards of County Commissioners

K.S.A. 2019 Supp. 48-925(h), as amended by L. 2020 Special Session, Ch. 1, § 33²⁰ provides:

(h) The board of county commissioners of any county may issue an order relating to public health that includes provisions that are less stringent than the provisions of an executive order effective statewide issued by the governor. Any board of county commissioners issuing such an order must make the following findings and include such findings in the order:

- (1) The board has consulted with the local health officer or other local health officials regarding the governor's executive order;
- (2) following such consultation, implementation of the full scope of the provisions in the governor's executive order are not necessary to protect the public health and safety of the county; and
- (3) all other relevant findings to support the board's decision.

Accordingly, any board of county commissioners in Kansas has statutory authority under L. 2020 Special Session, Ch. 1, § 33 to issue a local order relating to public health that is less stringent than the provisions of an executive order of the governor issued under the authority of the KEMA, if, 1) the governor's order is an "executive order effective statewide", 2) the order is "relating to public health", and 3) the three required statutory findings are made.²¹

We start our analysis with the rules of statutory interpretation established by the Kansas Supreme Court:

We must, first, try to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, we should not speculate about the legislative intent behind that clear language, and we should refrain from reading something into the statute that is not readily found in its words.²²

Effective Statewide: Executive Order 20-59 is an "executive order effective statewide." First, the plain and unambiguous text of the order addresses mitigation procedures in all

²⁰ See FN 11.

²¹ Although newly enacted in statute, this county "opt out" authority as it is colloquially known previously was widely exercised by all but a few counties to adopt provisions less stringent than Executive Order 20-52 (requiring masks or other face coverings in public). See <https://www.kansas.com/news/politics-government/article244091222.html> (last accessed August 10, 2020).

²² *Montgomery v. Saleh*, _____ Kan. _____, 2020 WL 3479264, at *4 (Nos. 117, 518 and 117,519, June 26, 2020) (internal citations omitted).

K-12 schools without any geographical or other relevant limitation. The order's text specifically applies to all public and private K-12 schools,²³ and there is at least one unified school district in each county in Kansas.²⁴ Second, the order is issued under authority of the state of disaster emergency proclaimed by the governor on March 12, 2020, which included "[a]ll 105 counties in Kansas";²⁵ and further proclaimed by the governor on April 30, 2020,²⁶ and May 26, 2020,²⁷ which each included "[a]ll 105 counties in Kansas; Iowa Tribe of Kansas and Nebraska; Kickapoo Tribe of Kansas; Prairie Band of Potawatomi Nation; and Sac and Fox Nation of the [sic] Missouri in Kansas and Nebraska"; and codified and extended by 2020 House Bill 2016, which specifically referenced the governor's proclamations and extended them without imposing any geographical limitation.²⁸ Thus, because the state of disaster emergency authorizing Executive Order 20-59 is in effect statewide and because the order itself applies to all K-12 schools in the state and does not impose or suggest any geographical limitation, we conclude that Executive Order 20-59 is an executive order effective statewide.

Relating to Public Health: Executive Order 20-59 is an "order relating to public health."²⁹ The Act neither defines nor provides standards for determining whether an order is one relating to public health, so we interpret the phrase by giving words their ordinary meaning. "Public health" generally is defined as "the art and science dealing with the protection and improvement of community health by organized community effort and including preventive medicine and sanitary and social science."³⁰ The purpose of the Kansas emergency response that includes Executive Order 20-59 is to protect and improve the health of the people of Kansas in general by combating the spread of COVID-19, a contagious or infectious disease that has become a global pandemic that is causing sickness and death in Kansas. That analysis of the statute's text is reinforced by the context in which Executive Order 20-59 was issued and by the plain and unambiguous text of the order itself.

²³ The text of proposed Executive Order 20-58 specified that it did not apply to non-accredited private schools. The text of Executive Order 20-59 contains no such exemption.

²⁴ See K.S.A. 72-516. See also, Kansas State Department of Education 2019-2020 Kansas Educational Directory of Kansas Unified School Districts, <https://www.ksde.org/Portals/0/Directories/2019-20%20Educational%20Directory/19-20-KSEDD-USD-Map.pdf?ver=2019-12-17-165921-913> (last accessed August 1, 2020).

²⁵ State of Disaster Emergency Proclamation, March 12, 2020, <https://governor.kansas.gov/wp-content/uploads/2020/03/2020-03-12-Proclamation.pdf> (last accessed August 2, 2020).

²⁶ State of Disaster Emergency Proclamation, April 30, 2020, <https://governor.kansas.gov/wp-content/uploads/2020/03/043020-COVID-19.pdf> (last accessed August 2, 2020).

²⁷ State of Disaster Emergency Proclamation, May 26, 2020, <https://governor.kansas.gov/wp-content/uploads/2020/05/2020-05-26-Proclamation.pdf> (last accessed August 2, 2020).

²⁸ L. 2020 Special Session, Ch. 1, New § 5(a).

²⁹ K.S.A. 2019 Supp. 48-925(h) addresses a *county* order "relating to public health" and does not specify that the governor's order must also be one relating to public health. In this case, we analyze the governor's order because if it is an order "relating to public health," then any less-stringent county order would necessarily relate to the same subject and therefore also be an order "relating to public health." Consequently, it is unnecessary to address that statutory ambiguity because both orders are "relating to public health."

³⁰ Public Health. Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/public%20health#h1> (last accessed August 10, 2020).

The text of Executive Order No. 20-59 describes the COVID-19 pandemic as a public health emergency,³¹ states that the “trend of increased COVID-19 spread is a danger to the health and safety of every Kansan”³² and asserts that it is necessary because the “safety and health of teachers, administrators, and students will be unnecessarily imperiled if schools reopen without commonsense mitigation measures in place.”³³ Executive Order 20-59 was issued under authority of the proclamations of a state of disaster emergency discussed above, and the text of those proclamations makes clear that the emergency is predicated on the effects of the global COVID-19 public health emergency in Kansas.³⁴ The order generally requires K-12 public and private schools to require all persons at a school attendance center to wear a mask, social distance, wash hands, and check temperatures³⁵ in an effort “to ensure that K-12 schools can operate as safely as possible and mitigate the spread of COVID-19.”³⁶ Thus, because the obvious purpose of the order is to respond to the global public health crisis in Kansas by attempting to mitigate the spread of COVID-19, and because the text of both the order itself and the state of disaster emergency proclamations upon which the order is predicated make that clear, we conclude that Executive Order 20-59 is an order relating to public health and so too would be any county order adopting any less-stringent provisions.

Required Statutory Findings: Having concluded that Executive Order 20-59 is an “executive order effective statewide” that is “relating to public health”, the only requirement remaining before a board of county commissioners may adopt a less-stringent provision than that in Executive Order 20-59 is making the three mandatory statutory findings.³⁷ Whether a board of county commissioners satisfies this statutory requirement is a question of fact outside the scope of this opinion.

Despite the above, it has been suggested that boards of county commissioners may not adopt orders less restrictive than the governor’s when the orders at issue involve the

³¹ Executive Order No. 20-59, *WHEREAS* clause 2.

³² Executive Order No. 20-59, *WHEREAS* clause 10.

³³ Executive Order No. 20-59, *WHEREAS* clause 11.

³⁴ “On March 7, 2020, the Secretary of the Kansas Department of Health & Environment (KDHE) confirmed the first case of novel coronavirus (COVID-19) in the state of Kansas and considers that a public health emergency exists within the state of Kansas.” State of Disaster Emergency Proclamation, March 12, 2020, <https://governor.kansas.gov/wp-content/uploads/2020/03/2020-03-12-Proclamation.pdf> (last accessed August 10, 2020). “On March 20, 2020, the president granted the State of Kansas an Emergency Declaration and directed the Department of Homeland Security, Federal Emergency Management Agency (FEMA), to provide appropriate assistance for required emergency measures to save live [sic] and to protect property and public health and safety, and lessen or avert the threat of a catastrophe in the state.” State of Disaster Emergency Proclamation, April 30, 2020, <https://governor.kansas.gov/wp-content/uploads/2020/03/043020-COVID-19.pdf> (last accessed August 10, 2020). “This Proclamation is necessary to protect Kansas from the current economic disaster and the imminent threat of additional disasters due to new spikes or outbreaks of COVID-19 cases.” State of Disaster Emergency Proclamation, May 26, 2020, <https://governor.kansas.gov/wp-content/uploads/2020/05/2020-05-26-Proclamation.pdf> (last accessed August 10, 2020).

³⁵ Executive Order No. 20-59, *WHEREAS* clause 13.

³⁶ Executive Order No. 20-59, *NOW, THEREFORE* clause.

³⁷ L. 2020 Special Session, Ch. 1, § 33.

regulation and oversight of local schools because county commissions have no legal authority over schools³⁸ and “[t]here is no indication that K.S.A. 2019 Supp. 48-925(h) [as amended] was intended to broaden a county commission’s powers to regulate where previously it had no such power.”³⁹ This suggestion is unpersuasive for at least two reasons. First, it has no basis in the plain and unambiguous text of K.S.A. 2019 Supp. 48-925(h), which does not distinguish executive orders of the governor relating to public health that apply in schools from other executive orders. Second, it misapprehends the nature of the 2020 Special Session House Bill 2016 amendments to KEMA. Prior to 2020 House Bill 2016, KEMA’s statutory scheme included various procedures and mechanisms that limited the governor’s authority to exercise the emergency powers it delegated.⁴⁰ The new provision in § 33 of 2020 House Bill 2016 granting authority to boards of county commissioners operates as a further check on the *governor’s* power—an additional procedure or mechanism that limits the governor’s exercise of emergency powers granted by KEMA, including any that apply to schools—not a freestanding grant of authority to boards of county commissioners to regulate schools.⁴¹

For the reasons above, we conclude that any board of county commissioners has the authority under L. 2020 Special Session, Ch. 1, § 33 to issue an order relating to public health that is less stringent than the provisions of Executive Order 20-59 if the required statutory findings are made.

Authority of Local School Boards

Local school boards are granted authority under the Constitution of the State of Kansas to manage their own affairs:

Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected

³⁸ “Schools are managed by local school boards in conjunction with the state board of education. Kan. Const. Art. 6, §§ 2, 5.” Letter to the Attorney General from Clay Britton, Chief Counsel, Office of the Governor, July 28, 2020.

³⁹ Letter to the Attorney General from Clay Britton, Chief Counsel, Office of the Governor, July 28, 2020.

⁴⁰ For example, the governor could exercise KEMA emergency powers only while a properly proclaimed state of disaster emergency was in effect (K.S.A. 2019 Supp. 48-925(b), as amended by L. 2020 Special Session, Ch. 1, § 33(b)), and the length of any emergency proclamation was limited unless ratified by action of the legislature (K.S.A. 48-924(b)(4)). Similarly, the governor could exercise KEMA emergency powers only by issuance of orders or proclamations. K.S.A. 48-924(b)(1).

⁴¹ Notably, however, the legislature did separately grant new, permanent authority to boards of county commissioners to review, amend, or revoke any order issued by the local health officer, including orders issued as a result of an executive order of the governor. L. 2020 Special Session, Ch. 1, § 37(b) (amending K.S.A. 65-201). The legislature also granted the board of county commissioners of any county affected by any order issued by its local health officer regarding remediation of any infectious disease, including orders issued as a result of an executive order of the governor, the authority to review, amend or revoke such order. L. 2020 Special Session, Ch. 1, § 38(c)(2) (amending K.S.A. 65-202). These new authorities do not expire on January 26, 2021. Thus, the legislature plainly intended to increase the role of boards of county commissioners in determining what health orders are in effect within their respective counties and drew no distinction in the statutes between orders directed at schools or directed otherwise.

boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the general supervision of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature.⁴²

While the Kansas Supreme Court has ruled that constitutional authority is not self-executing,⁴³ the legislature has granted local school districts limited statutory authority to execute that constitutional authority through K.S.A. 2019 Supp. 72-1138, which is often colloquially referred to as the “school district home rule statute.”⁴⁴ It states, in pertinent part:

(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 requirements included in Executive Order 20-59, such as wearing masks, social distancing, washing hands, and temperature takings, on their face appear to be the sorts of matters that fall within the local school board’s authority to “adopt policies” appropriate to “maintain, develop and operate local public schools.” Put another way, if Executive Order 20-59 did not exist, we think a local school board could exercise its authority to adopt for its local schools the same requirements contained in that executive order.⁴⁵ Thus, our analysis begins with an understanding that each local school board has *preexisting* home rule authority to decide the matters covered by Executive Order 20-59 unless the legislature by statute or the governor’s executive order has abrogated that preexisting local

⁴² Kan. Const. art. 6, § 5.

⁴³ “It appears clear that the legislature under § 1 of Article 6 has the broad duty of establishing the public school system. The local school board’s duties under § 5 of Article 6 are not self-executing but are dependent upon statutory enactments of the legislature. However, we do not imply that the legislature has carte blanche over the duties and actions of local school boards. The respective duties and obligations vested in the legislature and the local school boards by the Kansas Constitution must be read together and harmonized so both entities may carry out their respective obligations.” *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 253 (1994) (citing *Unified Sch. Dist. No. 380, Marshall Cty. v. McMillen*, 252 Kan. 451, 464 (1993)).

⁴⁴ K.S.A. 2019 Supp. 72-1138(e). See also, Letter to the Attorney General from Angela E. Stallbaumer, Attorney and Assistant Executive Director for Legal Services, Kansas Association of School Boards, July 28, 2020.

⁴⁵ Moreover, the State Board of Education has provided extensive guidance to local school districts on mitigating the spread of COVID-19. Navigating Change 2020: Kansas Guide to Learning and School Safety Operations, Kansas State Department of Education, August 5, 2020, https://www.ksde.org/Portals/0/Communications/Navigating%20Change/Navigating_Change.pdf?ver=2020-07-15-183032-667 (last accessed August 11, 2020). To the extent a local school boards may act consistent with that guidance, it could rely for legal authority on the *combination* of its preexisting local authority and in addition the general supervisory authority of the State Board of Education.

authority.⁴⁶ We are unaware of any state statute that denies local school boards authority over the matters covered by Executive Order 20-59,⁴⁷ so we will focus exclusively on whether Executive Order 20-59 has done so.

Neither the plain text of Executive Order 20-59 nor that of K.S.A. 2019 Supp. 48-925, which is the statutory basis for that executive order, suspends the preexisting authority of local school districts to make decisions regarding wearing masks, social distancing, washing hands, and temperature takings.⁴⁸ To exercise the emergency powers delegated by K.S.A. 2019 Supp. 48-925, the governor must “specify the provision or provisions of subsection (c) [of K.S.A. 2019 Supp. 48-925] by specific reference to each paragraph of subsection (c) that confers the power under which the order was issued.”⁴⁹ Pursuant to that statutory requirement, Executive Order 20-59 specifies it was issued under authority of K.S.A. 2019 Supp. 48-925(c)(1)⁵⁰ and (c)(11). We will analyze each in turn.

K.S.A. 2019 Supp. 48-925(c)(1) authorizes the governor to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute, if strict compliance with the provisions of such statute, order or rule and regulation would prevent, hinder or delay in any way necessary action in coping with the disaster.” Executive Order 20-59 does not exercise authority derived from that subparagraph to suspend local school board home rule authority for at least two reasons. First, the plain text of Executive Order 20-59 does not purport to do so.⁵¹ In fact, despite citing (c)(1) as a statutory subsection that confers the power for its issuance, Executive Order 20-59 does not specify *any* statute that it suspends, and K.S.A. 2019 Supp. 72-1138 (school board home rule authority) is not mentioned in the executive order nor are local school boards mentioned at all. Second, we doubt K.S.A. 2019 Supp. 72-1138 is a statute that may be suspended under authority of

⁴⁶ We also recognize that a local school board’s authority must be exercised consistent with the general supervisory authority of public schools, educational institutions and all the educational interests of the state granted to the State Board of Education by the Kansas Constitution. See Kan. Const. art. 6, § 5. The relationship between the authority of local school boards and the State Board of Education is not presented by your questions or addressed in this Opinion.

⁴⁷ The legislature did not enact any provision in L. 2020 Special Session, Ch. 1 that explicitly rescinds the preexisting authority of local school districts to adopt policies that the board deems appropriate for operating public schools during this pandemic. We have not researched other statutes previously in existence but have no reason to suspect they denied local school boards authority over the subject matter addressed by Executive Order 20-59. See K.S.A. 2019 Supp. 72-1138(e).

⁴⁸ See K.S.A. 2019 Supp. 48-925(c)(1).

⁴⁹ L. 2020 Special Session, Ch. 1, § 33(g). See *also* FN 11.

⁵⁰ K.S.A. 2019 Supp. 48-925(c)(1) authorizes the governor to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute, if strict compliance with the provisions of such statute, order or rule and regulation would prevent, hinder or delay in any way necessary action in coping with the disaster.”

⁵¹ The absence of any language in Executive Order 20-59 purporting to preempt local authority stands in stark contrast with previous executive orders issued in response to COVID-19 in which the governor has specifically claimed to exercise authority to preempt local authority. See, e.g., Executive Orders 20-07 20-08, 20-09, 20-10, 20-11, 20-12, 20-13, 20-14, 20-16, 20-17, 20-18, 20-21, 20-22, 20-24, 20-25, 20-28, 20-33, 20-35, 20-36, 20-37, 20-38, 20-44, 20-45, 20-50, 20-55, and 20-57.

K.S.A. 2019 Supp. 48-925(c)(1).⁵² That subparagraph does not grant the governor authority to suspend *any* statute; rather, it is limited to permitting the governor to suspend only certain provisions of “regulatory statute[s] prescribing the procedures for conduct of state business.” K.S.A. 2019 Supp. 72-1138 does not “prescrib[e] the procedures for conduct of state business” but instead grants statutory home rule authority to local school boards. We also doubt K.S.A. 2019 Supp. 72-1138 is a “regulatory” statute within the meaning of K.S.A. 2019 Supp. 48-925(c)(1). In the absence of a statutory definition, we turn to the common meaning of “regulatory” which is “of or relating to regulation”.⁵³ “Regulation” is an authoritative rule dealing with details or procedure.”⁵⁴ By that definition, K.S.A. 2019 Supp. 72-1138 does not regulate anything; rather, it grants home rule authority to local school boards.

K.S.A. 2019 Supp. 48-925(c)(11), a sort of catchall delegation of emergency power, authorizes the governor to “perform and exercise such other functions, powers and duties ... as are necessary to promote and secure the safety and protection of the civilian population.” But that subparagraph was significantly amended by L. 2020 Special Session, Ch. 1, § 33(c)(11) and now includes explicit restrictions on its previously sweeping language. By the statute’s terms, the authority of (c)(11) now may be exercised only “in conformity with the constitution and the bill of rights of the state of Kansas and with the statutes of the state of Kansas, except any regulatory statute specifically suspended under the authority of subsection (c)(1).”⁵⁵ Given that plain and unambiguous statutory language, subparagraph (c)(11) does not enable Executive Order 20-59 to suspend local school board home rule authority for at least three reasons. First, Executive Order 20-59 does not mention K.S.A. 2019 Supp. 72-1138; thus, that statute has not been “specifically suspended under the authority of subsection (c)(1).” Second, the same doubt that K.S.A. 2019 Supp. 72-1138 is a “regulatory” statute, as discussed above, applies here because the plain text of (c)(11) now incorporates the “regulatory statute” limitation. Third, the plain text of (c)(11) authorizes the governor to issue *only* orders that are “in conformity with ... statutes of the state of Kansas” that have not been properly suspended; because K.S.A. 2019 Supp. 72-1138 has not been (and likely cannot be) suspended by executive action, K.S.A. 2019 Supp. 48-925(c)(11) authorizes only executive orders that are “in conformity with” school district home rule.

For the reasons above, the preexisting statutory and constitutional authority of local school boards to adopt local policies for the operation of local schools regarding wearing masks,

⁵² We recognize that the school district home rule statute itself specifies that the self-governing authority of local school boards is limited by state law, see K.S.A. 2019 Supp. 72-1138(e)(2), and that makes our analysis on this point a somewhat closer call. But the initial question would be whether K.S.A. 2019 Supp. 48-925(c)(11) grants the governor emergency power that can suspend a local school board’s home rule authority granted by K.S.A. 2019 Supp. 72-1138, and for the reasons set forth herein we think the answer is “no.”

⁵³ Regulatory. Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/legal/regulatory> (last accessed August 10, 2020).

⁵⁴ Regulation. Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/regulation> (last accessed August 10, 2020).

⁵⁵ L. 2020 Special Session, Ch. 1, § 33(c)(11). See also, FN 11.

social distancing, washing hands, and temperature takings in local schools has not been displaced by Executive Order 20-59.⁵⁶ Consequently, local school boards retain their authority to adopt different or modified local requirements on these subjects.⁵⁷

Conclusion

Local public or private schools that seek flexibility to deviate from the requirements set forth in Executive Order 20-59 may obtain that flexibility from a less-restrictive order adopted by the board of county commissioners. Because Executive Order 20-59 is a statewide order relating to public health, boards of county commissioners have statutory authority under L. 2020 Special Session, Ch. 1, § 33 to issue an order relating to public health that is less stringent than the provisions of Executive Order 20-59, if the required statutory findings are made. Boards of county commissioners, acting as a county board of health, also have authority under L. 2020 Special Session, Ch. 1, §§ 37 and 38, to review, amend, or revoke any orders issued by a local health officer as a result of an executive order of the governor. In addition, local public schools also may obtain such flexibility from their local school boards, which ordinarily have statutory and constitutional authority to adopt local policies governing matters such as wearing masks, social distancing, washing hands, and temperature taking in local schools, and Executive Order 20-59 has not displaced that preexisting local authority.

Sincerely,

Derek Schmidt
Kansas Attorney General

Athena E. Andaya
Deputy Attorney General

DS:AA:sb

⁵⁶ Although we need not and do not analyze and decide this related question, it is reasonable to presume the same preexisting authority also would enable a local school board to require more-stringent COVID-19 mitigation in the operation of local schools than is mandated by either Executive Order 20-59 or by any less-restrictive county order.

⁵⁷ Because constitutional and statutory home rule apply only to the local board of education for public schools, private schools may not retain similar local authority under this analysis. To the extent private schools may wish to adopt different or modified local requirements on the subjects covered by Executive Order 20-59, they would need to obtain authority to do so from the board of county commissioners, which could adopt a less-restrictive order permitting greater local decision-making by private schools.