



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 28, 2020

Doug Svien
Mayor, City of Stephenville, Texas
298 W. Washington
Stephenville, Texas 76401

Dear Mayor Svien:

This letter responds to your request, under Government Code section 418.193, for guidance about whether a local health authority may order the closure of schools.

As background, we note several local health authorities have issued orders purporting to delay in-person instruction at public and private schools for the upcoming school year.¹ These orders generally rely on state law allowing a health authority to control communicable diseases.² But nothing in the law gives health authorities the power to indiscriminately close schools—public or private—as these

¹ These local health orders include:

- Health Auth. Order, City of Austin/Travis Cnty., Tex., July 14, 2020, http://austintexas.gov/sites/default/files/files/Health/20202.7.14%20Signed%20Health%20Authority%20Order_Schools_Final.pdf;
- Health Directive, Bexar Cnty./City of San Antonio, Tex., July 17, 2020, <https://www.sanantonio.gov/Portals/0/Files/NewsReleases/health-directive-2020.pdf>;
- Loc. Health Auth. Order, City of El Paso/El Paso Cnty., Tex., July 9, 2020, <http://epstrong.org/documents/covid19/2020.07.09%20Orders%20for%20School%20Systems%20Reopening.pdf?1594309795>;
- Loc. Health Auth. Order, City/Cnty. of Dallas, Tex., July 16, 2020, <https://www.dallascounty.org/Assets/uploads/docs/hhs/2019-nCoV/DCHHS%20Health%20Authority%20Order%20-%20Schools.pdf>;
- Joint Control Order, Harris Cnty., Tex. and City of Houston, Tex., July 24, 2020, <https://publichealth.harriscountytexas.gov/Portals/27/Documents/News/CJO-Order-Education-SeptReopening-20200724125347539.pdf?ver=2020-07-24-130843-693>;
- Loc. Health Auth. Order, Hidalgo Cnty., Tex., July 14, 2020, <https://www.hidalgocounty.us/DocumentCenter/View/39680/07142020-Hidalgo-County-Local-Health-Authority-Order>;
- Loc. Health Auth. Order, City of Laredo, Tex., July 9, 2020, https://www.cityoflaredo.com/assets/corona-07-10-20_order_by_local_health_authority_for_public_and_private_schools.pdf;
- Amended Loc. Health Authority Order, Waco-McClennan Cnty., July 24, 2020, <https://covidwaco.com/wp-content/uploads/2020/07/Modified-Order.pdfMcClennan>.

² See Tex. Health & Safety Code § 81.082(a).

local orders claim to do.³ Although the plain language of the law provides some authority to local health authorities to quarantine property in certain instances, that authority is limited. It does not allow health authorities to issue blanket quarantine orders that are inconsistent with the law.

Local orders must not conflict with state law.

When construing statutes, courts start with the plain language to give effect to the Legislature’s intent.⁴ Courts recognize that “the words the Legislature chooses should be the surest guide to legislative intent.”⁵ “Where text is clear, text is determinative of that intent.”⁶

Chapter 81 of the Health and Safety Code generally allows the Department of State Health Services or a local health authority to act to prevent the spread of a communicable disease.⁷ In particular, section 81.082 allows “control measures” to be imposed on people, places, or things.⁸ Under the statute, these measures can include:

- immunization;
- detention;
- restriction;
- disinfection;
- decontamination;
- isolation;
- quarantine;
- disinfestation;
- chemoprophylaxis;
- preventive therapy;

³ See *Guidance for Religious Private Schools*, <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/2020.07.17%20Letter%20to%20Religious%20Schools%20re%20COVID%2019%20Orders%20-%20Final.pdf>. See also *Guidance for Houses of Worship During the COVID-19 Crisis*, <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Third%20Revised%20AG%20Guidance%20for%20Houses%20of%20Worship%20During%20the%20COVID-19%20Crisis%20-%20Final.pdf>. This joint guidance identifies that the recommendations provided to religious institutions for religious services are just that—recommendations—and are the least restrictive means of serving a compelling government interest to protect public health. *Id.* at 5.

⁴ *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

⁵ *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) (brackets omitted)).

⁶ *Summers*, 282 S.W.3d at 437.

⁷ See Tex. Health & Safety Code §§ 81.081–.086.

⁸ *Id.* § 81.082(c).

- prevention; and
- education.⁹

It is important to note, however, that the law also specifies when these control measures may be applied. Section 81.084 governs the application of control measures to property.¹⁰

First, Section 81.084 provides that the Department or a local health authority may quarantine property only if there is “*reasonable cause to believe that property . . . is or may be infected or contaminated* with a communicable disease[.]”¹¹

Second, even when there is such a reasonable belief, the period of quarantine is limited. Section 81.084 restricts the duration of a quarantine to “the period necessary for a medical examination or technical analysis of samples taken from the property to determine if the property is infected or contaminated.”¹² If the property is not infected or contaminated, the quarantine must be removed.¹³ If the property is found to be infected or contaminated, the health authority must remove the quarantine and return control of a property if technically feasible control measures to disinfect or decontaminate property are effective.¹⁴

“We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.”¹⁵ The plain language of chapter 81 requires a local health authority to have at least a reasonable belief that infection exists on property before quarantining or imposing control measures on the property. Because nothing in chapter 81 allows a health authority to issue quarantine or control orders for property without any evidence or reasonable belief that actual infection

⁹ *Id.* § 81.082(f).

¹⁰ *Id.* § 81.084. Section 81.083, in turn, governs application of control measures to individuals. Because local health authorities that have ordered school closures do not rely on that authority to do so, we will not address it. However, we observe that section 81.083 likely does not provide any legal basis to impose closure orders on property or facilities, including schools.

¹¹ *Id.* § 81.084(a) (emphasis added).

¹² *Id.*

¹³ *Id.* § 81.084(c).

¹⁴ *Id.* § 81.084(d).

¹⁵ *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

exists, we therefore believe that a court would conclude that such prophylactic orders are prohibited.¹⁶

Similarly, section 81.085 empowers the Department or a local health authority to impose an “area quarantine coextensive with the area affected” by an outbreak of communicable disease.¹⁷ Like a property quarantine under section 81.084, an area quarantine requires at least “reasonable cause” to believe that “individuals or property in the area may be infected or contaminated with a communicable disease.”¹⁸ Therefore, like a property quarantine, an area quarantine may not be imposed for purely prophylactic reasons. To the extent a local health authority seeks to employ section 81.085 to order closure of a school, the authority would need to demonstrate reasonable cause to believe the school, or persons within the school, are actually contaminated by or infected with a communicable disease.

Even then, local health authorities would be wrong to rely on section 81.085 to quarantine individual parcels of property. That provision states that, “If an outbreak of communicable disease occurs in this state, the commissioner or one or more health authorities may impose an area quarantine *coextensive with the area affected.*”¹⁹ “Coextensive” means to the exact extent.²⁰ In this context, the “outbreak of communicable disease . . . in this state” is most naturally read to apply generally to the COVID-19 pandemic, not to infections occurring in individual buildings or locales. That is particularly true given that chapter 81 includes a separate provision for quarantining specific property.²¹ This provision can therefore not be read to authorize the quarantine of individual schools by local health authorities. The

¹⁶ See Tex. Const. art. XI, § 5(a); *City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 592 (Tex. 2018) (recognizing a home-rule city ordinance must not “contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State”).

¹⁷ See Tex. Health & Safety Code § 81.085(a); see also *id.* (providing that a local health authority may impose an area quarantine only within the boundaries of the authority’s jurisdiction).

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

²⁰ The Am. Heritage Dictionary (5th ed. 2020) (defining coextensive as “having the same limits, boundaries, or scope”).

²¹ The text of section 81.085, which applies to “areas” encompassing outbreaks of communicable disease among individuals or within property, and sections 81.083 and 81.084, which are limited to specific persons or property, support this construction. If section 81.085 could be used in situations governed by sections 81.083 and 81.084, it is unclear why the latter provisions are necessary. See *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014) (recognizing courts must not construe statutes to render any part superfluous (citing *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008))). This poor fit between section 81.085 and orders closing specific properties likely explains why no local health authorities we have canvassed have yet relied upon section 81.085 to order school closures.

“outbreak”—to the extent it exists in schools—exists equally throughout their jurisdictions.²²

Finally, a local health authority may not impose an area quarantine until it consults with the Department, and it must give written notice to and consult with each affected county and municipality.²³

We turn now to the other laws that some local health orders cite as additional authority, to determine if these laws contain the power to close schools that chapter 81 does not.²⁴ Both Section 121.024 of the Health and Safety Code and chapter 25, subsection 85.1(g), of the Texas Administrative Code generally recognize the duties imposed on a health authority. They do not, however, authorize quarantines of property that are inconsistent with controlling state law—chapter 81.

Nor does subsection 97.6(h) of the Texas Administrative Code provide any support here. “An agency can adopt only such rules as are authorized by and consistent with its statutory authority.”²⁵ Subsection 97.6(h) purports to allow health authorities to close schools or other places of assembly.²⁶ It is based on the Department’s authority to control communicable diseases under chapter 81. Thus, subsection 97.6(h) can give health authorities the power to close schools only to the extent that power is authorized by and consistent with chapter 81 and other applicable law.²⁷ As we stated above, a health authority may quarantine property or implement control measures under sections 81.084 or 81.085 only if there is at least a reasonable belief that property or persons within the quarantined area are infected or contaminated. Therefore, the only potentially valid construction of subsection 97.6(h) is one that allows health authorities to quarantine school property *after* it becomes or is reasonably believed to be infected. To conclude otherwise would allow health authorities to circumvent statutory requirements governing the application of control measures to property, by relying on an administrative regulation that conflicts with

²² See Procl. of Tex. Gov. Greg Abbott (Mar. 13, 2020) (declaring state of disaster in all Texas counties in response to COVID-19); Procl. of Tex. Gov. Greg Abbott (July 10, 2020) (extending declaration for all Texas counties).

²³ Tex. Health & Safety Code § 81.085(b).

²⁴ See *id.* § 121.024; 25 Tex. Admin. Code §§ 85.1(g), 97.6(h).

²⁵ *R.R. Comm’n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992) (quoting *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App.—Austin 1982, writ ref’d n.r.e.)).

²⁶ 25 Tex. Admin. Code § 97.6(h).

²⁷ *R.R. Comm’n of Tex.*, 844 S.W.2d at 685; see Tex. Educ. Code § 11.151(b).

those standards.²⁸ Because a health authority’s power to quarantine property under chapter 81 is limited, so too is the authority to close schools and other places of assembly under subsection 97.6(h).

Local orders that conflict with the Governor’s orders are superseded.

To mitigate the spread of COVID-19 while continuing to reopen the State, the Governor issued Executive Order GA-28.²⁹ Relevant here, the order limits “business establishments” to operating at 50 percent capacity or less, but it allows the following services to operate without any capacity restrictions:

- any services listed by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) in its Guidance on the Essential Critical Infrastructure Workforce, Version 3.1 or any subsequent version;³⁰
- religious services . . . ; [and]
- local government operations. . . .³¹

The order further provides:

For the remainder of the 2019–2020 school year, public schools may resume operations for the summer as provided by, and under the minimum standard health protocols found in, guidance issued by the Texas Education Agency (TEA). Private schools and institutions of higher education are encouraged to establish similar standards.³²

Finally, GA-28 states that it supersedes “*any conflicting order issued by local officials in response to the COVID-19 disaster . . . to the extent that such a local order restricts services allowed by this executive order.*”³³ And it suspends relevant laws, including the control-measure provisions in chapter 81 of the Health & Safety Code “to the

²⁸ Where possible, courts seek to harmonize laws, not to find conflict. *In re United Servs. Auto Ass’n*, 307 S.W.3d 299, 311 (Tex. 2010).

²⁹ Exec. Order GA-28.

³⁰ CISA Guidance, *available at* https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf.

³¹ Exec. Order GA-28 at 2.

³² *Id.* at 4.

³³ *Id.* (emphasis added).

extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order. . . .”³⁴

The Governor’s orders “have the force and effect of law.”³⁵ Accordingly, GA-28 should be construed according to ordinary principles of statutory construction.

Applying these principles here, nothing in GA-28 prohibits any school from opening. Indeed, the opposite is true. Religious services, such as those provided by religious private schools, and local government operations, such as public schools, are permitted to open and are excluded from any capacity restrictions.³⁶ The only limitation that GA-28 expressly imposes on school operations is TEA’s guidelines, which apply only to public schools.³⁷ Furthermore, our conclusion that GA-28 allows all schools to open is bolstered by the text in GA-28 that simply *encourages* private schools and institutions of higher education to adopt standards similar to TEA’s.³⁸ By recommending that private schools adopt such protocols, GA-28 presumes that private schools and institutions would be open to employ them.

Under its plain language, the Governor’s order allows all schools to operate. Public schools must follow TEA’s guidelines, while private schools and institutions should establish similar protocols.

Therefore, local orders that restrict these permitted school operations conflict with GA-28 and are superseded.³⁹ Local officials lack authority to impose restrictions, including control measures under chapter 81 of the Health and Safety Code, insofar as they are inconsistent with GA-28.⁴⁰ Accordingly, GA-28 both supersedes local orders that restrict the permitted operations of schools and suspends relevant laws that could allow local officials to impose restrictions on schools that are inconsistent with the Governor’s order.⁴¹

³⁴ *Id.*

³⁵ Tex. Gov’t Code § 418.012.

³⁶ Exec. Order GA-28 at 2. These exclusions compel us to conclude that non-religious private schools may also operate under GA-28 without similar restrictions.

³⁷ *Id.* at 4; *see also* Tex. Educ. Agency, SY 20–21 Public Health Planning Guidance, July 17, 2020, <https://tea.texas.gov/sites/default/files/covid/Covid-19-SY-20-21-Public-Health-Guidance.pdf>.

³⁸ Exec. Order GA-28 at 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ We recognize, however, that not all local orders are superseded by GA-28. To the extent a valid local order imposes restrictions that are consistent with GA-28, it would be permissible. *See id.* (authorizing local officials to enforce local restrictions consistent with the GA-28).

Conclusion

“Education of our children is an essential Texas value.”⁴² Texas law gives independent school districts the “primary responsibility for implementing the State’s system of public education and ensuring student performance.”⁴³ Districts are political subdivisions of the State, like cities and counties, and governed by boards of trustees who are elected by voters within the district.⁴⁴ District trustees “have the exclusive power and duty to govern and oversee the management of the public schools of the district,” subject only to laws expressly delegating authority to TEA or the State Board of Education.⁴⁵

Although a local health authority may possess some authority in limited circumstances to close schools, this authority is cabined by laws governing the application of control measures to property and the Governor’s executive orders. Therefore, a local health authority may act under chapter 81 of the Health & Safety Code to order a quarantine of school property only in the limited circumstances allowed by that chapter, and as permitted by GA-28.⁴⁶ Critically, local health authorities may not issue blanket orders closing all schools in their jurisdiction on a purely prophylactic basis. The decision to close schools on such a preventative basis—

⁴² *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

⁴³ *Id.* at 282 (quoting Tex. Educ. Code § 11.002 (brackets omitted)).

⁴⁴ *McKinney*, 936 S.W.2d at 282–83; see Tex. Educ. Code §§ 11.051–.066.

⁴⁵ Tex. Educ. Code § 11.151(b).

Courts have recognized, however, that school districts may nevertheless be subject to reasonable regulations adopted by a sister political subdivision, such as a city, under the police power delegated by the State. See *Port Arthur Indep. Sch. Dist. v. City of Groves*, 376 S.W.2d 330, 334 (Tex. 1964) (concluding district subject to reasonable construction ordinances imposed by municipality); see also Tex. Loc. Gov’t Code § 54.004 (authorizing home-rule municipality “to enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants”). But the police power does not give local governments *carte blanche* to impose any regulation whatsoever. The exercise of the police power must be reasonable and necessary, and it is subject to constitutional limitations. *Lombardo v. City of Dallas*, 73 S.W.2d 475, 479 (1934). One such limitation is that home-rule ordinances may not conflict with state law. Tex. Const. art. XI, § 5(a); *City of Laredo*, 550 S.W.3d at 592; see also Tex. Educ. Code § 11.151(b). Thus, local health orders that conflict with state law cannot stand as valid exercises of the police power, because the Constitution prohibits such actions.

⁴⁶ GA-28 does not purport to strip local health authorities of all power to impose targeted quarantines as permitted by chapter 81, and we do not read it as doing so. But to emphasize again, those quarantines are subject to the limitations on scope, purpose, and duration set forth in chapter 81, and may not operate to restrict the list of services permitted by GA-28 or effectively deny access to those services beyond what is necessary to address and mitigate a specific, identified instance of infection or contamination.

whether public or private—remains with school system leaders who should consult with relevant public health authorities, including the Department and local health authorities.

We recognize, of course, that these unprecedented circumstances are difficult times for many Texans and may require difficult decisions from our State and local leaders. But, as the Texas Supreme Court has recognized, “[t]he Constitution is not suspended when the government declares a state of disaster.”⁴⁷ Government action, no matter how urgent or expedient it is believed to be, may not exceed the constitutional limitations that have been placed upon it by the People. We encourage local and school system officials to work together to make the best decision, within their authority under the law, to protect the health and safety of the residents of their jurisdictions.

Sincerely,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large initial "K" and "P".

KEN PAXTON
Attorney General of Texas

⁴⁷ *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. 2020) (per curiam).