



LEGAL OPINION MEMO

(Confidential Attorney-Client Communication)

TO: Trustee C. Wines

FROM: Rob Salyer 

DATE: June 1, 2021

QUESTION: What are the potential consequences to both the District and individual Trustees of a board resolution to not adhere to the state mask mandate?

ANSWER: Several adverse consequences are detailed below.

ANALYSIS:

You requested this opinion during *Items From Board Members* at the May 25, 2021 meeting. Much of the information contained herein first appeared in a District Legal Opinion Memo dated August 10, 2020. As a preliminary matter, it should be noted that the Board does not have the authority to act in a manner that conflicts with state law. NRS 386.350. The governor's emergency directives carry the full force and effect of state law.

I. Legality of the Mask Mandate

Pursuant to NRS 414.070, the Governor has the authority to declare and end a "State of Emergency" and to establish health and safety protocols (e.g. mask mandate) to address the emergency. In accordance with NRS 414.090(1), during a "State of Emergency," Nevada's political subdivisions are required to abide by and comply with the State's emergency management plan and program, including any health and safety protocols dictated by the State. Notably, during a "State of Emergency," Nevada's political subdivisions (including the District) do not have the authority to override, ignore, or otherwise fail to comply with the State's emergency plan and program, or its health and safety protocols.

II. District Consequences

A. Fines, Penalties and Fees

Failing to comply with the mask mandate could expose the District to fines, penalties and legal fees associated with non-compliance. Operating schools in violation of the mask mandate would likely result in the District being assessed significant fines and penalties from the State of Nevada Department of Business and Industry, Division of Industrial Relations Occupational Safety and Health Administration (“Nevada OSHA”). According to Nevada OSHA’s January 14, 2021 memorandum, penalties for Covid mandate violations range from \$9,639 to \$136,532 *per occurrence*. Because we are talking about potential willful and knowing violations, across multiple facilities, I would expect any penalties assessed against the District for non-compliance to be on the high end.

B. Legal Liability

In addition to the fines and penalties that would likely be assessed by Nevada OSHA, the District could face significant legal liability as well. As you are no doubt aware, SB 4 (2020) provided Covid personal injury immunity to certain businesses, non-profits and governmental entities. Unfortunately, school districts were specifically excluded from the SB 4 grant of immunity. Accordingly, should a staff member, student, or community member become ill or die from Covid as a result of exposure at a District facility or event, the District would likely face protracted litigation and the possibility of serious monetary liability resulting from such illness or death. This would be especially true in a case where the District intentionally acted to defy State health and safety protocols such as the mask mandate.

C. Employee Grievances

Purposefully violating the Covid mask mandate would likely result in the filing of grievances by the District’s employee organizations. As the District would be acting contrary to state law by failing to comply with the State’s health and safety protocols, it is unlikely that an arbitrator would

agree with the District's actions. Therefore, the District would likely be ordered to re-implement the mask mandate at its facilities and events through a binding arbitration award and may also be subject to liability associated with any injuries resulting from staff exposure.

III. Trustee Consequences

A. Existing General Immunity Law

Prior to 1965, the common law doctrine of sovereign or governmental immunity protected public officials acting in good faith within the scope of their authority by making the officer immune from a lawsuit for damages. 67 CJS OFFICERS § 350. The purpose of common law immunity was to ensure that public officers could exercise the independent judgment necessary to carry out their duties without threats of harassment by litigation over decisions made within the scope of their official duties. *Id.*

In 1965, the Nevada Legislature conditionally waived the sovereign immunity of the state, its political subdivisions, and their officers and employees for torts, and conditionally consented to be sued for such torts. NRS 41.0305 - .039. The condition is that the state, political subdivision (such as a school district), or officer (such as a school board Trustee) is liable only to the extent provided in NRS 41.0305 - .039, and otherwise immune. Those statutes set out the basic rules for the personal liability of public officials for their actions and decisions. The statutes relevant to Covid and the mask mandate are further described below.

B. NRS 41.032

[N]o action may be brought ... against an ... officer ... of ... any political subdivision which is:

1. Based upon an act or omission of an officer ... exercising due care, in the execution of a statute or regulation, ... ; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of ... any officer ... of any political subdivision ...
(Emphasis added.)

If the Board votes to operate schools in violation of the governor's emergency directives, then the Board has failed to exercise "due care." Approving a motion that says no student is required to wear face coverings at school is a direct violation of said directives. That action would be properly characterized as a lack of due care. As a result, every Board member who voted in favor of the motion would lose their immunity and could be found *personally liable* for any injury that results.

There is no Board liability for the exercise of a "discretionary function or duty." For example, the decision to temporarily close Elko High School due to rising infection rates was a discretionary decision that would not expose Trustees to liability. But when schools are open for in-person learning, the District is obligated to operate them in substantial compliance with emergency directives and controlling health standards so as to keep the staff and students reasonably safe.

C. NRS 41.0339(1)

The [school district] shall provide for the defense [of the Board member] ... in any civil action brought against that person based on any alleged act or omission relating to the person's public duties ... if ... the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith.
(Emphasis added.)

In other words, the District is obligated to defend any Board member who is sued if the action complained of was performed in "good faith" within the "course and scope" of their duties. Voting to operate schools in violation of the mask mandate would not be a good faith action within such course and

scope. Therefore, the District would not be obligated to provide a legal defense for Trustees who voted *in favor* of the offending action.

D. NRS 41.0349

In any civil action brought against any present or former officer ... in which a judgment is entered against the person based on any act or omission relating to the person's public duty or employment, the ... political subdivision shall *indemnify* the person unless:

...

3. The act or omission of the person was not within the scope of the person's public duty or employment; or
4. The act or omission of the person was wanton or malicious.
(Emphasis added.)

The District has a statutory duty to indemnify its Trustees. However, if a Board member operates outside the “scope” of his or her duty or does something “wanton,” the duty to indemnify goes away. “Wanton” means reckless. BLACK’S LAW DICTIONARY 6th Ed. The decision to operate schools in violation of the mask mandate could be considered both outside the scope and wanton. As a result, the District would have no duty indemnify (reimburse) offending members for attorney's fees or a personal judgment against them.

IV. Conclusion

Disregarding the state mask mandate could result in dire consequences for both the District and the Trustees who vote in favor of breaking the law: (a) fines and penalties (District); (b) liability and legal fees (District); (c) employee grievances (District); (d) personal liability (Trustees); (e) loss of defense (Trustees); and (f) no indemnification (Trustees).

CC: President
Superintendent