



Commonwealth of Kentucky  
Office of the Attorney General

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**OAG 20-13**

*Subject:* Whether, during the current state of emergency caused by the spread of the novel coronavirus, the Governor, the Cabinet for Health and Family Services, or any other state or local officials may order the closure of religiously affiliated schools that are in compliance with reasonable social distancing and hygiene guidelines set forth by recognized national or international health agencies and organizations.

*Requested by:* Senator Wil Schroder  
Kentucky State Senate

*Written by:* Carmine G. Iaccarino, Assistant Attorney General  
Marc Manley, Assistant Attorney General

*Syllabus:* No. Under the First and Fourteenth Amendments to the United States Constitution, and Kentucky's Religious Freedom Restoration Act, KRS 446.350, the Governor, the Cabinet for Health and Family Services, and any other state and local officials, are prohibited from closing religiously affiliated schools because it does not appear that school closure is the least restrictive means to serve a compelling state interest.

***Opinion of the Attorney General***

Although life in the Commonwealth has changed, the United States Constitution and the demands of Kentucky law have not. On March 6, 2020, Governor Andrew Beshear declared a state of emergency in response to the spread of the novel coronavirus. Since that time, state and local officials have taken extraordinary

measures in an attempt to protect the public health. All of the measures may have been well-intended, but many have been unconstitutional. *See, e.g., Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (finding the Governor’s ban on drive-in church services unconstitutional); *Roberts v. Neace*, --- F.Supp.3d ----, No. 2:20-cv-054, 2020 WL 2115358 (E.D. Ky. May 4, 2020) (finding the Governor’s travel ban unconstitutional); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, --- F.Supp.3d ----, No. 3:20-CV-00033-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020) (granting statewide injunction against of the Governor’s prohibition on mass gatherings with respect to any in-person religious service that adheres to applicable social distancing and hygiene guidelines); *Ramsek v. Beshear*, --- F.Supp.3d ----, No. 3:20-cv-00036-GFVT, 2020 WL 3446249 (E.D. Ky. June 24, 2020) (finding the Governor’s ban on political protests unconstitutional). “The laws and Constitution are designed to survive, and remain in force, in extraordinary times.” *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

During these extraordinary times, on August 10, 2020, Governor Beshear “recommended” that districts delay in-person instruction until September 28, 2020.<sup>1</sup> Now, in a reversal for some, and in response to the Governor’s recommendation and pressure from the Department of Education, most public schools are preparing to start the year using non-traditional instruction (“NTI”) rather than in-person instruction.<sup>2</sup> However, a number of religiously affiliated schools, after a summer of preparation, have chosen to begin in-person instruction.<sup>3</sup> Understandably, religiously affiliated schools and concerned parents wonder whether the Governor, or other state and local officials, may lawfully coopt their informed decisions to reopen for in-person instruction. Specifically, this Office has been asked whether the Governor, the Cabinet for Health and Family Services, or any other state or local governmental agency or official may order the closure of religiously affiliated schools that are in compliance with reasonable social distancing and hygiene guidelines set forth by recognized national or international health agencies and organizations. For the reasons that follow, they may not.

The freedom to practice one’s faith is a defining feature of American liberty. “Since the founding of this nation, religious groups have been able to ‘sit in safety

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<sup>1</sup> Kentucky Department of Education News Release, *Gov. Beshear asks Kentucky superintendents to delay in-person classes until Sept. 28* (Aug. 10, 2020), available at <https://content.govdelivery.com/accounts/KYDE/bulletins/299a3dc> (last visited Aug. 19, 2020).

<sup>2</sup> Kevin Wheatley, WDRB, *Opinions from school leaders vary on Beshear’s call to delay start of classroom learning* (Aug. 11, 2020), available at [https://www.wdrb.com/in-depth/opinions-from-school-leaders-vary-on-beshears-call-to-delay-start-of-classroom-learning/article\\_12be9204-dc16-11ea-aaaa-2fd813fe00b4.html](https://www.wdrb.com/in-depth/opinions-from-school-leaders-vary-on-beshears-call-to-delay-start-of-classroom-learning/article_12be9204-dc16-11ea-aaaa-2fd813fe00b4.html) (last visited Aug. 19, 2020).

<sup>3</sup> *See, e.g.,* Letter to Governor Beshear from the Catholic Bishop’s Conference of Kentucky (Aug. 12, 2020), available at <http://ccky.org/wp-content/uploads/2020/08/2020-8-12-Reopening-Schools-Ltr-to-Gov-Beshear.pdf> (last visited Aug. 19, 2020).

under [their] own vine and figtree, [with] none to make [them] afraid.” *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (quoting Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)). This is the promise of America. It is one of the Nation’s “most audacious guarantees.” *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249, at \*3 (W.D. Ky. Apr. 11, 2020). And that promise extends to the right of Kentucky parents not only to “establish a home and bring up children” and “to control the education of their own,” *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923), but also to do so in a manner consistent with their faith.

The “American community is today, as it long has been, a rich mosaic of religious faiths.” *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 628 (2014) (Kagan, J. dissenting). Indeed, “[r]eligious education is vital to many faiths practiced in the United States.” *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). For example, “[i]n the Catholic tradition, religious education is ‘intimately bound up with the whole of the Church’s life.’” *Id.* at 2065 (quoting Catechism of the Catholic Church 8 (2d ed. 2016)). And, “Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation.” *Id.* In Islam, the importance of education “is traced to the Prophet Muhammad, who proclaimed that ‘[t]he pursuit of knowledge is incumbent on every Muslim.’” *Id.* “The contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts.” *Id.* “The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education,” and Seventh-day Adventists “trace the importance of education back to the Garden of Eden.” *Id.* at 2066.

Reflecting the fundamental importance of this heritage of religious diversity in America, the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend I. State governments, like Congress, are restricted by the First Amendment. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (“The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”). In exercising their First Amendment rights, parents may choose to send their children to religiously affiliated schools instead of public schools. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925). Parents may make that choice because “[m]any such schools expressly set themselves apart from public schools that they believe do not reflect their values.” *Our Lady of Guadalupe School*, 140 S. Ct. at 2065.

Just weeks ago, the United States Supreme Court recognized “that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” *Id.* at 2064. And, in light of this country’s rich history and tradition of

religious education, it should come as no surprise that a state’s general authority in the educational arena must yield to the parents’ fundamental right to educate their children in accordance with their faith. This is because “[t]he child is not the mere creature of the state; those who nurture him [or her] and direct his [or her] destiny have the right, coupled with the high duty, to recognize and prepare him [or her] for additional obligations.” *Pierce*, 268 U.S. at 535. Accordingly, compulsory-attendance laws have been held unconstitutional where they prevent parents from sending their children to religious schools. *Id.* And if the state cannot *compel* children to attend public schools when doing so conflicts with the parents’ faith, it follows that the state cannot *prohibit* children from attending religiously affiliated schools.

Of course, any attempt by the state to prevent parents from sending their children to religiously affiliated schools does not only implicate parents’ First Amendment rights. “Such action [also] interferes with the internal governance of the church” in violation of the religious organizations’ First Amendment right. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012). The First Amendment “gives special solicitude to the rights of religious organizations.” *Id.* at 189. It protects a religious organization’s “autonomy with respect to internal management decisions that are essential to the institution’s central mission.” *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. Thus, a religious organization’s decisions about *how* to teach children—here, whether in-person or by virtual means—is similarly protected by the First Amendment.

Given the central importance of religious education to faith communities, any order by a state or local official to close a religiously affiliated school likely would “prohibit[] the free exercise” of religion in violation of the First and Fourteenth Amendments, especially if the government continues its arbitrary manner of picking and choosing which institutions must close and which may remain open to the public. U.S. Const. amends. I, XIV.<sup>4</sup>

In addition, such an order likely would violate Kentucky’s Religious Freedom Restoration Act, KRS 446.350, which provides that the government may not “substantially burden” a sincerely held religious belief “unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.” A “burden” is defined to include “indirect burdens such as

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<sup>4</sup> As the basis for his expansive use of executive power, the Governor has repeatedly invoked the provisions of KRS Chapter 39A. The scope of executive power under KRS Chapter 39A is currently being litigated. *See, e.g.*, Boone Circuit Court’s 2020 Order in *Florence Speedway v. Beshear*, Case No. 20-CI-678 (Boone Cir. Ct. July 20, 2020). Because this Office reaches its conclusions based upon the United States Constitution and Kentucky’s Religious Freedom Restoration Act, it declines to address the additional legal infirmities with any assertion that the Governor or others may close religiously affiliated schools under KRS Chapter 39A or any other provisions of law.

withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.” *Id.*

Closing a school affiliated with a religious organization undoubtedly meets the definition of “burden” under KRS 446.350. Accordingly, the government would be required to prove by clear and convincing evidence that its closure order furthers a compelling governmental interest and is the least restrictive means to further that interest. No one doubts that preventing the spread of Covid-19 is a compelling government interest. But, even amid the current state of emergency, the American Academy of Pediatrics “strongly advocates that all policy considerations for the coming school year should start with a goal of having students physically present in school.”<sup>5</sup> Moreover, the Academy has emphasized that “[t]he importance of in-person learning is well-documented, and there is already evidence of the negative impacts on children because of school closures in the spring of 2020.” In fact, the Academy has counseled policy makers to “acknowledge that COVID-19 policies are intended to *mitigate*, not eliminate, risk. No single action or set of actions will completely eliminate the risk of SARS-CoV-2 transmission, but implementation of several coordinated interventions can greatly reduce that risk.”<sup>6</sup>

Likewise, the National Academies of Sciences, Engineering, and Medicine recommend that “school districts should prioritize reopening schools full time [for in-person instruction], especially for grades K-5 and students with special needs.”<sup>7</sup> They advise that “[o]pening schools will benefit families beyond providing education, including by supplying child care, school services, meals, and other family supports. Without in-person instruction, schools risk children falling behind academically and exacerbating educational inequities.”<sup>8</sup> And, the Centers for Disease Control and Prevention has plainly stated that “[e]xtended school closure is harmful to children,” and that “[r]eopening schools creates opportunity to invest in the education, well-being, and future of one of America’s greatest assets—our children—while taking every precaution to protect students, teachers, staff and all their families.”<sup>9</sup>

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<sup>5</sup> American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Re-entry* (June 25, 2020), available at <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/> (last visited Aug. 19, 2020).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> The National Academies of Sciences, Engineering, and Medicine, *Schools Should Prioritize Reopening in Fall 2020, Especially for Grades K-5, While Weighing Risks and Benefits* (July 15, 2020), available at <https://www.nationalacademies.org/news/2020/07/schools-should-prioritize-reopening-in-fall-2020-especially-for-grades-k-5-while-weighing-risks-and-benefits> (last visited Aug. 19, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> Centers for Disease Control and Prevention, *The Importance of Reopening America’s Schools this Fall* (July 23, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html> (last visited Aug. 19, 2020).

Religiously affiliated schools in the Commonwealth have pledged to heed these expert recommendations, and guidance to wear face coverings, wash hands frequently, and maintain social distancing of six feet. For that reason, and considering that various other activities and gatherings may move forward—it is difficult to imagine how closing religiously affiliated schools could pass Constitutional or statutory muster. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (“The least-restrictive-means standard is exceptionally demanding[.]”); *Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (“[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.”). Thus, state and local officials should carefully consider their specific statutory authority and the compelling interest that requires action, if any, and then implement only the most carefully crafted measures in response to a public health emergency. *Ramsek*, 2020 WL 3446249, at \*1 (“[C]ourts must not accept as sufficient whatever explanation is offered. In exercising its constitutional function, it is not enough to simply ‘trust’ . . . that a restriction is necessary or right. . . . Even in times of crisis, the Constitution puts limits on governmental action.”).<sup>10</sup>

Finally, it is axiomatic that if a public official may not do something directly, that same official may not do it indirectly. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2256 (2020) (“The Free Exercise Clause protects against even ‘indirect coercion[.]’”). Although cast as a “recommendation” to close schools to in-person instruction, there is some indication “that is word play.” *Maryville Baptist Church, Inc.*, 957 F.3d at 614. As is well-documented, government officials have recently stated that there would be “consequences” for those public school boards that chose to “defy” the recommendation to close schools to in-person instruction.<sup>11</sup> Such comments strongly suggest that should a public school choose to open for in-person instruction, it will be met with pressure to “choose” otherwise. At a minimum, that is

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<sup>10</sup> This is not to suggest that an attempt to close a religiously-affiliated school would not violate other laws as well. Section 1 of the Kentucky Constitution provides Kentuckians with the inherent and inalienable rights to worship according to their own conscience, freely communicate their thoughts and opinions, and peaceably assemble. Section 2 prohibits “arbitrary” state action. Section 5 forbids government from taking away or diminishing any right due to a person’s “belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.” Section 5 further guarantees that no person shall “be compelled to send his child to any school to which he may be conscientiously opposed.

<sup>11</sup> *See* Kentucky Department of Education, Special Superintendents Webcast on COVID 19 (Q & A Session – August 11, 2020), at 14:00–21:40, available at <https://mediaportal.education.ky.gov/advisory-groups/2020/08/special-superintendents-webcast-on-covid-19-q-a-session-august-112020/> (last visited Aug. 19, 2020); *See also* Kentucky Department of Education News Release, *Gov. Beshear asks Kentucky superintendents to delay in-person classes until Sept. 28* (Aug. 10, 2020), available at <https://content.govdelivery.com/accounts/KYDE/bulletins/299a3dc> (last visited Aug. 19, 2020) (stating that, according to Commissioner Brown, “[I]f a district does not abide by the governor’s recommendation, . . . the district can expect to receive a call from state education and health officials.”).

unfortunate. But, to the extent a state or local official intends to apply such strong-arm tactics to religiously affiliated schools, that likely would be unconstitutional. *Holzemer v. City of Memphis*, 621 F.3d 512, 523 (6th Cir. 2010) (“[R]etaliatio[n] by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment.”).<sup>12</sup>

As the Commonwealth continues to grapple with the impact of the coronavirus, it is important to emphasize that “a desirable end cannot be promoted by prohibited means.” *Meyer*, 262 U.S. at 401. Perhaps “[a] perfect response would require everyone to stay put and limit contact with everyone else. But that is not the world we live in.” *Ramsek*, 2020 WL 3446249, at \*11. Because the words of the Constitution have fixed meanings, the protections that they provide must endure—whether in ordinary or extraordinary times. *Maryville Baptist Church*, 957 F.3d at 615 (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”).

No matter the times, the Attorney General is the lawyer for the people of Kentucky. KRS 15.020; *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). As the people’s lawyer, the Attorney General will steadfastly seek to vindicate the Constitutional and statutory rights of Kentucky’s citizens. This Opinion, however, is a reminder to all Kentuckians of our collective responsibility to preserve the rights guaranteed by the laws of the Commonwealth and the Constitution—even during a pandemic.

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<sup>12</sup> Cf. 42 U.S.C. § 1983 (granting a private right of action for the deprivation of any rights, privileges, or immunities secured by the Constitution).