



Radisson Plaza Hotel & Suites
100 West Michigan Avenue
Suite 200
Kalamazoo, MI 49007-3960



RICHARD O. CHERRY
Attorney at Law

269.226.2987
269.226.2951 fax
cherryr@millerjohnson.com

September 9, 2021

VIA E-MAIL TO RSARRO@ALLEGANCOUNTY.ORG

Allegan County
ATTN: Robert Sarro, County Administrator
3283 122nd Avenue
Allegan, MI 49010

Re: Miller Johnson Legal Opinion

Dear Mr. Sarro:

You have requested our legal opinion relative to arguments that the current mask order violates the First Amendment Free Exercise Clause, and *MCL 380.1307b (j)* prohibition on restraints that restrict a student's breathing. Based on the research and analysis of the applicable case law and state statutes, both arguments are misplaced.

On August 18, 2021 the Allegan County Health Department issued a mask mandate order for all K-6th grade. The health officer made the following findings in issuing the order:

1. As of August 16, 2021, a total of 11,675 probable/confirmed cases and 159 probable/confirmed deaths attributed to COVID-19 have occurred in Allegan County. Currently, the County is designated by the CDC as having a high level of community transmission of COVID-19. The test positivity rate is 11.7% and the weekly case rate is 127 per 100,000 population ([data](#) from August 8-August 15, 2021).

2. The principal mode by which people are infected with SARS-CoV-2 (the virus that causes COVID-19) is through exposure to respiratory fluids carrying the infectious virus. Exposure occurs in two main ways: (1) inhalation of very fine respiratory droplets and aerosol particles, and (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye by direct splashes and sprays.

3. People release respiratory fluids during exhalation (e.g., quiet breathing, speaking, singing, exercise, coughing, sneezing) in the form of droplets across a spectrum of sizes. These droplets carry virus and transmit infection.

4. The risk of SARS-CoV-2 infection varies according to the amount of virus to which a person is exposed. Once infectious droplets and particles are exhaled, they move outward from the source. The risk for infection decreases with increasing distance from the source and increasing time after exhalation.

5. Two main factors determine the amount of virus to which a person is exposed in the air or by touching a surface contaminated by the virus:

- a. Decreasing the amount of virus in the air; and
- b. Progressive loss of viral viability and infectiousness over time influenced by environmental factors such as temperature, humidity, and ultraviolet radiation (*e.g.*, sunlight).

6. Transmission of SARS-CoV-2 from inhalation of the virus in the air farther than six feet from an infectious source can occur. Although infections through inhalation at distances greater than six feet from an infectious source are less likely than at closer distances, these transmission events have involved the presence of an infectious person exhaling virus indoors for an extended time (more than 15 minutes and in some cases hours) leading to virus concentrations in the air space sufficient to transmit infections to people more than 6 feet away.

7. Available evidence continues to demonstrate that existing recommendations to prevent SARS-CoV-2 transmission remain effective. These include physical distancing, community use of well-fitting masks, adequate ventilation, and avoidance of crowded indoor spaces. These methods will reduce transmission both from inhalation of the virus and deposition of the virus on exposed mucous membranes.

8. Masks are primarily intended to reduce the emission of virus-laden droplets (“source control”), which is especially relevant for asymptomatic or pre-symptomatic infected wearers who feel well and may be unaware of their infectiousness to others, and who are estimated to account for more than 50% of transmissions. Masks also help reduce inhalation of these droplets by the wearer (“filtration for wearer protection”). The community benefit of masking for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly.

9. The Delta variant of the SARS-CoV-2 virus is the dominant variant in Michigan and is significantly more contagious than the original form that entered the United States in winter 2020. While the risk of severe disease is lower in children, low risk does not equal no risk. [Among 23 states reporting](#), children ranged from 1.6%-3.5% of their total cumulated hospitalizations, and 0.2%-1.9% of all of their child COVID-19 cases resulted in hospitalization.

10. The most effective way to prevent transmission in schools is to support your community being vaccinated. Achieving high levels of COVID-19 vaccination among eligible students, as well as teachers, staff, and household members, is the most critical strategy to help schools stay open safely. Individuals 12 years of age and older are eligible for COVID-19 vaccination. Students younger than 12 years of age are ineligible to receive the vaccination.

11. According to the American Academy of Pediatrics (AAP), the Centers for Disease Control and Prevention (CDC), and the Michigan Department of Health and Human Services (MDHHS), universal use of masks in schools is a safe, essential, and proven strategy to reduce the spread of COVID-19 in schools.

12. When multiple prevention strategies are applied consistently, including ensuring ventilation for increased air exchange within a setting, proper and frequent hand-washing, and consistent and proper mask use, school-associated transmission of COVID-19 is reduced.

13. On August 18, 2021, the MDHHS publicly presented an update on COVID-19 data trends across the state. That presentation included data and interpretation supporting the following statements from MDHHS:

- a. Consistent mask use can reduce risk in the school setting. A study from North Carolina concluded that 40-70% of cases could be prevented through mask use.
- b. Counties with mask mandates have experienced lower rates of illness.

Based on these findings the Allegan Health Department issued the mask order.

Challenges to the Current Order

1. **Religious Freedom Argument.** It is currently the law in this Circuit that mask mandates such as Allegan County's do not violate the Free Exercise Clause of the First Amendment because these orders are neutral and of general applicability, meaning they apply to everyone equally and satisfy rational-basis review. *Resurrection Sch. v. Hertel*, No. 20-2256, 2021 WL 3721475, at *16 (6th Cir. Aug. 23, 2021).

2. **Any Restraint that Negatively Impact Breathing Argument.** Pursuant to *MCL 380.1307b (j)*, any restraint that negatively impacts breathing is prohibited pursuant to statute. An argument has been made that masks are restraints that negatively impact breathing and therefore mask mandates should be prohibited pursuant to state statute. This argument is without merit. The statute School Code defines **restraints** as:

[A]n **action that prevents or significantly restricts a pupil's movement**. Restraint does not include the brief holding of a pupil in order to calm or comfort, the minimum contact necessary to physically escort a pupil from 1 area to another, the minimum contact necessary to assist a pupil in completing a task or response if the pupil does not resist or resistance is minimal in intensity or

duration, or the holding of a pupil for a brief time in order to prevent an impulsive behavior that threatens the pupil's immediate safety, such as running in front of a car. Restraint does not include the administration of medication prescribed by and administered in accordance with the directions of a physician, an adaptive or protective device recommended by a physician or therapist when it is used as recommended, or safety equipment used by the general pupil population as intended, such as a seat belt or safety harness on school transportation. Restraint does not include necessary actions taken to break up a fight, to stop a physical assault, as defined in section 1310.5 or to take a weapon from a pupil. Restraint does not include actions that are an integral part of a sporting event, such as a referee pulling football players off of a pile or a similar action. *MCL 380.1307h(emphasis added).*

Additionally, any restraint that negatively impacts a student's breathing means:

[A]ny restraint that inhibits breathing, including floor restraints, facedown position, or any position in which an individual is bent over in such a way that it is difficult to breathe. This includes a seated or kneeling position in which an individual being restrained is bent over at the waist and restraint that involves sitting or lying across an individual's back or stomach. *Id.*

Nothing in this statute or definition section can plausibly be applied to the use of masks. The clear intent of the statute is to address actions that restrain or restrict a pupil's movement. Any action that restricts movement cannot restrict breathing pursuant to *MCL 380.1307b (j)*. A mask is not an **action** that prevents or significantly restricts a pupil's movement, therefore masks cannot be considered a restraint under the definition. If masks do not fit under the definition of restraint, it cannot be a restraint that negatively impacts breathing. Thus, the application of this statute to the current mask order is misplaced.

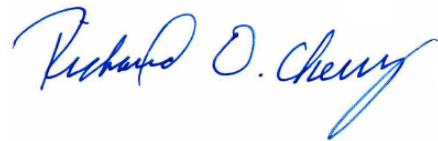
Thank you for the opportunity to provide our legal opinion. Please contact me should you have any questions or concerns or should you need additional information.

MILLER JOHNSON

Allegan County
September 9, 2021
Page 5

Sincerely,

MILLER JOHNSON



Richard O. Cherry

ROC:tlc