

Members of the Kansas House of Representatives  
State Capitol  
Topeka, Kansas 66601

July 22, 2020

Kansas Attorney General Derek Schmidt  
c/o Ms. Athena Andaya  
Deputy Attorney General, Logic Division  
Office of Attorney General Derek Schmidt  
120 SW 10<sup>th</sup>, 2<sup>nd</sup> Floor  
Topeka, Kansas 66612

Re: Request for Attorney General Opinion

Dear Ms. Andaya:

I respectfully request the Attorney General issue an opinion regarding the authority of county commissions to issue public health orders that include provisions that are less stringent than the provisions of an executive order effective statewide regarding public and private schools. In particular, I request an opinion regarding the authority of county commissions to impose less stringent requirements than, or opt-out completely from, the provisions of Executive Order 20-59 (“EO 20-59”), as well as the provisions of proposed Executive Order 20-58 as considered and ultimately rejected by the State Board of Education.

As you are aware, the Kansas Legislature passed H.B. 2016 during the recent special session of the Kansas Legislature. This bill amended K.S.A. 48-925 by adding the following provision:

(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.

K.S.A. 48-925(h) (emphasis added). EO 20-59 is an “executive order effective statewide issued by the governor,” and it relates to public health. Therefore, according to the plain language of HB 2016, county commissions can issue “an order relating to public health that includes provisions that are less stringent,” if they so choose.

Nevertheless, the Governor has recently stated that county commissions may not act in regard to these particular orders because EO 20-58 and HB 20-59 relate “only to our school districts and the school districts operate under a different jurisdiction as our county commissions.”<sup>1</sup> Further, some counties have expressed concern they would be wandering into the lane of the school board; however, K.S.A. 48-925(h) seems to provide a clear local check on the Governor’s emergency powers and authority to issue statewide executive orders carrying the force and effect of law, including orders affecting local public and private schools. In addition, we request an opinion regarding local school board’s ability to act on EO 20-59 through protections and provisions of the Kansas Constitution. Governor Kelly has recently been quoted to have said that “neither counties nor local school districts can opt out.” Because of her continued position, we believe it’s necessary to have a formal response from the Attorney General’s office.

In fact, EO 20-59 expressly cites K.S.A. 48-925 as authority for the governor’s order. The local authority by the county commissions to opt-out of a more restrictive statewide executive order is derived from this very same statute. Local school boards have no role under K.S.A. 48-925. To the extent the Governor has power to regulate public and private schools by executive order during a declared emergency, the county commissioners have power to issue less restrictive orders related to public health.

Please issue an opinion indicating whether county commissions may issue orders regarding the operation of public and private schools that include provisions that are less stringent than the provisions of an executive order effective statewide issued by the governor. In particular, please issue an opinion as to the authority of county commissions to effectively opt-out of the restrictions imposed statewide EO 20-59 and as previously proposed in order EO 20-58. Thank you for your prompt attention to this matter.

Sincerely,

Senator Ty Masterson  
Representative Tory Marie Arnberger  
Representative Emil Berquist  
Representative Blake Carpenter  
Representative Leo Delperdang  
Representative Renee Erickson  
Representative Cheryl Helmer  
Representative Kyle Hoffman  
Representative Steve Huebert  
Representative Susan Humphries  
Representative Brenda Landwehr  
Representative Les Mason  
Representative Stephen Owens  
Representative Bill Rhiley  
Representative Joe Seiwert  
Representative Adam Smith  
Representative Sean Tarwater  
Representative Jack Thimisch  
Representative Adam Thomas  
Representative Paul Waggoner  
Representative Barbara Wassinger  
Representative Kristey Williams

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<sup>1</sup>See Press Conference of Governor Kelly, July 20, 2020 (starting at 16:50 timestamp), *available at* <https://www.facebook.com/GovLauraKelly/videos/663459251046658> (last accessed July 23, 2020).