Governor Whitmer's School/Educational EO (2020-142) Regarding the Opening and Operation of Private Schools in Michigan

Michigan Governor Gretchen Whitmer recently issued Executive Order (EO) 2020-142 regarding the opening of schools and the education of K-12 children for the 2020-2021 school year.

I. The Governor's EOs are Unlawful:

The issue of whether Governor Whitmer's EOs issued after April 30, 2020, are lawful is still undecided. The Michigan Supreme Court will hear this issue on September 2, 2020. It is our opinion that the current EOs are illegitimate because the Governor lacks the authority to act unilaterally after 28 days without the concurrence of the Legislature (MCL 30.403).

However, even if the Supreme Court upholds the Governor's general authority to issue EOs, an issue remains as to whether the Governor or the State Board of Education (Board) has the proper authority to mandate educational requirements. Michigan's Constitution (Art. 8, § 3) assigns "Leadership and general supervision over all public education" to the State Board of Education and it "shall serve as the general planning and coordinating body for all public education." (see also MCL 388.1007, 1009).

The Board is a constitutionally created body with its own constitutional and statutory duties and responsibilities and has sole authority over public schools. Declaring a public health emergency does not shift control of public schools to the Governor. When officials improperly exercise power beyond that provided by law, it violates principles of good governance and the Rule of Law.

II. Impact on Private Schools:

EO 142 (¶ 2) states, "Every … nonpublic school must develop and adopt a COVID-19 Preparedness Plan" consistent with the State's "Return to School Roadmap." However, the Roadmap itself is not state law and is not mandatory. (www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7.pdf)

The rest of ¶ 2 (subsections a through d) only applies to public schools, not private schools. These subsections cover areas like requiring the use of face coverings, prohibitions of sports and indoor assemblies, etc. While there is another EO (2020-153) that requires the use of face coverings for indoor public spaces, EO 142 does not require the use of face coverings in private schools. Whether EO 153 would require face coverings in private schools is an undecided question.

The Preparedness Plan must be approved by your school administrator by August 15, 2020, unless your school year begins earlier (¶ 3.b.2). Further, the EO requires the administrator to send a copy of the Preparedness Plan to the State Superintendent of Public Instruction (¶ 3.c.3). Many private schools object to sending any information directly to the State, therefore, we recommend that you file the Plan with your church, school association or other oversight body. This type of third-party reporting has previously been accepted by the State.

You must also post your Preparedness Plan on the home page of the school's web site (¶ 3.d). If your school does not have a Preparedness Plan in place, then the EO states you may not operate for the 2020-21 school year (¶ 6.g). Again, this presumes the EO is legally valid.

Moreover, the State is required to follow the Private School Code and give notice of any claimed noncompliance with state law, an opportunity to cure the noncompliance, and hold an administrative hearing before attempting to shut down a private school (MCL 388.554).

Paragraphs 4 and 5 of the EO clearly only apply to public schools. ¶ 6.f. requires your school to cooperate with the local public health department if a person at your school contracts the virus. This will include contact tracing, including giving names and addresses of affected students and staff. Individuals do not have to give private health information or records or allow officials to enter their homes without their consent, a search warrant, or a court order.

The Great Lakes Justice Center is prepared to assist your school if any issues arise.

The Great Lakes Justice Center