

Wisconsin Supreme Court Declares Emergency Order 28 Unlawful, But Allows School Closure Order to Stand

On May 13, 2020, the Wisconsin Supreme Court, by a 4 to 3 decision, declared that Emergency Order 28 is “unlawful, invalid, and unenforceable,” effective immediately. (See the full decision [here](#)). However, most notable for school districts, the Court stated in footnotes that its decision does not apply to Section 4.a. of Emergency Order 28. Section 4.a. indicates that “[p]ublic and private K-12 schools shall remain closed for pupil instruction and extracurricular activities for the remainder of the 2019-2020 school year.” Based upon the Court’s decision, this school closure order remains in effect, and all schools must remain closed for pupil instruction and extracurricular activities for the duration of the current school year (which means through June 30).

The Court’s determination was not based upon an analysis of whether Emergency Order 28 was necessary or beneficial to contain the spread of COVID-19. Instead, the Court’s analysis was based upon a finding that Emergency Order 28 constituted a “rule,” and that the Wisconsin Department of Health Services (“DHS”) did not follow the designated rulemaking procedures established in the Wisconsin Statutes. Therefore, the Court declared that Emergency Order 28 was unenforceable (except for Section 4.a).

NEXT STEPS FOR SCHOOL DISTRICTS

The Court’s exclusion of Section 4.a. from its decision means that schools will continue to be closed for pupil instruction and extracurricular activities for the remainder of the 2019-2020 school year. That exclusion also means that for the remainder of the current school year, schools may continue to provide “distance learning or virtual learning” to students. In addition to keeping students engaged and minimizing potential student regression, continuing distance or virtual learning may mitigate against future requests for compensatory education from students with disabilities and their families.

Districts should also continue to monitor communications from local governmental authorities. Local governments have the authority to issue their own emergency public health orders, and several jurisdictions have already acted to either adopt the provisions of Emergency Order 28 or implement orders containing similar provisions. Remaining in close contact with local government officials and members of the county health department will be essential in remaining in compliance with any local orders and in planning for future school activities.

Importantly, DHS has the statutory authority “to close schools and forbid public gatherings in schools” (Wis. Stat. § 252.02), and based on the Court’s decision, that authority is likely independent of the statutory rulemaking process. Consequently, DHS may issue future school closure orders affecting gatherings at schools, including potentially extending the current school closure order beyond the current school year and beyond its current scope. Those orders, if within the authority of DHS, would not be subject to the statutory rulemaking process, and therefore could go into effect with little procedural delay.

Districts should also monitor the State’s progress towards achieving the “gating criteria” established in the [Badger Bounce Back Plan](#). Those criteria will likely inform DHS’s decision-making process regarding future orders affecting schools.

Finally, districts should expect that Governor Evers and the Legislature will now engage in the designated statutory rulemaking process to promulgate a new Safer at Home rule. That process may take an extended period of time, and the provisions of any such rule are difficult to predict at this time.

CONCLUSION

For now, any district that is contemplating holding any type of in-person mass gathering is advised to do the following:

- Contact local public health authorities for any applicable local orders and to discuss whether the district's specific gathering is advisable from a health perspective.
- Contact the district's insurance carriers to verify that the district will have insurance coverage for the district's specific gathering.
- Contact the district's legal counsel to assess the district's legal risk under the circumstances.

The School Law Team at Boardman Clark will closely monitor further legal developments and provide guidance and analysis as appropriate.

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