



**Updated NJDOH Guidance: Are Schools Obligated to Follow It and
What Happens if They Don't**

A number of New Jersey school boards have raised questions regarding the implications of a board's decision not to comply with updated COVID-19 guidance recently issued by the New Jersey Department of Health ("DOH"), such as those relating to student quarantines and contact tracing. While DOH guidance does not carry the force of an Executive Order or a State law or regulation, and some school districts are inclined to discontinue or otherwise significantly relax their efforts to comply with all of the various recommendations issued by the DOH, many districts have also expressed legitimate concerns regarding the extent to which such decisions would satisfy the board's duty of care to its students, and whether it could expose their board to liability.

1. Summary of Current DOH Recommendations

On February 22, 2022, the DOH issued an updated guidance document entitled "COVID-19 Public Health Recommendations for Local Health Departments for K-12 Schools." This updated guidance released by the DOH explicitly states that public school districts should follow the current CDC guidance pertaining to isolation and quarantining as applicable to K-12 schools.¹

In addition, the DOH has indicated in the same guidance document that school districts should continue to implement contact tracing (including the possible use of "Test to Stay" protocol) for positive COVID-19 cases at this time. The updated DOH guidance further advises that a school district's "ability to perform effective contact tracing of cases" and "ability to ensure appropriate exclusion of students and staff with COVID-19 or who have been exposed" are both appropriate factors to be considered in determining whether to continue universal masking in the district's schools, in consultation with the local health department and district medical personnel.

Despite that New Jersey public school districts are no longer required to have a universal masking mandate in schools, there are a number of guidelines recommended by the DOH for any districts who will no longer have such a mandate in effect. With regard to contact tracing and quarantining of students, even for districts that do not mandate universal masking, in general, the DOH still strongly recommends that these districts require masking in some specific circumstances, including, but not limited to, when an "outbreak" occurs, when students and staff are returning from isolation or quarantine, and during the use of any "Test to Stay" protocols for students.

With respect to "outbreaks," the updated DOH guidance states as follows:

¹ See https://www.state.nj.us/health/cd/documents/topics/NCOV/RecommendationsForLocalHealthDepts_K12Schools.pdf, at 10-12.

Schools must report outbreaks or suspected outbreaks to their LHD. The LHD [Local Health Department] will work with schools to determine if there is an outbreak and provide guidance as to a response. An outbreak in a school setting is defined as three or more individuals with COVID-19 (positive by RT-PCR or antigen) COVID-19 cases among students or staff with onsets within a 14-day period, who are epidemiologically linked, do not share a household, and ***were not identified as close contacts of each other in another setting during standard case investigation or contact tracing.***

If an outbreak has been identified, schools and LHDs should promptly intervene to control spread while working to determine whether the outbreak originated in the school setting.

Id. at 15 (emphasis added).

If a school district has an outbreak, the DOH recommends that the district either transition to universal masking in school or masking in any affected classrooms. Therefore, notwithstanding that school districts are no longer required to have a universal masking policy for their schools, the current DOH guidelines indicate that school districts are strongly recommended to continue the contact tracing of students and staff who test positive for COVID-19, in order to identify “outbreaks” which warrant consideration of implementing universal masking either in the affected classrooms, or district-wide.

Regarding exclusion and quarantining of students who are close contacts of an individual with confirmed COVID-19, the DOH guidance provides as follows:

For determining a school-based close contact to a COVID-19 case:

- Individuals would be considered exposed during the period between 2 days prior to symptom onset (or positive test date if asymptomatic) and 5 days after.
- Individuals would NOT be considered exposed during the case’s additional precaution period at day 6-10.

Exception: In the K–12 indoor classroom setting or a structured outdoor setting where mask use can be observed (i.e., holding class outdoors with educator supervision), the close contact definition excludes students who were within 3 to 6 feet of an infected student (laboratory-confirmed or a clinically compatible illness) if both the infected student and the exposed student(s) correctly and consistently wore well-fitting masks the entire time. ***However, without universal masking, the school must be able to readily identify whether both students***

were masked prior to applying the close contact exception.

This exception does not apply to teachers, staff, or other adults in the indoor classroom setting.

School staff should identify school-based close contacts of positive COVID-19 cases in the school.

- As with any other communicable disease outbreak, ***schools will assist in identifying the close contacts within the school and communicating this information back to the LHD.***
- With guidance from the LHD, ***schools will be responsible for notifying parents and staff of the close contact exposure and exclusion requirements while maintaining confidentiality.***
- The LHD contact tracing team will notify and interview the close contacts identified by the school and reinforce the exclusion requirements.

Id. at 16 (emphasis added).

Based upon the above provisions set forth in the DOH guidance issued on February 22, 2022, it is clear that the DOH recommends that school districts continue to implement both contact tracing and the exclusion of students from school for quarantining for reasons related to COVID-19 (including testing positive, having symptoms consistent with COVID-19 pending a test result, and/or being identified as a close contact of an individual with confirmed COVID-19). Additionally, if the district has determined that it will not mandate universal masking in school, then the district will need to be able to accurately determine whether or not an “outbreak” has occurred, and will also need to properly calculate and determine when students and staff should return from quarantining. This is because the DOH guidance indicates that when an “outbreak” occurs, a district that generally does not mandate universal masking should consider whether to require masking in any affected classrooms or schools, or mandate masking district-wide.

Similarly, the DOH guidance expressly states that “students and staff who return to school during days 6-10 of isolation or quarantine should be required to mask.” Id. at 3. Therefore, in order for a district to make accurate determinations regarding the need for masking in the special circumstances of “outbreaks” and returns from quarantine by students and staff, in which masking is highly recommended by the DOH even if the district no longer requires universal masking, the district would need to properly implement contact tracing and quarantining for students and staff.

Furthermore, the DOH guidance document uses the word “must” on multiple occasions within its provisions relating to contact tracing and excluding students from school for quarantining (for example, stating that “[s]chools ***must*** report outbreaks or suspected outbreaks to their LHD,” which requires contact tracing in order to determine an “outbreak” has occurred, and stating that “without universal masking, the school must be

able to readily identify whether both students were masked prior to applying the close contact exception”). The DOH guidance also explicitly states that “schools ***will*** be responsible for notifying parents and staff of the close contact exposure and exclusion requirements while maintaining confidentiality,” which strongly suggests that this is not merely advisory, but reflects that schools remain obligated to take action to conduct contact tracing and exclude students from school for quarantining when recommended by DOH guidelines, and may not simply abandon any efforts to perform such contact tracing and exclusion for quarantining.

To be sure, the DOH guidance and recommendations do not have the same force and effect of a New Jersey statute or regulation, or an Executive Order issued by the Governor, and as such, they may be properly viewed as advisory rather than mandatory. However, school boards should carefully consider the risks and benefits of a voluntary decision to intentionally not comply with the explicit recommendations set forth in the most recent DOH guidance, which may include possible liability to the board as a result of that decision.

2. Potential Liability for Noncompliance with DOH Recommendations

The issue of whether a school board could be subject to liability if it were to decide to not follow DOH recommendations on quarantining and contact tracing is uncertain. The New Jersey Tort Claims Act (“TCA”), N.J.S.A. 59:1-1 et seq., immunizes public entities and public employees from claims alleging “injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community.” N.J.S.A. 59:6-3.

Nevertheless, to date, no New Jersey court decisions have been issued pertaining to the scope of immunity to which a public entity is entitled to receive, where the entity purposely chose not to follow public health recommendations made by the State, and an individual alleges that he or she suffered harm as a result. Therefore, the TCA may provide some level of immunity to a school district that intentionally chose to not comply with DOH guidance on COVID-19, but it is not possible to assess with certainty at this time specifically how a court would apply the immunity described in N.J.S.A. 59:6-3 to a school board that determines to disregard DOH recommendations for public schools.

The TCA also generally provides that a public entity, such as a school board, is entitled to immunity for injuries that may occur as a result of its discretionary actions, unless those actions were palpably unreasonable. However, if the public entity’s actions were arguably “ministerial acts” mandated by law, policy, or practice, as opposed to resulting from discretionary decision-making on how to appropriately allocate and use its resources, then liability is possible, because the TCA does not provide immunity for ministerial functions that are required by law, policy, or practice, while discretionary actions are entitled to such immunity. There are no court decisions that have been issued to date that address the question of whether a school board’s determination not to follow DOH recommendations would constitute a “discretionary action” pursuant to the TCA.

Again, even if a court were to hold that a school board may take discretionary action not to comply with DOH recommendations relating to COVID-19, the applicable law also provides that if such discretionary actions were “palpably unreasonable,” then the immunity that would otherwise be available will not apply. The term “palpably unreasonable” is not defined in the TCA, but an abundance of case law is instructive. See Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985) (defining the term as “behavior that is patently unacceptable under any given circumstance”); Furey v. County of Ocean, 273 N.J. Super. 300, 312-13 (App. Div.) cert. denied, 138 N.J. 272 (1994) (palpably unreasonable means that the “public entity acted or failed to act under circumstances which would make it manifest and obvious that no prudent person would approve of its course of action or inaction”). Therefore, even if a school board were to claim that its decision to not follow DOH guidance constituted “discretionary action,” immunity may not apply if the court found the board’s conduct to be palpably unreasonable.

Of course, a school board could preemptively make efforts to defend against a potential claim that immunity should not apply to its decision not to follow DOH guidance, based on an argument that such a decision was palpably unreasonable. Recently, a number of school districts have relied upon on alternative medical recommendations issued by renowned medical centers such high-ranking children’s hospitals, whose advice often differs from DOH guidance. For any school boards that have relied upon alternative medical recommendations from a reputable entity such as a high-ranking children’s hospital, as opposed to following DOH guidelines, it would be highly beneficial for the board to be able to demonstrate the specific efforts it undertook in reaching its decision, including, but not limited to, documentation showing: (1) the extent to which the board investigated options; (2) the reputation and credentials of any medical authorities whose recommendations the board relied upon; (3) how the board carefully weighed the recommendations received from those authorities; and (4) a record of the deliberations and consultations between school personnel and such medical authorities. With respect to possible insurance coverage issues relating to a school board’s implementation of DOH recommendations, it should be noted that insurance carriers that issue policies to New Jersey school districts, such as New Jersey Schools Insurance Group (“NJSIG”), have previously recommended that in making decisions regarding school operations related to COVID-19, districts should “follow the guidance issued by federal, state and local officials.”² For example, NJSIG has advised that districts should comply with any guidance issued by the State or federal government pertaining to COVID-19 vaccination and/or testing for students and staff. Id. at 12. Although an insurance carrier may not necessarily disclaim coverage based on a school board having voluntarily disregarded DOH guidance, it should be recognized that at least one insurance company that issues policies to numerous school districts has explicitly advised in writing that school boards should comply with any guidance regarding COVID-19 issued by State and federal governmental entities.

Finally, school boards should be aware that as a general matter, in the event of any tort claims asserted or lawsuits filed by any students, staff, or other individuals who allege

² See <https://www.njsig.org/downloads/covid-19/COVID-19%20%20Coverage%20QA%20Updated%204-26-21.pdf>

that they suffered harm as a direct result of a school district's handling of any COVID-19 issues, it should certainly be anticipated that such claims will heavily rely upon the extent to which the district complied with State and federal public health mandates and guidelines, or at least made reasonable efforts to do so. Therefore, a school board should recognize that if at any time, any students, staff, or other individuals are negatively impacted as a result of the board's decision-making on issues such as contact tracing and quarantining of students, any evidence indicating that the board voluntarily chose not to comply with the DOH recommendations applicable to public schools, which were readily available at the time of its decision, would be utilized in support of such claims or lawsuits.

Such evidence could be harmful to the board's position and defenses, and it may be viewed by a court as either a discretionary act under the TCA, or as a failure to implement a ministerial action required by law, policy, or practice. If a court were to find that the board's decision not to comply with DOH recommendations was not within the discretionary authority of the board, then it is certainly possible that the court would also rule that any immunity that might otherwise apply pursuant to the TCA does not apply where a school board intentionally and voluntarily elects to contravene any current DOH recommendations.

Conclusion

School boards should be aware of the following with respect to any possible decision to not comply with current DOH recommendations relating to quarantining of students and contact tracing, as well as any potential liability that could result from such a decision:

(1) Although the most recent DOH guidance does not carry the force and effect of a statute or regulation, several of its recommendations suggest that school districts do not necessarily have discretion to use their own judgment and decision-making regarding contact tracing and quarantining of students, such as the following statements:

- “Schools ***must*** report outbreaks or suspected outbreaks to their LHD.”
- “[W]ithout universal masking, the school ***must be able to readily identify whether both students were masked prior to applying the close contact exception.***”
- “As with any other communicable disease outbreak, ***schools will assist in identifying the close contacts*** within the school and communicating this information back to the LHD.”
 - This provision suggests that a school board is generally obligated by law to identify close contacts within the school and communicate such information to the LHD for any type of communicable disease, not just COVID-19, but it is not clear what specific legal authority the DOH recommendations are relying upon with regard to this statement.

- “With guidance from the LHD, schools ***will be responsible for notifying parents and staff of the close contact exposure and exclusion requirements while maintaining confidentiality.***”
- (2) The TCA immunizes public entities and public employees from claims alleging “injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community.” N.J.S.A. 59:6-3. However, our courts have not yet addressed the scope of immunity that may apply if a school board has voluntarily determined not to follow DOH recommendations, and an individual alleges that he or she suffered harm as a result. Accordingly, although immunity may apply to a school board that intentionally chooses to not comply with DOH recommendations, it is not possible to accurately assess at this time how a court would apply the immunity described in N.J.S.A. 59:6-3 to such circumstances.
- (3) In addition, the TCA generally grants immunity to a public entity for discretionary actions, as opposed to ministerial acts that are required by law, policy or practice. Nevertheless, it is unclear, if a school board were to decide not to follow any DOH recommendations whether that decision would be viewed as discretionary action under the TCA, as the courts have not yet considered this issue. Moreover, even if a court were to find that such a decision does constitute discretionary action as defined by the TCA, it is possible that the action could still be found “palpably unreasonable,” and therefore, the immunity that would otherwise be available would not apply.
- (4) In view of the above, school districts should recognize that non-compliance with any DOH recommendations regarding COVID-19 will involve legal risks that are difficult to assess at this time, simply because there is no available precedent to review and consider that could serve as an instructive example. More specifically, to date, our courts have not yet considered an intentional decision by a school board not to follow DOH recommendations and a claim for damages resulting from that decision, and the extent to which any liability and/or defenses or immunities may apply.
- (5) In short, a school board may decide not to comply with current DOH recommendations regarding COVID-19, if it determines that it is willing to incur the legal risks and possible liability as described above.

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