

**BACK TO SCHOOL – COVID STYLE:
SOME FAQs AS THE NEW SCHOOL YEAR STARTS**

Prepared by Gust Rosenfeld PLC and Udall Shumway PLC

Gust Rosenfeld Attorneys: Rob Haws and Jennifer MacLennan

Udall Shumway Attorneys: Lawton Jackson and Denise Lowell-Britt

July 29, 2021

Introduction

During the 2020-2021 school year, school districts throughout Arizona were routinely performing contact tracing on behalf of their local health agencies and sending staff and students home to isolate or quarantine. In recent weeks, the role of public schools relative to quarantine of students has been questioned. The purpose of this FAQ is to identify and address the most common questions that Gust Rosenfeld and Udall Shumway education law attorneys are being asked. We hope the information below is helpful or at least a helpful starting point for further discussion with your school law attorney.

We recognize that federal and state statutes, rules and guidance are evolving day by day. It is challenging to keep up with all the changes. Therefore, we hope the links in this document will help you get to the webpages of the agencies that are publishing updates and you can, of course, reach out to your school law attorney for updates as well.

Disclaimer: This document was prepared for general information purposes only and is not intended as legal advice or a substitute for such advice. Please contact your school attorney for attorney-client privileged legal advice for your school district or for further discussion.

Question 1: What legal authority does the Arizona Department of Health Services and/or do Arizona Counties have to quarantine students?

The Arizona Department of Health Services (ADHS) has broad authority to define and prescribe emergency measures to control communicable diseases including as follows:

(H) Notwithstanding subsection I, paragraph 1 of this section, the director may define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases or conditions if the director has reasonable cause to believe that a serious threat to public health and welfare exists. Emergency measures are effective for no longer than eighteen months.

(I) The director, by rule, shall:

1. Define and prescribe reasonably necessary measures for detecting, reporting, preventing and controlling communicable and preventable diseases. The rules shall declare

certain diseases reportable. The rules shall prescribe measures, including isolation or quarantine, that are reasonably required to prevent the occurrence of, or to seek early detection and alleviation of, disability, insofar as possible, from communicable or preventable diseases. The rules shall include reasonably necessary measures to control animal diseases transmittable to humans.

A.R.S. § 36-136(H) and (I). *See also*, A.R.S. § 36-788 (ADHS authority to quarantine in state of emergency).

ADHS has issued rule A.A.C. R9-6-361. Novel Coronavirus (e.g., SARS or MERS), which provides as follows:

A. Case control measures:

1. A diagnosing health care provider or an administrator of a health care institution, either personally or through a representative, shall isolate and institute both airborne precautions and contact precautions for a novel coronavirus case or suspect case, including a case or suspect case of severe acute respiratory syndrome or Middle East respiratory syndrome, until evaluated and determined to be noninfectious by a physician, physician assistant, or registered nurse practitioner.

2. A local health agency shall:

- a. Upon receiving a report under R9-6-202 of a novel coronavirus case or suspect case, notify the Department within 24 hours after receiving the report and provide to the Department the information contained in the report;
- b. In consultation with the Department, ensure that isolation and both airborne precautions and contact precautions have been instituted for a novel coronavirus case or suspect case to prevent transmission;
- c. Conduct an epidemiologic investigation of each reported novel coronavirus case or suspect case; and
- d. For each novel coronavirus case, submit to the Department, as specified in Table 2.4, the information required under R9-6-206(D).

B. Contact control measures: A local health agency, in consultation with the Department, shall determine which novel coronavirus contacts will be quarantined or excluded, according to R9-6-303, to prevent transmission.

Local health authorities have independent authority coextensive with that of ADHS to adopt reasonably necessary measures to prevent and control communicable diseases. *See* [Ariz. Admin Code R9-6-113\(5\)](#) (authorizing local health officials to institute any reasonable

communicable disease control measures “in addition to those in the regulations of the Department of Health Services ...”). See also [*Black Cloud Building Corp. v. Maricopa County*, 149 Ariz. 55, 716 P.2d 424 \(App.1985\)](#); [*State v. Kelsall*, 22 Ariz.App. 97, 523 P.2d 1334 \(1974\)](#).

School district staff should look to their County Health Department websites for contact tracing and quarantine guidance. For example, the Maricopa County Department of Health has instituted quarantine guidance as updated on May 11, 2021 at the following link: [https://www.maricopa.gov/DocumentCenter/View/58864/Quarantine-Guidance-for-Household-and-Close-Contacts?bidId=.](https://www.maricopa.gov/DocumentCenter/View/58864/Quarantine-Guidance-for-Household-and-Close-Contacts?bidId=)

ADHS and the local health agencies have authority to issue guidance under Arizona law and applicable regulations.

Question 2: What legal authority does a public school have to exclude students from school who have been in close contact with someone with COVID?

A school district’s legal authority in this area is not as specifically defined as a County Health Department’s authority. See Answer 1 above. However, school district governing boards have been granted specific authority by the Legislature to “manage and control the school property within its district.” A.R.S. § 15-341(A)(3); See also, *Maricopa County Health Dept. v. Harmon*, 156 Ariz. 161, 750 P.2d 1364 (Ct. App. 1987) (court of appeals upheld a superior court order allowing Mesa Public Schools to exclude children who had not received the measles vaccine during a measles epidemic).

Arizona case law holds that schools have both a statutory and common law duty not to subject their students within their charge to an unreasonable risk of harm through acts, omissions, or school policy. See, *Monroe v. Basis School, Inc.* 234 Ariz. 155, 318 P.3d 871 (Ct. App. 2014) and *Hill v. Safford Unified School Dist.*, 191 Ariz. 110, 952 P.2d 754 (Ct. App. 1997). Although neither of these cases deal with fact patterns involving communicable diseases they are important in establishing the principle that schools have a standard of care that must be met. The recently expanded immunity provided to school districts (see Answer 4 below) references the requirement that school districts must have reasonable policies related to the pandemic.

A governing board also has specific statutory authority to prescribe and enforce policies and procedures relating to the health and safety of students who participate in district sponsored practices or games. See, A.R.S. § 15-341(A)(24).

ASBA’s standard Policy JLCC, “Communication / Infectious Diseases” provides in pertinent part that a student suffering from a communicable disease must be excluded from school to protect the student’s own welfare and to protect other students from illness. The Policy tasks school administrators or a county health director with making the decision for exclusion and readmission.

Note: Newly enacted A.R.S. §15-342.05, “Face Coverings; Requirement Prohibition” does not contain any language prohibiting a school district from following guidance provided by

federal, state or local public health authorities regarding quarantine of students [or staff] who have been exposed to COVID-19.

Question 3: What is the status of federal and state law or orders relating to face masks on school buses?

On January 29, 2021, the CDC issued an Order (not simply guidance) that requires people riding on public transportation to wear masks. *See*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html#print>. The CDC interprets the term "public transportation" to include school buses. The U.S. Department of Transportation references the CDC Order on its website at <https://www.transportation.gov/safety/mask-travel-guidance>. On July 27, 2021, the Arizona Department of Education issued a statement that the CDC's Order applies to school buses in Arizona. *See*, <https://www.azed.gov/covid-19-guidance>.

The Order currently remains in effect and per the CDC, it obligates the transportation provider to use "best efforts" to ensure that any person on the bus wear a mask when boarding, disembarking, and for the duration of travel.

The Order does contain the same limited exceptions to the mask requirement as schools included in their 2021-2022 mitigation plans (e.g., children under the age of two; certain persons with disabilities who cannot wear a mask, a person for whom wearing the mask would create a risk to workplace health, safety or job duty, while communicating with a person who is hearing impaired when the ability to see the mount is essential for communication).

Earlier this summer, the Arizona legislature enacted A.R.S. § 15-342.05, which prohibits school districts from requiring students or staff to wear masks while on school property or as a condition for students and teachers to participate in in-person instruction. However, the U.S. Constitution's Supremacy Clause establishes that federal law takes precedence over state laws when the federal government properly exercises its powers that are exclusively entrusted to the federal government. To our knowledge, the Order has not been challenged, so whether the Supremacy Clause applies to A.R.S. § 15-342.05 is untested.

Question 4: What protection does A.R.S. § 12-515 provide to schools and how might decisions regarding quarantine impact that protection?

A.R.S. § 12-515, "Emergency declaration for a public health pandemic; immunity from liability; burden of proof; presumption; applicability; definitions" was recently enacted. The law provides broad immunity for persons or providers, including school districts, that act in good faith to protect people from injury from a public health pandemic. The immunity applies to civil actions for injury from a public health pandemic that occur on or after March 11, 2020 and that are based on a claim of failure to protect the claimant from the effects of the pandemic.

Like other providers covered by the law, a school district will be presumed to act in good faith if it "adopted and implemented reasonable policies related to the pandemic". The immunity applies unless the district's action or failure to act was due to its willful misconduct or gross negligence.

Question 5: What steps could a school district take to allow quarantined students to be able to return to school before completion of the full quarantine period?

Students, staff, and educators¹ who have been in close contact with a COVID-19 positive person should receive diagnostic testing per CDC, ADHS and County guidance. The CDC recommends that school districts work with local public health officials, consistent with applicable laws and regulations, including those related to privacy, to determine the prevention strategies needed in their area. See, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

CDC guidance provides that following the recommendations of the local health department, a person may be able to shorten the quarantine period:

- After day 10 without testing.
- After day 7 after receiving a negative test result (test must occur on day 5 or later).

<https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>

Question 6: What actions can be taken to mitigate loss of learning for quarantined students?

School districts should do their best to reduce COVID-19 exposures. While A.R.S. §15-342.05 prohibits schools from requiring the use of face coverings by students or staff during school hours or on school property, other mitigation strategies recommended by the CDC, ADHS and County guidance can be utilized. Examples include but are not limited to limiting visitors on campus, requiring visitors to wear masks (which is not prohibited by the new law), social distancing when feasible, encouraging the use of face masks, utilizing enhanced hygiene protocols, and perhaps utilizing a free statewide program to implement “classroom pooling” to test (with parent permission) for COVID-19, thereby lessening the risk of exposure and quarantining.

According to the CDC, students who are fully vaccinated and do not have COVID-19 symptoms do not need to quarantine following an exposure to someone with suspected or confirmed COVID-19, if they follow CDC testing and masking recommendations. As of July 28, 2021, CDC recommends that fully vaccinated people get tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wear a mask in public indoor settings for 14 days after exposure or until a negative test result. Fully vaccinated people should monitor for symptoms of COVID-19 for 14 days following an exposure.

Students who do quarantine will miss in-person instruction. To support those students, a school district could implement a variety of options such as:

- Access to synchronous remote learning for duration of quarantine.
- Access to learning materials for duration of quarantine.
- The option to provide proof of vaccination to return to school immediately after exposure.
- The option to return after 7 days with testing, to shorten time out of classroom.

¹ Including individuals who have tested positive for and recovered from COVID-19 in the prior 3 months

- Additional instructional support, during or after school hours, upon the student’s return to school.
- Flexible policy on grading assignments missed due to quarantine.

Question 7: May a school conduct a “re-entry” symptom screening before a student with COVID-19 symptoms resumes classroom instruction?

The CDC recognizes screening testing, ventilation, handwashing and respiratory etiquette, staying home when sick and getting tested, contact tracing in combination with quarantine and isolation, and cleaning and disinfection are important layers of prevention to keep schools safe. The CDC recommendation for a student who tested positive for COVID-19 is that the student(s) can return to school and end isolation once the following are met:

- 10 days out from the start of the symptoms, AND
- Fever free for 24 hours without fever reducing medication, AND
- Symptoms have improved.

<https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-options-to-reduce-quarantine.html>

Question 8: How does workers compensation insurance or OSHA standards relate to employees who become infected with COVID-19?

If an employee becomes ill, injured or dies because of work-related exposure to COVID-19, worker’s compensation and/or OSHA compliance issues may come into play.

Worker’s Compensation

Public employees in Arizona are covered by workers’ compensation insurance. Arizona’s worker’s compensation is a “no-fault” system, whereby employees receive compensation without having to prove that the employer was at fault for the injury; the employee only needs to show that the injury arose “out of and in the course of employment”. When an employee is covered by worker’s compensation, he/she may not sue the district in civil court, even if the district was negligent. This is the trade-off for the employee’s ability to receive the income and medical benefits without having to prove that the district was at fault. In the event of an employee’s death due to a workplace injury, worker’s compensation provides death benefits to a surviving spouse and dependent children.

The Industrial Commission of Arizona oversees Arizona’s worker’s compensation programs. On May 14, 2020, the Industrial Commission issued a Substantive Policy Statement entitled, “COVID-19 Workers’ Compensation Claims” (effective May 15, 2020). Although the Statement is identified as “advisory only”, it is reflective of the Commission’s stance on handling COVID-19 claims. Statements included in the Policy Statement include the following:

- Workers’ compensation insurance carriers, self-insured employers, the Special Fund, and authorized claims processing representatives administering Arizona workers’ compensation claims *may not* categorically deny COVID-19 claims. All claims must be reviewed and investigated in good faith.

- Claim denials related to COVID-19, like any claim denial, must be “well-grounded in fact” and “warranted by existing law”.

In a related Announcement entitled, “Adjusting COVID-19 Workers’ Compensation Claims” (May 14, 2020), the Industrial Commission recommends that carriers and self-insured employers evaluate COVID-19 claims in conjunction with Arizona law, considering:

- The nature of the employment and the risks of contracting COVID-19.
- Whether an identifiable exposure occurred at work.
- Whether any identifiable exposure occurred outside of work.
- The timing between an identifiable exposure and the development of COVID-19 symptoms.
- The reliability of medical or other evidence that the work-related exposure caused the disease.

A.R.S. §12-515 (discussed in Question 4 above) specifically provides that its protections do not apply to worker’s compensation claims.

Note: While individual employees may reject worker’s compensation coverage, exceedingly few do so. Employees who do reject such coverage may sue the employer if the employer’s negligence causes injury. The coverage waiver must be filed *before* the injury is sustained. (A.R.S. § 23-901 et. seq.).

Occupational Safety and Health Administration (OSHA) Complaints

The Occupational Safety and Health Act (OSH Act) was enacted by Congress to provide safe working conditions to employees. The U.S. Department of Labor’s OSHA department is empowered to administer and enforce safety standards and make surprise inspections to ensure that employers adhere to safety and health standards established by the OSH Act. Arizona received federal approval for a state-plan, called the Arizona Occupational Safety and Health Act (A.R.S. § 23-401 et. seq.). The Arizona Industrial Commission / Arizona Division of Occupational Safety and Health (ADOSH) administers the Act and has adopted the federal safety and health standards by reference. As a covered employer, school districts are responsible for providing a workplace free from recognized hazards that could cause death or serious injury.

On June 10, 2021, OSHA published an updated version of its January 29, 2021, Guidance entitled, “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace”. <https://www.osha.gov/coronavirus/safework>. The Guidance focuses on protecting unvaccinated or otherwise at-risk workers in their workplaces and contains both recommendations and reference to mandatory OSHA standards. The Guidance states in pertinent part:

Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards like to cause death or serious physical harm. ***

Employers should engage with workers and their representatives to determine who to implement multi-layered interventions to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID, including: * * *

2. Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work to prevent or reduce the risk of transmission of the virus that causes COVID-19.

The Guidance states it is not a “standard or regulation” and is not creating “new legal obligations”. However, the Guidance is relevant to OSHA’s enforcement of existing health and safety standards, including OSHA’s power under a “general duty clause” to regulate all workplace activities relating to employee health and safety.

On July 7, 2021, OSHA published a Memorandum on the subject of “Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)” (“the Plan”) <https://www.osha.gov/laws-regs/standardinterpretations/2021-07-07>. The Plan states, “OSHA will prioritize its enforcement resources to ensure employers eliminate and control workplace exposures to SARS-CoV-2, the cause of COVID-19, in non-healthcare settings” and “Worker protections in non-healthcare industries will be focused on employees who are unvaccinated or not fully vaccinated.”

A.R.S. §12-515 does not shield school districts from their obligation to comply with federal or state laws pertaining to worker safety, nor will it protect school districts from an OSH Act complaint or lawsuit.

Acknowledgment: Thank you to our colleagues Denise Bainton and John Richardson at DeConcini McDonald Yetwin & Lacy PC for their input and review of this document.

6102070.1