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By Opinion Committee at 4:27 pm, Sep 10, 2021

Via Electronic Mail

(opinion.committee@oag.texas.gov)

The Honorable Ken Paxton
Attorney General of the State of Texas
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0432-KP

FILE# ML-49017-21

I.D.# 49017

Re: Request for an opinion regarding whether a governor's emergency disaster order, proclamation, or regulation issued under the authority of Chapter 418, Government Code, falls within the definition of "law" under the Penal Code

Attorney General Paxton:

The Williamson County Attorney's Office respectfully requests your opinion on the following issue:

Question:

Is a governor's order issued pursuant to the authority granted in Chapter 418 of the Government Code and having the "force and effect of law" enforceable as "law" as that term is defined in section 1.07(a)(30) of the Penal Code?

Background:

The Texas Disaster Act of 1975 provides that "[t]he governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent." Tex. Gov't Code §418.014(a). On March 13, 2020, Governor Abbott declared a statewide disaster in response to the imminent threat posed by COVID-19. Proclamation by the Governor of the State of Texas, issued Mar. 13, 2020 (https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf). The disaster declaration has been subsequently renewed and numerous executive orders issued in response. See "News—Proclamations," Office of the Texas Governor: Greg Abbott (<https://gov.texas.gov/news/category/proclamation>); "Governor Abbott Renews COVID-19 Disaster Declaration In August 2021," Office of the Texas Governor: Greg Abbott, issued Aug. 30, 2021 (<https://gov.texas.gov/news/post/governor-abbott-renews-covid-19-disaster-declaration-in-august-2021>). "Those orders cover

a broad range of issues, including data collection and reporting, hospital capacity, mitigation efforts, air transportation, jails, face coverings, and more recently, the safe re-opening for segments of Texas society.” *State v. El Paso County*, 618 S.W.3d 812, 815 (Tex. App.—El Paso 2020, no pet.).

On July 29, 2021, Governor Abbott issued *Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster* (herein referred to as “Executive Order No. GA-38”), in which he ordered that “no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.” Tex. Exec. Order No. GA-38 (July 29, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf. The order further denies any “governmental entity, including a county, city, school district, and public health authority” or “governmental official” the ability to “require any person to wear a face covering or to mandate that another person wear a face covering.” Tex. Exec. Order No. GA-38. Under the authority of Section 418.173, Texas Government Code, and the State’s emergency management plan, Executive Order No. GA-38 provides that “the imposition of any conflicting or inconsistent limitation by a local governmental entity or official” or “the imposition of any such face-covering requirement by a local government entity or official constitutes a ‘failure to comply with’ this executive order that is subject to a fine up to \$1,000.” Tex. Exec. Order No. GA-38. Several governmental entities in Williamson County have imposed requirements that individuals wear face coverings despite Executive Order No. GA-38. See Exhibit A (“Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions,” issued Aug. 25, 2021); Exhibit B (“Superintendent: Mask Requirement for all Schools, Effective Aug. 18,” issued Aug. 17, 2021).

While Executive Order No. GA-38 contains a method of enforcement through fine, provisions of the Penal Code may also be applicable to violations by governmental officials. Specifically, Texas Penal Code section 39.02(a)(1) criminalizes the acts of a public servant who, “with intent to obtain a benefit or with intent to harm or defraud another, [...] intentionally or knowingly violates a law relating to the public servant’s office or employment.”¹ Tex. Penal Code §39.02(a)(1). Within Chapter 39, Penal Code, a “[l]aw relating to a public servant’s office or employment” “means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly: (A) imposes a duty on the public servant; or (B) governs the conduct of the public servant.” Tex. Penal Code §39.01(1). “Law” means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.” Tex. Penal Code §1.07(a)(30).

Executive Order No. GA-38 expressly prohibits any “governmental entity” or “governmental official” from “requir[ing] any person to wear a face covering or to mandate that another person wear a face covering” and thus governs the conduct of governmental officials. Tex. Exec. Order No. GA-38. However, whether a governmental official could be prosecuted under section 39.02(a)(2) for violating Executive Order No. GA-38—assuming the other statutory elements are met—depends on if the governor’s executive order, which has the “force and effect of law,” is a “law” as that term is defined in section 1.07(a)(30), Penal Code.

When interpreting statutory language, words and phrases are read in context and construed according to normal rules of grammar and usage. *Stahmann v. State*, 602 S.W.3d 573, 577 (Tex. Crim. App.

¹ An offense under Penal Code section 39.02(a)(1) is punishable by a fine not to exceed \$4,000 or confinement in jail for a term that does not exceed 365 days or both. Tex. Penal Code §12.21; Tex. Penal Code §39.02(b).

2020); see Tex. Gov't Code §311.011(a). "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Tex. Gov't Code §311.011(b). It is presumed that the Legislature has used every word for a purpose and "that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006) ("It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous."). When construing more than one statute, courts "interpret statutes 'together and harmonize[], if possible,' to give effect to all of the statutory provisions." *State v. Wood*, 575 S.W.3d 929, 935 (Tex. App.—Austin 2019, pet. ref'd) (quoting *Ex parte Gill*, 413 S.W.3d 425, 430 (Tex. Crim. App. 2013)).

Section 418.012, Government Code, which provides that during a disaster, "the governor may issue executive orders, proclamations, and regulations," states that "[e]xecutive orders, proclamations, and regulations have the force and effect of law."² Tex. Gov't Code §418.012; see *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020) ("The Texas Legislature has given Governor Abbott the authority to issue executive orders in times of emergencies, and those order have the force of a law."); *In re Hotze*, ___ S.W.3d ___, ___, No. 20-0430, 2020 WL 40456034, at *2 (Tex. July 17, 2020) (Devine, J., concurring) ("During declared states of 'disaster,' the Texas Disaster Act of 1975 bestows upon the governor the power to issue executive orders that have the 'force and effect of law.'"); *El Paso County*, 618 S.W.3d at 815 (recognizing that the governor's disaster declarations "become state law"); *Abbott v. Anti-Defamation League Austin*, No. 03-20-00498-CV, 2020 WL 6265526, at *6 (Tex. App.—Austin Oct. 23, 2020), *rev'd* 610 S.W.3d 911 (Tex. 2020) (noting the governor's "proclamation has the force of law"). As a matter of statutory construction, is an executive order issued under the authority of section 418.012 that has "the force and effect of law" criminally enforceable as a "law" under the Penal Code? Does permissible enforcement of the governor's executive orders issued under section 418.178, Government Code, extend to the Penal Code as a "law" that may be violated by a public servant?

As time is of the essence in determining the enforcement of Executive Order No. GA-38, I ask that your office expedite our request. If you have any questions concerning this request, please feel free to contact me. Thank you for your review and consideration of this opinion request.

Respectfully submitted,



Dee Hobbs
Williamson County Attorney

Enc.

- Exhibit A—"Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions"
- Exhibit B—"Superintendent: Mask Requirement for all Schools, Effective Aug. 18"

² Section 418.173 provides that failure to comply with a state, local, or interjurisdictional emergency management plan or any rule, order, or ordinance adopted under the plan is an offense punishable by a fine not to exceed \$1,000 or confinement in jail for a term that does not exceed 180 days. Tex. Gov't Code section 418.173.

"Exhibit A"

Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions

Aug 25, 2021

Update: [Mask exemption forms](#) were updated on Aug. 26 in order to comply with medical privacy concerns. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor.

Round Rock Independent School District is tightening its [current mask policy](#), restricting exemptions to health and developmental conditions only, following action by the Board of Trustees at a [special called meeting](#) on Tuesday, Aug. 24, 2021. The stricter policy goes into effect on Thursday, Aug. 26.

Last week, the Board approved a temporary mask requirement set to expire on Sept. 17, 2021. The Board's regular monthly meeting is scheduled for Sept. 16, 2021, and the Trustees could vote to extend the requirement at that time if conditions warrant. The requirement approved last week allowed a broad opt-out provision for staff and students. At Tuesday's meeting, Trustees approved a recommendation by Dr. Hafedh Azaiez, Superintendent of Schools, to limit exceptions to health and/or developmental conditions. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor. Parents and staff who plan to apply for a health or developmental exemption will have a week to provide documentation and will not be required to wear a mask in the interim.

"I miss seeing the smiling faces of our students and teachers and I can't wait until we can all put our masks away. But that time is not now," Dr. Azaiez said. "We must do all we can to prevent the spread of COVID-19 and keep our school doors open."

The latest recommendation was precipitated by changes in the legal landscape on whether or not school districts have the authority to require masks. Late last week, the [Texas Education Agency](#) released new guidance that the state is currently not enforcing the governor's executive order banning mask requirements in public schools due to ongoing legal battles in state and federal courts. Also, the Texas Supreme Court declined to overturn temporary restraining orders requiring masks in public schools, including an order that applies to Round Rock ISD schools located in Travis County and the City of Austin.

Under the updated mask protocol, all students, teachers, staff members and adult visitors, including Trustees, must wear masks on buses and while inside school buildings when six feet of distance cannot be maintained. Students and staff have the option to remove their masks while seated in cafeterias and staff lunchrooms and while outdoors. Masks may be removed for activities during athletics, fine arts, and physical education classes if deemed appropriate by the coach, director or instructor.

Local health authorities from Travis and Williamson counties, and the [Centers for Disease Control and Prevention](#), recommend that students, staff, and visitors wear masks at school to mitigate the current community spread of COVID-19, particularly considering the disease's heightened transmission and infection rate primarily caused by the more transmissible "Delta" variant. Also, the [American Academy of Pediatrics recommends everyone older than the age of two wear a mask in schools regardless of vaccination status](#). Currently, local and federal health officials emphasize that masks are the most effective strategy to reduce the chances of transmission and slow the virus' spread.

Round Rock ISD's current [COVID-19 protocols](#) are designed with the guidance of local health agencies and in consideration of the current and developing public health climate. Round Rock ISD will reassess conditions frequently and adjust accordingly.

"Exhibit B"

Superintendent: Mask Requirement for all Schools, Effective Aug. 18

Aug 17, 2021 | [COVID-19, News & Announcements](#)

Thank you for your patience and support as we opened our 2021-22 school year last week. We know our families and staff share mixed emotions about the school year, especially considering the spread of COVID-19 in our community.

I am announcing an update to our [health protocols](#), as we implement **a temporary districtwide mask requirement effective Wednesday, Aug. 18**. We are elevating our response level to “Red” as we continue to see cases of COVID-19 in our schools and community. We will keep the mask requirement in place through Sept. 10. The Board will meet on Sept. 9 for a regular meeting that may include an extension of the mask requirement.

Under the district’s new mask protocol, all students, teachers, staff members, and visitors, must wear masks when indoors, including buses and all school buildings. Students and staff have the option to remove their masks while eating or when outdoors. We will require masks during athletics, fine arts, and physical education classes, practices, and rehearsals unless students are actively exercising, rehearsing, or performing indoors.

Why Require Masks Now

- After four days of reporting this week, we have had 87 [reported cases of COVID-19 on our dashboard](#). Our highest count total from last school year for an entire week was 130 cases on Jan. 29, 2021.
- Officials from Austin Public Health (APH) and the Williamson County and Cities Health District (WCCHD) shared their concerns about rising cases in our region. They strongly recommended requiring masks to help reduce the spread across our community.

Help Keep In-Person Learning Open

We understand our families and staff feel strongly about masks, individual freedoms, and the health crisis. While there may not be common ground on those issues, we can all

agree **in-person learning works best for most students**. We will do everything we can to stay open and keep our students and staff safe.

The following public health and medical organizations have asked schools to require masks:

- [Austin Public Health \(APH\)](#)
- [Williamson County and Cities Health District \(WCCHD\)](#)
- [American Academy of Pediatrics](#)
- [Centers for Disease Control and Prevention](#)

If the spread of a contagious disease like COVID-19 continues in our schools, we may be forced to close portions of buildings or entire schools. It is critical for our entire #1LISD community to come together for the greater good of every student. Our students need us to stay open, and we believe masks can help the cause.

Red Stage

In addition to requiring masks, the [Red stage](#) includes:

- Cohorting (keeping students in pods or common groups).
- Only essential visitors are allowed at campus/district facilities.
- Cover and close water fountains and use water bottle fillers.

It may take time for schools to implement new protocols. Please give our schools grace as they implement the new guidance as quickly as possible.

Next Steps

Board President Trish Bode called a Special Meeting of our Board of Trustees for Monday, Aug. 23 at 6:15 p.m. During the meeting, the Board will discuss a resolution to require masks and health response protocols.

Families who are currently enrolled in the district's remote learning program and wish to transition back to on-campus learning may do so by contacting their school's registrar. We designed our current COVID-19 protocols with the guidance of local health agencies and in

consideration of the current and developing public health crisis. We will continue to monitor the situation in our community and schools, and adjust protocols accordingly and with the guidance of our health departments and the law.

We have been working with our principals on processes and procedures for enforcing the mask requirement in our school buildings. We ask for patience, grace, and support from our students, staff, teachers, and families during this transition.

We made this work last year. It was tough, but we came together to stay open and minimize the health risk in our schools. We can do what's best for most students.

Respectfully,

Bruce Gearing, Ed.D.

Superintendent of Schools