November 22, 2021

Q & A Regarding Covid-19 Protocols

provided by Thrun Law Firm

1. *Does the District have a legal obligation to enforce the health department-issued quarantine?*

   School districts are not required to "police" students, employees, or others to ensure that they stay home during a health department-issued quarantine. The question is whether school officials, knowing that a student, employee, or other person is subject to quarantine status, will allow that individual to attend school or school activities in- person during the quarantine period.

   Based on the legal authority identified in Q&A 2, it is my opinion that the District hasthe authority to preclude a student, employee, or other person from being present at school or school activities during the quarantine period. Moreover, as explained in Q&A 6, the school district has a statutory obligation to require certain employees to notbe physically present at the work site due to COVID-19 exposure.

2. *What authority does the District have to not allow a student to attend school or school activities?*

   The District has the legal authority to prohibit a student in quarantine status from beingin-person at school during that time. Rule 5(2) of the Bureau of Epidemiology's Communicable and Related Diseases Rules authorizes a school official to exclude a student from school under the following circumstances:

   > When a school official reasonably suspects that a student has a communicable disease … , *the [school] official may exclude the student* fora period sufficient to obtain a determination by a physician or local health officer as to the presence of a communicable disease.

R 325.175(2)

A student under a health department-issued quarantine provides a school official with a reason to suspect that the student has a communicable disease sufficient to invoke theschool exclusion under Rule 5(2).

Revised School Code Section 11a also provides general authority for school districts totake action incidental to operating a public school, unless otherwise provided by law. As a matter of law in Michigan, there is no legal provision which prohibits a school district from excluding from school a student under quarantine status. Section 11a, in part, states:

> A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as otherwise provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of publiceducation services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following: . . .(b) *Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school ora school sponsored activity*.
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> MCL 380.11a(3) (emphasis added)

3. *Would the District risk potential liability or gross negligence charges if they allow a person to attend school or school activities when they have the knowledge that the person is either COVID-19 positive or under a health department quarantine order?*

   Yes. To minimize liability exposure, it is my opinion that the District should follow the quarantine/isolation standards established by the health department. Despite the many frustrations that schools are experiencing, public health departments remain the expertsin developing these types of protocols.

   Application of the immunity doctrine is fact-specific. In a situation where a school district does not follow the guidance, recommendations, guidelines, protocols, or best practices (as opposed to statute, rule/regulation, or order) issued by the CDC, MDHHS,or local health department, the immunity application will depend on whether the actionthat proximately caused the injury were "grossly negligent". And, if so, the plaintiff must still prove by a preponderance of the evidence that the grossly negligent conductwas the proximate cause of the injury.

   Contemplate the following scenario: the District has been sued in litigation arising fromthe COVID-related death of a school employee or student. The court did not dismiss the case based on immunity. Contact tracing suggests (at least enough to present

evidence to the jury) that the deceased's exposure occurred at school from a student under health department-issued quarantine status who nonetheless chose to attend school. And, school officials knew of the quarantined student's status but declined to deny the student's access to school or school activities during the quarantine period. Assuperintendent, you are on the witness stand and are asked the following questions, "Isn't it true that:

- You knew that the health department placed Covid Carly under quarantine status due to her [choose] close contact exposure, positive Covid test, or display of principal Covid symptoms;
- If applicable] Your Board Policy requires compliance with health department protocols for students with casual contact communicable diseases;
- You knew that the health department, as well as the CDC and MDHHS, strongly recommend that such persons as Covid Carly not attend school during that quarantine status;
- You knew that Michigan law requires that employees with quarantine status are prohibited from reporting to work;
- And, despite this knowledge, you permitted Covid Carly to attend school while under quarantine status and, according to contact tracing reports, exposed at least ___people (including the deceased) while at your school.

For the reasons reviewed above, it is my opinion that the District should not permit a student, employee, or other person who is under a health department-issued quarantineorder to be present at school or a school activity.

4. *There is not currently a Lenawee County Public Health Order. What authority does the Lenawee County Health Department have to issue quarantines in the absence of this?*

The local health department has the legal authority to issue two kinds orders – one typeof order is an emergency order that applies to the designated circumstances; the other type of order is to an individual to quarantine.

In my opinion, the District should not permit a student to attend school or a school activity who is under such an order. The District has the legal authority to direct the student to not attend school while under a quarantine order.

Also, the MDHHS October 6, 2020 Order entitled "Reporting of Confirmed and Probable Cases of COVID-19 at Schools" remains in place until rescinded. Paragraph 4 of that Order expressly states that providing direct notice to persons who were, or are suspected to have been,a Close Contact of School Associated Case(s)… "is the responsibility of the local health department.

5. *Is the District legally required to provide close contact information to the health department?*

   Yes. Rule 4 of the Bureau of Epidemiology's Communicable and Related Diseases Rules requires school districts to provide medical, epidemiologic, and other information pertaining to individuals who were potentially exposed to a designated condition when such is requested of them by an investigator of the local health department or the Michigan Department of Health and Human Services. R 325.174

6. *Is the school district obligated to provide a safe working environment for employees?*

   Yes. The Michigan COVID-19 Employment Rights Act states that the following categories of employees "must not report to work" until conditions in the statute have been met: an employee who tests positive, an employee who displays the principal symptoms of COVID-19 but has not yet tested positive, and an employee who has hadclose contact with an individual who tests positive for COVID-19. MCL 419.405. Thisstatutory requirement has no expiration date.

   Accordingly, the District must take steps to ensure that an employee under one of those circumstances does not report to work. Any such employee who reports to work shouldbe immediately directed to leave the work place. That is the extent of the District's legal responsibility as employer. The District has no further obligation to enforce a "quarantine" against the employee beyond the work place.

7. *How does 333.5203 apply to 325.175 and quarantines – warning notice?*

   Section 5203 is in Part 52 of the Public Health Code, which addresses "hazardous communicable diseases". Section 5101 (definitions) uses the term "serious communicable disease", which is defined as "a communicable disease or infection thatis designated as serious by the department under this part. Serious communicable disease or infection includes, but is not limited to, HIV infection, acquired immunodeficiency syndrome, sexually transmitted infection, and tuberculosis."

   My understanding is that COVID-19 is *not* a "**serious communicable disease**" but rather a "communicable disease" transmitted by casual contact. The Public Health Code defines "**communicable disease**" as "an illness due to a specific infectious agent or its toxic products that results from transmission of that infectious agent or its products from a reservoir to a susceptible host, directly as from an infected individual or animal, or indirectly through the agency of an intermediate plant or animal host, vector, or the inanimate environment." If that is the case, the provisions below *do not apply* because they address "serious communicable disease".

   Significantly, Section 5209 states: "This part does not limit the power of the department, a local health department, or the probate court to deal with the preventionand control of communicable diseases and infections."

First and foremost, these procedural issues are for the Health Department, not the District, to address. It may be based on the MDHHS classification of COVID-19 as a "communicable disease" and not a "serious communicable disease" as defined in the Public Health Code.

Section 5203(1) requires the health department to "issue a warning notice" regarding the prevention of control of a serious communicable disease. Section 5203(2) states that the warning notice "shall be in writing". An email or other electronic communication is in writing, albeit electronic writing. Also, Section 2453 provides: "except that in urgent circumstances, the warning notice may be an oral statement, followed by a written statement within 3 days." But Section 5203(2) also states that the"written warning notice shall be **served either by registered mail**, return receipt requested, **or personally** by an individual who is employed by, or under contract to, the department or a local health department." This language certainly suggests that thewritten warning notice must be something more than an email.

This statutory provision was last amended in 1989 – well before the advent of email and text messages!