



**BISMARCK CITY COMMISSION
SPECIAL MEETING NOTICE**

TO: Board of City Commissioners
Media

FROM: Keith Hunke, City Administrator

DATE: September 21, 2021

SUBJECT: Special Meeting Notice

Board of City Commissioners
Wednesday 22, 2021
12:00 p.m.
City/County Building
221 N. 5th Street, Tom Baker Room
Bismarck, ND 58503

AGENDA

1. Receive Public Health Director Renae Moch's Covid-19 update.
2. Receive and consider September 19, 2021, letter from the BPS Parent and Community Coalition for COVID-19 Safety in School.

ADJOURN



City Attorney

DATE: September 21, 2021

FROM: Jannelle Combs, City Attorney

ITEM: Receive letter from BPS Parent and Community Coalition

REQUEST:

Receive and consider September 19, 2021, letter from the BPS Parent and Community Coalition for COVID-19 Safety in School.

Please place this item on the September 22, 2021 City Commission special meeting agenda.

BACKGROUND INFORMATION:

The members of the City Commission, acting as the City Board of Health, received the attached letter. Commissioner Guy, as portfolio holder for Public Health, requested that the City Board of Health meet to discuss this letter. In addition, for the Commission's information, please see the three documents from Public Health and my memo regarding City authority which have previously been provided to Bismarck Public Schools.

RECOMMENDED CITY COMMISSION ACTION:

Receive and consider September 19, 2021, letter from the BPS Parent and Community Coalition for COVID-19 Safety in School.

STAFF CONTACT INFORMATION:

Jannelle Combs | City Attorney, 355-1340 or jcombs@bismarcknd.gov



September 19, 2021

Open Letter to the Bismarck Public Health Board:

The following parents of Bismarck Public Schools students and concerned community members are writing to ask for intervention from the Bismarck Public Health Board as it relates to the COVID policy in Bismarck Public Schools.

We have asked the BPS School Board and Superintendent to adopt a COVID policy consistent with the American Academy of Pediatrics (AAP) and the Centers for Disease Control (CDC) guidance, but we have been told that the School Board does not have a public health “portfolio” and that COVID policies are a community matter. The president of the school board, in an email to one of our members said the following, “Bismarck Burleigh Public Health has the power to issue a mandate through the Chief Medical Officer and/or through the City or County commission, both of which have a member that holds Public Health in their portfolio.”

North Dakota’s – and Burleigh County’s – current surge in COVID-19 cases continues to outpace the number of cases that were active a year ago (see Figure 1). The childhood COVID-19 infection rate in Burleigh County exceeds that of the rest of the state and is TWICE as high as Cass County’s (see Figure 2). In comparing COVID-19 cases within BPS students since the beginning of this school year to those at the beginning of last school year – when school was in a hybrid model and masks were required – the number of cases are at least four times higher this year.

Increases in infections and hospitalizations have concerned medical professionals, but our educational leaders have brought children back into classrooms while downplaying the risk of a COVID-19 outbreak and in direct opposition to [Centers for Disease Control K-12 Guidance](#) which was updated in July and again in early August. Children under the age of 12 currently are not able to get vaccinated against COVID-19 – approximately half of the enrolled population of Bismarck Public Schools. Public schools are the only place where the government requires a vulnerable population to congregate by law.

What we are asking for you to do is to act within your authority to require Bismarck Public Schools to require and enforce mask wearing on all Bismarck Public Schools owned and contracted buses and in BPS school buildings for all students, staff members, and guests. We would welcome the opportunity to speak with you about this request.

Sincerely,

BPS Parent and Community Coalition for COVID-19 Safety in School

Enclosure: ND AAP Letter to ND School Boards (August 17, 2021)

cc: BPS School Board Members, ND DPI, NDDH, Bismarck Tribune, KFYP, KXNews, Fargo Forum, CDC, US Department of Education, MSNBC

Figure 1. Comparison of 2020 to 2021 for the period August 1 to September 15, Burleigh County Childhood COVID-19 Case Rate per 100,000 residents. Source: ND Department of Health Public Use Download Data.

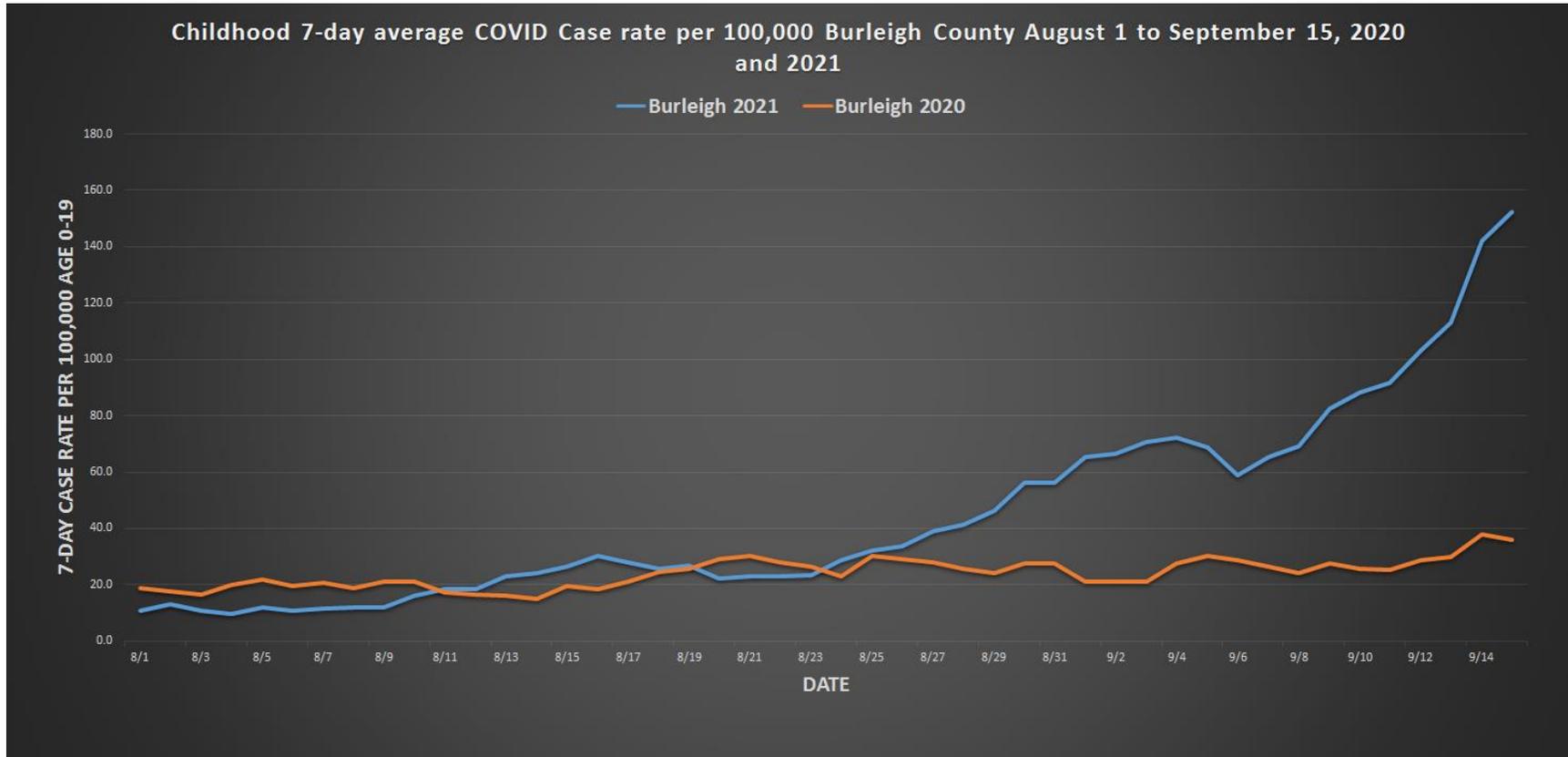
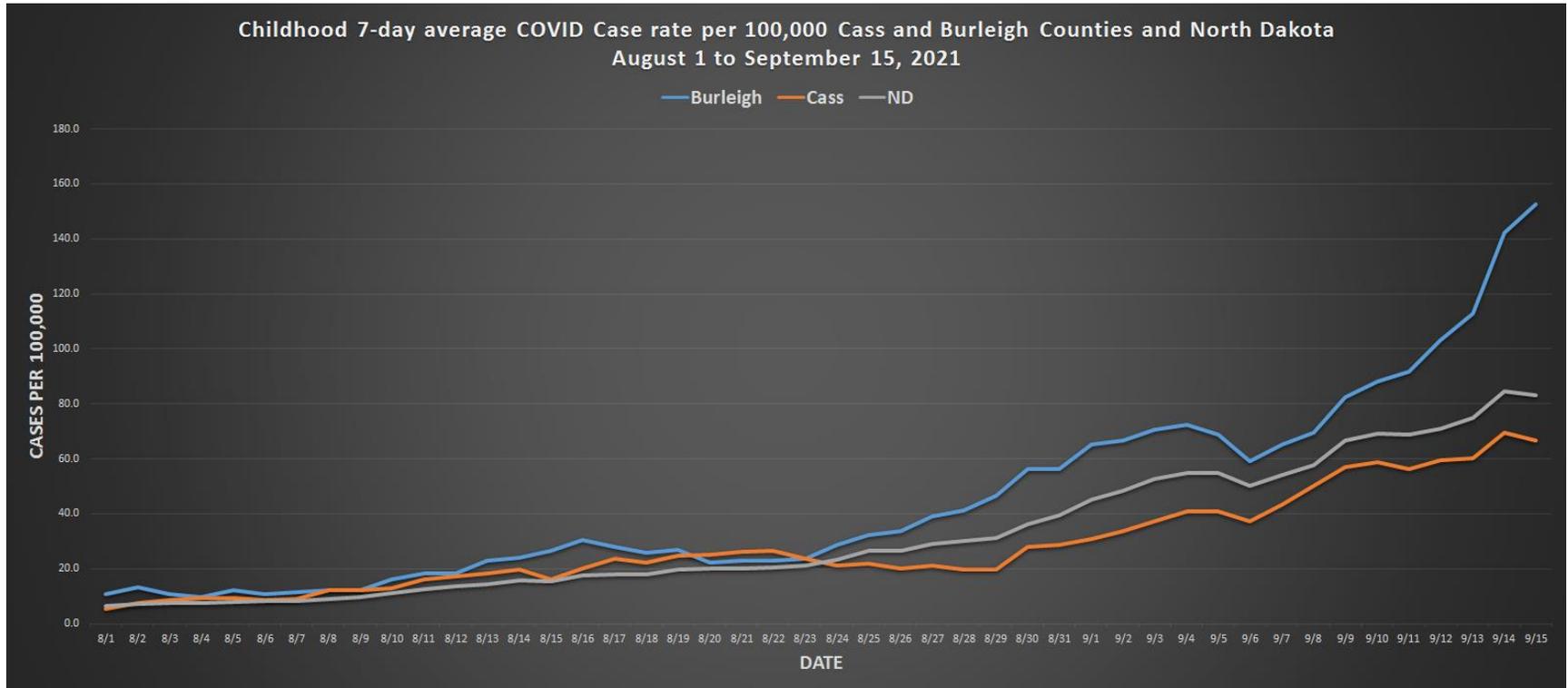


Figure 2. Comparison of Statewide, Burleigh County, and Cass County Childhood COVID-19 infection rate per 100,000 residents for the period August 1 to September 15, 2021. Source: ND Department of Health Public Use Download Data.



List of Signing Members of the BPS Parent and Community Coalition for COVID-19 Safety in School:

Krisanna Peterson, Parent	Carol Skalsky, Parent
Alisa Hessinger, Community member	Marlena Zaun, Parent
Chris Tigges, Parent	Kelly Gorz, Parent
Cecelia Dasinger, Community member	Erin O'Leary, Parent
Becky A. Larson, Community member	Emily R Ehrens, Community member
Mary L Rennich, Community member	Margaret Townsend, Parent
Jodi Kieson, Parent	Stephen Townsend, Parent
Susan Goodale, Community member	Melissa Johnson, Parent
Megan Toman, Parent	Lori Riehl, Teacher
Josh Toman, Parent	Erin Price, Parent
Hannah Balaban, Grandparent	Steven Price, Parent
Steve Balaban, Grandparent	Alexis Thompson, Student
Katherine Kline, Parent	Aiden Thompson, Student
Donna Poling, Parent	Brandy Chap, Parent
Torey Kieson, Parent	Jim Goodale, Grandparent
Jenna Corsiatto, Parent	Matthew Chap, Parent
Parag Kumar, MD, Pediatrician	Whitney Tigges, Community member
Nicole Thompson, Parent	Andrew J. Gorz, Parent
Elizabeth Loos, Parent	Kristen Northrup, Parent
Karen K Ehrens, Community member	Craig Brewster, Parent
Berdell Wilson, Community member	Sidney Mick, Community member
Donald R Wilson, Community member	Beth Schwab, Parent
Stephanie Orr, Parent	Diane Zwinger, Grandparent
Katherine Netzer, Grandparent	Sairy Ruth Miller, Parent
Rachael TreeTop, Parent	Intika Chavy Williams-Miller, Student
Jonathan TreeTop, Parent	Nicole Hafner, Parent
Steven Balaban, Grandparent	Karen Dunlap, Parent
Hannah Balaban, Grandparent	Sean Dunlap, Parent
Rose TreeTop, Grandparent	Robert Dunlap, Student
Duane Ehrens, Community member	
Amelia K. Doll, Parent	
Renee Stromme, Parent	
Stephen McDonough MD, Community member	
Sheri Ocampo, Community member	
Lindsay Brewster, Parent	
Cheryl Underhill, Community member	



Public Health
Prevent. Promote. Protect.

Bismarck-Burleigh Public Health



"Bismarck's the spot for optimal health in a thriving community."

August 10, 2021

Dear Superintendent:

Bismarck-Burleigh Public Health (BBPH) would like to provide the following guidance for COVID-19 prevention in K-12 Schools in Burleigh County. These recommendations are based on current available science and intended to provide the safest in-person learning environment for all students and staff entering the 2021-2022 school year. Please know this guidance can change based upon updated research and as more data becomes available regarding COVID-19 and the Delta variant.

The Delta variant of COVID-19 has become the predominant variant for positive cases. The Centers for Disease Control (CDC) described Delta as more transmissible than influenza and as contagious as chickenpox. In addition to the acute symptoms of COVID-19, infection with this virus may lead to serious long-term health consequences including chronic lung problems, memory and concentration issues, brain fog, fatigue and many other complications.

Viral spread of COVID-19 is predominantly among the unvaccinated, the largest population of which are children under age 12 who are not yet eligible for COVID-19 vaccine. Since vaccine isn't an option for children under age 12 at this time, universal masking is the most readily available method to prevent the spread of COVID-19 in schools.

BBPH supports the guidance released by the Centers for Disease Control (CDC) and the North Dakota Department of Health. This guidance focuses on keeping children healthy and safe as they return to in-person learning utilizing layered prevention strategies.

Due to the highly contagious Delta variant, the CDC recommends the following prevention strategies:

- **Vaccination:** Promote vaccination for those that are eligible.
- **Masking:** Universal indoor masking all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.
- **Physical distancing:** Maintaining 3-feet of physical distance between students to the best of ability.
- **Screening/testing:** Promptly identify cases, clusters, and outbreaks.
- **Ventilation:** Improving ventilation reduces the number of virus particles in the air.
- **Cleaning and disinfection.**
- **Handwashing and respiratory etiquette.**
- **Staying home when sick and getting tested for COVID-19.**
- **Contact tracing, in combination with isolation and quarantine.**



Per direction from the North Dakota Department of Health, the following post-exposure guidelines are recommended:

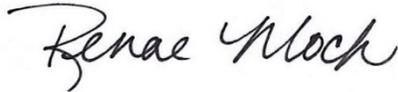
- **Mask to mask exposure (both parties masked):** Exempt from quarantine.
- **Fully vaccinated contacts:** If no symptoms, no quarantine. Monitor for symptoms and test 3-5 days after exposure.
- **Unmasked contacts:** 14-day quarantine. Contacts may release from quarantine after day 10 if no symptoms, after day 7 with negative test collected on day 5 or later.

Please let us know if you have questions regarding the guidance for COVID-19 prevention. Schools are an important part of the infrastructure in our community and public health is here as a resource for you to ensure a healthy and safe environment throughout the 2021-2022 school year.

Sincerely,



David J. Pengilly, MD
Bismarck-Burleigh Health Officer



Renae Moch, MBA, FACMPE
Public Health Director



Public Health
Prevent. Promote. Protect.

Bismarck-Burleigh Public Health



"Bismarck's the spot for optimal health in a thriving community."

August 25, 2021

Dear Bismarck Public School Board Member:

As the Health Officer for the City of Bismarck and Burleigh County, I have a responsibility to this community for the preservation of life and health of individuals. I also have a responsibility to advise you as decision makers for Bismarck Public Schools, on making the safest decisions for students and staff relating to COVID-19 and other infectious diseases.

In the school setting, my authority is limited to closing classrooms and/or schools for decontamination when a serious infectious disease is present. As school board members, the authority to establish policies for Bismarck Public Schools (BPS) resides with you. This includes COVID-19 prevention policies such as mask requirements.

As you are aware, Burleigh County is experiencing increasing cases of COVID-19 and an increase in positivity rates. We are also seeing several clusters of COVID-19 in this community including clusters in four Bismarck Public Schools. This is very concerning as school has not yet started. With no mask requirements in place, the impacts on the health of students, teachers and staff, could be detrimental in the weeks ahead.

The Delta variant of COVID-19 has become the predominant variant for positive cases. This variant is as contagious as chickenpox. In addition to the acute symptoms of COVID-19, infection with this virus may lead to serious long-term health consequences including chronic lung problems, memory and concentration issues, brain fog, fatigue and many other complications. Those at highest risk for severe illness are the unvaccinated, many of which are children under the age of 12 who are not yet eligible for vaccine.

As Bismarck-Burleigh Health Officer, I am advising you, the board members for Bismarck Public Schools, to require masks in all schools. A COVID-19 surge is predicted to last through the month of September. Masking now is important to mitigate the spread of this virus and can be reevaluated as community conditions change. The science is clear that masks work to prevent COVID-19 infection. Masking is the most readily available method to prevent the spread of COVID-19 within the school district and gives the students and teachers the best chance of keeping classrooms and schools open.

Please let me know if you have questions regarding this advice. Schools are an important part of the infrastructure in our community and as your health officer, I am here to advise you on the best decisions to ensure a healthy and safe environment throughout the 2021-2022 school year.

Sincerely,

David J. Pengilly, MD
Bismarck-Burleigh Health Officer

Renae Moch, MBA, FACMPE
Public Health Director



Questions Regarding City-County Health Officer Authority

North Dakota's public health system is decentralized with 28 independent local public health units working in partnership with the North Dakota Department of Health. In this decentralized approach, the units are required to meet state standards and follow state laws and regulations, but they can exercise their own powers and have [administrative authority](#) to make decisions to meet their local needs.

What specific authority does the local health officer have in schools?

The only specific authority for the Health Officer on schools relate to building conditions or too many students in a building. Any other powers would be the same throughout the City of Bismarck as they are for schools. It may be possible under the confinement powers for the Health Officer to close school rooms or schools or businesses if he believes there is significant spread of an infectious disease. He may also communicate the ways in which the likelihood of that power being exercised would be less if the business or building mandated the wearing of masks within it.

Can a local health officer issue a mask mandate for Bismarck Public Schools only?

Without an emergency in place, I believe a mask mandate issued by the health officer would not be upheld by courts.

Can a local health officer issue a mask mandate for all schools in Burleigh County?

Without an emergency in place, I believe a mask mandate issued by the health officer would not be upheld by courts.

Can a local health officer issue a mask mandate for all children under age 12?

Without an emergency in place, I believe a mask mandate issued by the health officer would not be upheld by courts. State laws deems all children under 10 incapable of committing a crime. Since the courts typically provide that children from 10 to 14 are not able to be charged in criminal matters, this would be practically unenforceable. Schools can make rules, like dress codes or attendance or behavior, that they can enforce because of their custody of the minors at school that the City just cannot do.

A mask mandate would fall within the term of regulations. This is a legislative function while the Health Officer is an executive function position. That authority is with the City Commission, sitting as the Board of Health. The City Commission could possibly enact a rule; however, I would advise an opportunity for notice at minimum since there is no state of emergency declared within the City of Bismarck. It would be difficult to target only school buildings as a City Commission for a rule on masks as that could seem discriminatory, especially when another political subdivision controls those buildings. A large swatch for a mask mandate rule or ordinance at the City level would be difficult to draft that does not unintentionally include other properties. Additionally, the children requested to wear masks are not of an age that the City could enforce any of the rules

on them because they are too young. They are able to be subject to discipline from the school.

What is the process to implement a mask requirement for all public indoor spaces in the City of Bismarck?

1. City Commission acting as the Board of Health (whose members are the City Commissioners) convene at the request of local health officer to consider mask requirement for all public indoor spaces.
2. Need majority vote (3-2) to implement this requirement.
 - a. If there is a state of emergency, this law can be created without an ordinance change process, if Board agrees it is an emergency situation.
 - b. If no statement of emergency
 - i. Board can do a resolution that would not be criminally enforceable.
 - ii. Matter gets drafted into an ordinance which requires 2 Commission meetings and a public hearing before the Commission can adopt it.

What is the process to implement a mask requirement for all public indoor spaces in Burleigh County?

You could request a joint City/County Board of Health meeting to see if both sides would agree. I do not know what it takes for the county to pass any ordinances. This would be the Burleigh County States Attorney's jurisdiction.

23-35-12. Local health officers.

2. Within the jurisdiction of the board of health, a local health officer:

- a. Shall keep a record of the official acts of the local health officer.
- b. Shall enforce every law and rule relating to preservation of life and health of individuals.
- c. May exercise the powers and duties of the board of health under the supervision of the board of health.
- d. May make sanitary inspections of any place within the jurisdiction in which the local health officer finds a probability a health-threatening condition exists.
- e. May investigate public water and ice supplies suspected of contamination and initiate necessary condemnation proceedings.
- f. May enforce school cleanliness; inspect any school that may be overcrowded, poorly ventilated, or unsanitary; and, when necessary, report cases of any unsanitary or unsafe school building to the board of health for investigation.
- g. May take any action necessary for the protection of public health and safety.
- h. May determine when confinement and decontamination is necessary for the safety of the public. The local health officer may establish confinements consistent with procedures provided under chapter 23-07.6 and perform any acts required for decontamination when necessary.

23-35-13. Penalty.

A person who violates any order, ordinance, or rule prescribed by any board of health or health officer or any rule adopted under this chapter is guilty of a class B misdemeanor.

See the following statement highlighted in yellow:

g. May take any action necessary for the protection of public health and safety.

Question:

If the action the health officer felt was necessary was to require masks in schools for the protection of public health and safety, is this within his authority to do so based on this statement?

Answer:

No. If it was an emergency, it could possibly be, but absent an emergency declaration, his authority derives from the board of health. The health officer cannot make laws. City Commission/Board of Health serves as the legislative authority.



City Attorney

DATE: August 9, 2021
FROM: Janelle Combs, City Attorney
ITEM: Health officer authority

REQUEST:

Whether the Bismarck City Health Officer has authority to issue a mask mandate for Bismarck Public Schools buildings only.

DISCUSSION:

Initially, it must be clear that the Bismarck City Commission, Board of Health nor Health Officer have any authority over the Lincoln, Apple Creek or Menoken elementary schools. Those are outside the city limits. All actions are limited to properties within the annexed area of the City of Bismarck.

It is also noteworthy that current political climates prefer local control. This would include not just the preference of local subdivisions to control over state or federal directives, but also that local political subdivisions most narrowly confined to the issue, act on the issue. In this case, I believe that the location where children under 12 gather, under the requirements of law to attend school, are within school district property. The City acting to enforce a law only on another political subdivision's property is typically not appropriate. There are voters who vote for the School Board that are not in the City limits. And the City cannot act on all the School Board property, as some is outside the City limits. I will provide brief explanation of both the Board of Health and the Health Officer's powers under state and city law.

There are both statutory and home rule authority with Bismarck's Board of Health. Some jurisdictions operate solely under state authority or provide for regional units. There is no formal joint city-county health district under NDCC 23-35-03 in Bismarck, even though we appear to operate jointly. As such, the county and city operate autonomously, even though the Public Health Director and Health Officer are the same for Bismarck and Burleigh County. In both instances, the governing body sits as the Board of Health.

The powers under NDCC 23-35-08 for Boards of Health are numerous. Specific powers by statute include:

5. May make rules regarding any nuisance, source of filth, and any cause of sickness which are necessary for public health and safety.

7. May make rules in a health district or county public health department, as the case may be, and in the case of a city public health department may recommend to the city's governing body ordinances for the protection of public health and safety.

8. May adopt confinement, decontamination, and sanitary measures in compliance with chapter 23-07.6 which are necessary when an infectious or contagious disease exists.

9. May make and enforce an order in a local matter if an emergency exists.

12. May abate or remove any nuisance, source of filth, or cause of sickness when necessary to protect the public health and safety.

At state law, the cause of sickness can be abated or removed through a Notice and Order, similar to what the Commission has seen for junk yards. That Notice and Order relates to building condition remedies though, not necessarily rules for people within that building. Bis. Ord. 8-01-07.

At state law, local health officers provide that they are appointed for 5 years, subject to removal for cause. NDCC 23-35-12. In the Bismarck home rule charter, the term is for 2 years from July 1 after the regular election of commissioners and the appointment is at will. Bis. Ord. 2-07-02. These two laws conflict. While it is possible a court could find differently, I would argue the more restrictive terms control so the health officer's appointment is now until July 1, 2022, unless the next Commission approves his appointment too. I would also believe it is possible that the City Commission could remove the health officer without cause; however, with the contract signed by the Commission, we would be obligated to continue to pay him.

The Health Officer's powers below are identical in ordinance, as they are in state law. Under the authority of the Board of Health, the officer:

*May exercise the powers and duties of the board of health under the supervision of the board of health.

*May make sanitary inspections of any place within the jurisdiction in which the local health officer finds a probability a health-threatening condition exists.

*May enforce school cleanliness; inspect any school that may be overcrowded, poorly ventilated, or unsanitary; and, when necessary, report cases of any unsanitary or unsafe school building to the board of health for investigation.

*May take any action necessary for the protection of public health and safety.

*May determine when confinement and decontamination is necessary for the safety of the public. The local health officer may establish confinements consistent with procedures provided under chapter 23-07.6 and perform any acts required for decontamination when necessary.

Additionally, City specific law limits the above. In order to issues regulations, the City Commission sitting as the Board of Health must publish those regulations, so new regulations cannot be enacted without City Commission approval. Bis.Ord. 8-01-03. If the City Commission wishes to make an ordinance, that would require two meetings to do and would be permanent. In addition, all decisions of the Health Officer dealing with violations above are subject to appeal to the Board of City Commissioners. During that appeal period, the decision of the health officer is stayed (unenforceable) unless and until the Commission affirms the decision. Bis. Ord. 8-01-08.

CONCLUSION:

The only specific authority for the City Health Officer on schools relate to building conditions or too many students in a building. Any other powers would be the same throughout the City as they are for schools. It may be possible under the confinement powers for the Health Officer to close school rooms or schools or businesses if he believes there is significant spread of an infectious disease. He may also communicate the ways in which the likelihood of that power being exercised would be less if the business or building mandated the wearing of masks within it.

A mask mandate would fall within the term of regulations. This is a legislative function while the Health Officer is an executive function position. That authority is with the City Commission, sitting as the Board of Health. The City Commission could possibly enact a rule; however, I would advise an opportunity for notice at minimum since there is no state of emergency declared within the City of Bismarck. It would be difficult to target only school buildings as a City Commission for a rule on masks as that could seem discriminatory, especially when another political subdivision controls those buildings. A large swatch for a mask mandate rule or ordinance at the City level would be difficult to draft that does not unintentionally include other properties. Additionally, the children requested to wear masks are not of an age that the City could enforce any of the rules on them because they are too young. They are able to be subject to discipline from the school.

STAFF CONTACT INFORMATION:

Janelle Combs | City Attorney, 355-1340 or jcombs@bismarcknd.gov