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**MEMORANDUM**

**TO:** KNOX COUNTY BOARD OF EDUCATION  
KNOX COUNTY DIRECTOR OF SCHOOLS

**FROM:** DAVID L. BUUCK, Knox County Law Director  
GARY T. DUPLER, Deputy Knox County Law Director

**DATE:** August 3, 2021

**RE:** Authority of the Director of Schools on COVID-19 protocols

Question originally posed by Board Member Daniel Watson:

Question 1: Based upon the Knox County Board of Education's vote on April 14, 2021, with regard to recommended COVID-19 protocols for the 2021-2022 school year and the Board of Education's vote on May 12, 2021, to sunset Board Policy C-240 "Face Coverings" on May 26, 2021, what is the Director of School's authority with regard to COVID-19 protocols for the 2021-22 school year?

Answer: The Director of Schools does not have the authority to institute a mask mandate for the 2021-22 school year. He does have some control with regard to other COVID-19 protocols pursuant to the authority granted by the Board.

**OPINION DISCUSSION:**

- 1. Control and management of the local school system is vested exclusively in the LEA, elected board of education (The Knox County Board of Education in this County).**

Education is a state function, as expressed in the Tennessee Constitution, Article XI, Section 121 and throughout state law. T.C.A. § 49-1-101 ("There is established a system of public education"); T.C.A. § 49-1-102(a)(system of public education to be governed by the laws of the general assembly and state board of education). In addition, responsibility for local

administration of public education is vested exclusively in an elected board of education. See *e.g.*, T.C.A. §§ 49-1-102(c)(local system of education to be administered by local board of education); 49-2-201(b)(establishment and election of local board of education); § 49-2-203(powers and duties of the board).

Furthermore, the state has expressed a clear intent to hold local boards of education accountable for the administration and performance of the school systems under their care. Specifically, the Education Improvement Act of 1992 (EIA) imposed unprecedented accountability measures on local boards of education. The Act mandated that every Tennessee school system be administered by an elected board of education and that each local board of education appoint a director of schools. T.C.A. §§ 49-201(a)(1); § 49-2-301(c), (d). It was focused on the state constitutional core duty of boards of education to provide a free and appropriate public education (FAPE).

A director of schools (who may also be referred to as "superintendent"), is appointed by the local board of education and is considered an employee of the board. T.C.A. § 49-2-301. The numerous duties of this position are described in T.C.A. § 49-2-301. Many of the duties in that statute are related to the employment of school personnel and the day-to-day management of the schools in the system. Other duties pertinent to this analysis include: ensuring that laws relating to education are faithfully executed; attend all meetings of the school board and serve on its executive committee; keep records of meetings, actions, and financial transactions of the school board; and make recommendations to the board, although the director of schools may not vote.

A primary goal of the EIA was to provide clear lines of authority in local school systems. Subsequent revisions to the EIA have only reinforced this point. The director of schools answers to a duly elected board of education, which is charged with, among other things, setting policy, developing a budget and the overall control and management of the school system. Perhaps the most telling change was the requirement that all boards of education be elected – a move that enabled the voters and the department of education to identify a single body that is to be held accountable for the local school system. Much of the foregoing is taken from pleadings and the resolution of the 2003 Knox Chancery Court case. Order of Compromise, *KCBE v. KCC, et al.*, 152623-3 (April 21, 2003).

Locally, the Knox County Charter has further delineated the responsibilities of the County Commission and the Board of Education. Section 6.01.A. of the Charter of Knox County states, in part:

There is hereby created the Knox County Board of Education. The exclusive management and control of the school system of Knox County... is vested in the Knox County Board of Education....

Section 6.02.C. of the Charter of Knox County mandates:

The Board shall have all such duties, powers, and authority necessary or reasonably implied to manage and control the County School System as provided by Constitution, general law, this Charter, or ordinance.

## **2. State and local authority to institute COVID-19 protocols and mandates.**

As state-created entities, local education agencies (or boards) (LEA) must adhere to directives from the state legislature, governor, State Board of Education and Tennessee Department of Education. These directives may take the form of statutes, rules and regulations, or executive orders. The Tennessee Department of Health may also issue public health mandates from time to time.

During the height of the COVID-19 pandemic in 2020, Governor Lee issued various executive orders related to COVID-19. Executive Order No. 14 was signed on March 12, 2020 and was the beginning of numerous orders dealing with the state's response to COVID-19. By March 19, 2020, Governor Lee declared a state of emergency in Tennessee and as such, was able to suspend many state statutes and rules and regulations. (Executive Order No. 15). A state of emergency is defined in Tennessee as "an occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, that results or may result in substantial injury or harm to the population, or substantial damage to or loss of property; provided, that natural threats may include disease outbreaks and epidemics..." T.C.A. § 58-2-101(7). Although the state did not mandate the use of face coverings at any time during the COVID-19 pandemic in 2020 and thus far in 2021, the governor did issue Executive Orders which allowed local authorities to issue face covering (mask) mandates in certain circumstances. (Executive Orders No. 38 and 54, as amended by subsequent orders). In the executive orders, other public health mandates were outlined, and some guidelines and recommendations from the Centers for Disease Control (CDC) and the Tennessee Department of Health (TDH) were also treated as mandates due to the declared state of emergency. The CDC and the TDH presently still offer guidelines and recommendations.

However, on April 27, 2021, Governor Lee issued Executive Order No. 80 which revoked the authority for local face covering mandates to most of the state, revoked the "Tennessee Pledge" which had recommendations and mandates for Tennessee citizens in dealing with COVID-19, and announced a limited state of emergency in Tennessee. Locally, Knox County Mayor Glenn Jacobs sunset the Knox County mask mandate as of 11:59 p.m. on April 27, 2021. By May 28, 2021, Executive Order 81 reduced the limited state of emergency to only "National and State Guard support for health care and vaccination efforts" and "maintaining current prison and parole related operations." Most recently, Governor Lee issued Executive Order 82 which further limited the state of emergency to "utilization of National and State Guard members to support certain health care and vaccination efforts." (July 30, 2021).

A recent Tennessee statute also has bearing to the issue at hand. The Tennessee General Assembly passed Public Chapter No. 96 into law on April 7, 2021. That chapter, which becomes law at T.C.A. § 49-2-214, states, "During an emergency as defined in § 58-2-101, local boards of education and governing bodies of a public charter school may consult with state and local health departments when determining whether to open or close in person instruction." *Id.* It goes on to state, "a local board of education or governing body of a public charter school has sole authority to open or close in person instruction during an emergency. A local board of

education or governing body of a public charter school may delegate the authority to the director of schools or administration of the public charter school.” *Supra*, at section (b).

Finally, there has been discussion with the Knox County Board of Education regarding a Chancery Court case out of Williamson County, Tennessee. The final decision in *Citizens v. Golden and Williamson County Board of Education* came out on April 30, 2021 (case was not appealed). In that decision, a Williamson County Chancellor, the Hon. Michael W. Binkley, dismissed the claims against the Defendants on a technical deficiency ground of the lack of damages/standing. The Chancellor also issued an alternate ruling should the case be appealed to the Tennessee Appellate Court. That ruling stated in pertinent part as follows:

The Court is not convinced, as a matter of law, that WCBOE acted within its statutory authority as the time it promulgated its face-covering requirements. Further, the policy decisions promulgated by Mayor Anderson [Williamson County] and Governor Lee in February 2021 and April 2021 are inconsistent with WCBOE’s continued enforcement of face-covering requirements. With respect to WCBOE’s authority to issue a face-covering requirement, Defendants’ *Motion to Dismiss or For Summary Judgment* is alternatively **DENIED**. The Court cannot find, as a matter of law, Defendants have acted within the authority given to them by the legislature when enacting face-covering requirements. (*Golden* at p. 15).

The cited decision is not binding in Knox County and is the opinion of one trial court. However, the Knox County Board of Education was informed in a public meeting that the cited case is a valid consideration when weighing the merits of a face-covering policy. Furthermore, it is wise to review the reason why Chancellor Binkley came to the conclusion of the Court. He stated that the most relevant portion of state law for local boards of education is found under T.C.A. § 49-2-203(a)(2) which states: “It is the duty of the local board of education to: Manage and control all public schools established or that may be established under its jurisdiction.” (*Golden* at p. 14). The Court also examined various other state statutes and was not able to find the power for a local board of education to institute face-covering requirements. The Court examined the following other statutes, T.C.A. § 49-2-203(a)(7) [student discipline]; T.C.A. § 49-2-203(a)(11) [student attendance]; T.C.A. § 49-2-203(b)(2) [require students to have physical examination and exclusion from school for communicable diseases]; T.C.A. § 49-1-302(h) [ability to adopt uniforms]; T.C.A. § 49-6-4002(a) [discipline policy mandatory]; T.C.A. § 49-6-4005 [different but consistent discipline policies for grade levels in school]; and T.C.A. § 49-6-4203(b),(c) [*in loco parentis* and to protect students from harm]; and concluded that none of the duties or powers of local boards of education extend to issuing a face-covering requirement. *Id.*

In reading the opinion of Chancellor Binkley in *Citizens v. Golden*, it is apparent that he was weighing the role of school boards and local government in general. Judge John F. Dillon, an Iowa Supreme Court Judge, espoused a rule that brought him fame among municipal lawyers and students of local government. In *Merriam v. Moody’s Executor*, 25 Iowa 163, 170 (1868), Dillon’s Rule outlines the kind of powers legislatures give to municipalities and what happens if there is some doubt about a municipality’s power:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in **express** words; second, those necessarily or fairly **implied** in or incident to the powers expressly granted; third, those **essential** to the accomplishment of the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. *Id.* (See also, MTAS-866).

Dillon's Rule is still alive in Tennessee as shown by cases such as *Southern Contractors v. Loudon County Board of Education*, 58 S.W.3d 706 (Tenn. 2001), and *Arnwine v. Union County Board of Education*, 2002 Tenn. App. LEXIS 326.

### 3. Actions by the Knox County Board of Education

Director of Schools Bob Thomas and his staff prepared a proposed COVID-19 protocol plan entitled "KCS Connect 2021-22" prior to the April 2021 Knox County Board of Education voting meeting. The plan was produced at a time before the face covering mandates and recommendations were dismissed or relaxed. The plan contained language that Tennessee Department of Health guidelines would be followed and that "**Any guidance issued by the State would take precedence.**" [emphasis in original]. That plan was discussed and approved by a majority of the Board [5-4] on April 14, 2021. However, later in that same meeting, the Board voted to sunset its Policy C-240 as of August 1, 2021 [8-1 vote]. Said Policy required the use of face coverings in schools, with certain exceptions. (*See*, Board Policy C-240). Subsequently, at its May 12, 2021 meeting, the Knox County Board of Education voted to sunset its face covering policy earlier, with an effective date of sunset being May 26, 2021 [6-2-1 vote].

There were lively Board discussions with regard to the specific votes cited and others during the spring of 2021 on the subjects of COVID-19 and the use of masks/face coverings. In fact, different Board Members made statements either in favor of, or against, mandating face coverings at numerous points in both 2020 and early 2021. However, when ascertaining the present legal authority of the Board and the Director of Schools, this office must only ascribe to the actions taken by the Board as a whole, with a majority vote.

### Conclusion

With no state statute or rule or regulation specifically authorizing local boards of education to mandate COVID-19 protocols, including but not limited to mask/face covering mandates, this Knox County Board of Education should proceed with caution. At least one court has reviewed the authority and found it lacking. Further, this Board and others across the state have previously proceeded under a Tennessee state of emergency which is not in effect at present.

Based upon this Board's votes in April and May of 2021, this office concludes that the Director of Schools, Bob Thomas, does not have the present legal authority to institute a mask/face covering mandate without a directive from the Governor or the Board. The Director of Schools has specific duties under T.C.A. § 49-2-301, and outside of those duties, only has authority as specifically granted by the Board. The Board of Education may institute a mask/face covering

mandate, or empower the Director of Schools to do so, in regard to its general power under T.C.A. § 49-2-203(a)(2), but this office does not recommend such action based upon the discussion of authority herein.

As a result of the Board's action on April 14, 2021 with regard to the KCS Connect 2021-22 plan, this office concludes that the Director of Schools has been given specific authority by the Board with regard to instituting COVID-19 protocols other than mask/face covering mandates, and specifically those listed in the plan. Guidelines and recommendations from agencies such as the CDC and TDH are just that, guidelines and recommendations, not mandates. Should the Board as a whole desire to mandate certain COVID-19 protocols or perhaps remove authority from the Director of Schools in regard to COVID-19, it may do so with its power.