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**Open Letter to the Kenosha County Health Department, and to  
School Boards, School Administrators, and Parents in Kenosha County**

The Wisconsin Institute for Law & Liberty (WILL) is a non-profit, public interest law firm that advocates for the rule of law and high-quality educational opportunities for all Wisconsin students. We regularly litigate cases in the K-12 context where government officials exceed their authority or violate statutory or constitutional rights.

We have received multiple reports from parents that the Kenosha County health department has told school boards and schools administrators in Kenosha County that it has the power to close schools, and will close schools, if they do not follow the health department's recommendations or meet various metrics created by the health department. One recent document from the health department (attached to this letter) states that certain "indicators *will trigger* a transition to at-home learning for all staff and students in a school or the district." Another email from a school district administrator to families in the district noted that "Kenosha County Public Health has shared they would intervene and *require* a move to virtual instruction for all of our students if we reached a point of 3% active infections."

The Kenosha health department's position is wrong; it does *not* have the power to close schools. We write this letter to remind the health department, as well as local school boards, school administrators, and parents in Kenosha County and elsewhere, of the Wisconsin Supreme Court's decision this summer (in a case brought by WILL), holding that "local health officers do not have the power to close schools." *James v. Heinrich*, 2021 WI 58, ¶ 26, 960 N.W.2d 350. The Court stated this repeatedly, in multiple ways, leaving no ambiguity. *Id.* ¶ 18 ("Because the legislature expressly granted local health officers discrete powers under Wis. Stat. § 252.03 but omitted the power to close schools, *local health officers do not possess that power.*"); *Id.* ¶ 25 ("[Wis. Stat. 252.03] withholds the power to close schools from local health officers."); *Id.* ¶ 31 ("[T]he legislature never gave local health officers the power to 'close schools'—only the statewide health agency (now DHS).").

The Supreme Court struck down multiple school closure orders (i.e., orders to go virtual) this summer: one issued by the Dane County health department (in *James*) and one by the Racine health department, in another case brought by WILL. *See School Choice Wisconsin Action v. Bowersox*, No. 2020AP1911 (July 2, 2021).

Under state law, the local elected school board is the final authority on how to run schools in their district. Wis. Stat. § 120.12 ("The school board ... shall ... have the possession, care, control and management of the property and affairs of the school district" and "exercise general supervision over" "the schools of the school district."). The Kenosha County health department can certainly

*recommend* practices for preventing the spread of COVID and *propose* criteria for when schools should go virtual, but these decisions are ultimately for the school board, and the board may reject the health department's recommendations. The same is true with respect to school administrators. To the extent that school board members in Kenosha County have been told otherwise, they should not let themselves be pushed around. On the flip side, to the extent any school board members are attempting to blame the health department or others for these decisions, let it be clear to parents—and voters—that the school board is ultimately responsible.

While there is certainly value in taking reasonable and science-based precautions to prevent the spread of COVID, it should go without saying that such precautions can go too far, and school boards should not discount the critical importance of in-person education. Many parents who experienced virtual learning first-hand can testify that it was terrible for their children. These decisions are not easy, and where to strike a balance is up for reasonable debate, but that is precisely why state law puts these decisions on the elected school board, who, unlike local health officials, are directly accountable to parents and voters.

Sincerely,

WISCONSIN INSTITUTE FOR  
LAW & LIBERTY

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**Kenosha County Public Health  
COVID-19 School Metrics  
8/26/2021**

Data Metrics that will be reviewed by KCPH:

- County Burden of COVID Status/Harvard Model – The 7 day average number of COVID-19 cases computed as a rate per 100,000 population that allows for comparison between communities (<https://globalepidemics.org/key-metrics-for-covid-suppression/>).
  - Critical (Purple) Case rate is greater than 35
  - High (Red) Case rate is greater than 25 but less than or equal to 35.
  - Moderately High (Orange) Case rate is greater than 10, but less than or equal to 25.
  - Moderate (Yellow) Case rate is greater than 1, but less than or equal to 10.
  - Low (Green) Case rate is less than or equal to 1.
- New Positive Cases among ages 5-18.
- School Positive Case Percentage (The total number of positive cases as a percentage of students + staff)

Recommendations Based on Metrics:

Though every effort will be made to keep our schools open, based on the metrics listed above, there may be a need to shift a school or even the entire district to a period of at-home learning. To ensure a clear and effective transition to at-home learning when needed, Kenosha County Public Health has identified a set of trigger points that would signal the need to shift to at-home learning.

These trigger points are based on the health department's experience with other sectors (businesses, daycares, restaurants, etc.) that have reopened or remained open during the pandemic, and have been developed in conjunction with resources from the Centers for Disease Control & Prevention (CDC) and the Wisconsin Department of Health Services (DHS). They are designed to identify and mitigate COVID-19 spread swiftly and efficiently.

- Burden of COVID Status (County COVID-19 cases)
  - Critical Virtual
  - High Virtual or hybrid based on assumptions below.
  - Moderately High Hybrid format of virtual and in-person as school determines.
  - Moderate In-person five days per week as school determines.
  - Low In-person five days per week.

The following indicators will trigger a transition to at-home learning for all staff and students in a school or the district (please note-all metrics are subject to change based on new guidance from public health officials):

- >3% positive case percentage in a school facility within a 14-day time period (cumulative total positive cases over the last 14 days, divided by the total number of people in the facility).
- A significant community outbreak is occurring or has recently occurred (large community event or large local employer) and is impacting multiple staff, students, and families served by the community.
- Staff absences reach a level that has the potential to compromise the safety or fidelity of the learning environment.

\*\* Metric indicators should be at a threshold for a minimum of 14 days before considering moving from virtual learning back to hybrid or in-person learning.

Data Availability:

1. County Burden of COVID Status/Harvard Model and school age specific data will be released weekly in the KCPH Situation Report.