



MEMORANDUM

TO: Majority Leader Jim Steineke
FROM: Rick Champagne, chief
DATE: May 21, 2020
SUBJECT: Use of School Grounds for Recreational Purposes

You have asked whether the emergency orders issued during the public health emergency limit the use of public school grounds for recreational purposes, such as summer recreation leagues and American Legion leagues. For the reasons discussed in this memorandum, the emergency orders do not limit the use of public school grounds for these purposes. That said, local health officers may issue orders that could limit public school grounds for recreational purposes. For that reason, the answer to your question will vary depending on local health officer orders issued in specific counties or municipalities.

Emergency Order 28 and Public Schools

During the public health emergency, the Department of Health Services Secretary-designee Palm issued several emergency orders closing public and private schools. On March 13, she issued [EMO 1](#), which ordered all public and private schools to close for the purposes of pupil instruction and extracurricular activities, effective March 18, with an anticipated reopening of April 6. On March 17, Secretary-designee Palm issued [EMO 5](#), extending the closure of public and private schools until the end of the public health emergency declared under [Executive Order #72](#), or until lifted by a subsequent order. [EMO 12](#), the “Safer at Home” order issued on March 24, required public and private schools to remain closed to pupil instruction and extracurricular activities, but allowed them to be used for essential government functions and food distribution. EMO 12 had specified the duration of the school closures as lasting until 8 a.m. on April 24.

On April 16, Secretary-designee Palm issued [EMO 28](#), the “Safer at Home” order extension, which modified EMO 12 to close schools for the remainder of the 2019-20 school year. The only provision relating to school closures read as follows:

4. a. **Schools.** Public and private K-12 schools shall remain closed for pupil instruction and extracurricular activities for the remainder of the 2019-2020 school year. Schools may continue to facilitate distance learning or virtual learning. Schools may continue to be

used for Essential Government Functions and food distribution.
This section does not apply to facilities operated by the Wisconsin
Department of Corrections.

In this provision, there were no limitations imposed on the use of public school grounds or on gatherings of individuals on school grounds. Instead, this provision made clear that schools could be used for essential government functions and food distribution while closed. Other provisions in EMO 28 dealt with permissible gatherings of nonhousehold members, but not this provision dealing with school closures.

***Wisconsin Legislature v. Palm* and Emergency Order 28**

In *Wisconsin Legislature v. Palm*,¹ the Wisconsin Supreme Court ruled on the legality of EMO 28. In addition to holding that the order should have been promulgated as an administrative rule, as it was a general order of general application, and was therefore invalid, the court concluded that those parts of EMO 28 confining people to their homes, restricting travel, and closing nonessential businesses exceeded DHS's statutory powers. In strong language, the court described EMO 28 as a "vast seizure of power" and concluded, among other reasons, that "Palm's order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stats. 252.02, upon which Palm claims to rely."² This statute does not authorize DHS to take the actions it did in EMO 28.

Importantly, however, the court said that the provision of EMO 28 that closed public and private schools remained in effect, specifically exempting from its ruling the provision of EMO 28 described above.³ Public and private schools were to remain closed until the end of the 2019-2020 school year. All other provisions of EMO 28, including bans of mass gatherings of any size, were struck down. Because the court only exempted the one provision relating to the closure of schools, there is no remaining provision in EMO 28, or any other order for that matter, that would limit the uses of school buildings or grounds for recreational purposes.

That said, there may be other governmental actions that could limit the use of school grounds for recreational purposes. *Wisconsin Legislature v. Palm* dealt only with EMO 28; no other state or local government actions were at issue. This is important because local government actors may have the authority to limit the uses of school grounds, especially local health officers. In fact, going forward, it may be local health officer orders that determine whether public school grounds or any grounds may be used for recreational purposes.

Powers and Duties of Local Health Officers

A local health officer is an appointed government official who has the duty to administer a local health department and enforce state public health statutes and rules.⁴ Wis. Stat. § 252.03 assigns powers and duties to local health officers to control communicable diseases. For example, local

¹ 2020 WI 42.

² 2020 WI 42, ¶ 59.

³ 2020 WI 42, ¶ 3 and ¶ 58.

⁴ Wis. Stat. § [251.06\(3\)](#).

health officers must “promptly take all measures necessary to prevent, suppress and control communicable diseases.”⁵ Also, local health officers “may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics.”⁶

A local health officer’s powers and duties are very similar to those of DHS. Under Wis. Stat. § 252.02, DHS may “forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics”⁷ just as a local health officer may “forbid public gatherings when deemed necessary to control outbreaks or epidemics.” Moreover, DHS may “authorize and implement all emergency measures necessary to control communicable diseases”⁸ just as a local health officer may “promptly take all measures necessary to prevent, suppress and control communicable diseases.” In this respect, a local health officer’s powers and duties to prevent and suppress disease are a local version, if you will, of DHS’s broad powers to control and suppress outbreaks and epidemics and other communicable diseases. But *Wisconsin Legislature v. Palm* did not address local health officer powers.

Because local health officers have authority within their counties or municipalities to take measures to prevent, suppress, and control communicable diseases, including forbidding public gatherings, it may be the case that a local health officer could issue an order affecting the use of public school grounds, especially if the order bans gatherings of a certain size. If the order limits gatherings of individuals or requires that when individuals gather certain social distancing measures be observed, then it may be difficult, if not impossible, for some types of team sports to be conducted. Team sports that involve contact or require players to be in proximity of one another could be affected regardless of where games are played—on school grounds or public parks. Thus, whether public school grounds can be used for recreational purposes may vary by county or municipality depending on orders issued by the local health officer.

Conclusion

After *Wisconsin Legislature v. Palm*, the DHS emergency orders issued during the public health emergency do not limit the use of public school grounds for recreational purposes. The only provision of a DHS order that remains in effect is the one in EMO 28 that closed public and private schools for the remainder of the 2019-2020 school year. If these DHS orders were the only government actions requiring consideration, then summer recreation leagues and American Legion leagues could use public school grounds just as they have in the past, assuming school board permission. The emergency orders no longer limit directly or indirectly the use of public school grounds.

However, *Wisconsin Legislature v. Palm* did not address local health officer authority. This public health authority is similar in many ways to DHS public health authority, but at the local level. Local health officers retain the statutory authority to issue orders to prevent, suppress, and

⁵ Wis. Stat. § [252.03 \(1\)](#).

⁶ Wis. Stat. § [252.03 \(2\)](#).

⁷ Wis. Stat. § [252.02 \(3\)](#).

⁸ Wis. Stat. § [252.02 \(6\)](#).

control communicable diseases, including by limiting public gatherings. If a local health officer limited gatherings of a certain size or mandated social distancing measures, then recreational activities, like American Legion or other sports leagues, could be affected if conducted at any public or private location within the county or municipality, including public school grounds. At this point, it is local health officer orders, not DHS orders, that control and could restrict recreational activities on public school grounds.

I hope this information is helpful. Please let me know if the LRB can provide any additional assistance.