



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 17, 2020

To Religious Private Schools in Texas:

With the start of the school year approaching, the Office of the Attorney General provides this guidance to help you comply with COVID-19 public health and disaster orders from State and local governments.

The Attorney General acknowledges the robust constitutional and statutory protections unique to religious individuals and communities at all times, even during the COVID-19 pandemic.¹ These protections promote religious liberty and ensure that permissible government action takes only the least restrictive form.

The Governor of Texas rightfully identified access to “religious services” as essential services, which must remain open even when other aspects of our communities must close to mitigate the spread of the virus.² Religious private schools and religiously affiliated private schools should utilize prior joint guidance on mitigation strategies for houses of worship issued by the Governor and Attorney General.³ The Governor also exempted religious services from the state-wide masking order, but strongly encouraged houses of worship to require masks.⁴ Additionally, when the Governor issued orders applicable to public schools, he expressly acknowledged that private schools and institutions have the freedom to make their own decisions.⁵

To mitigate the spread of COVID-19, the Governor referred all schools to the Texas Education Agency’s (TEA) guidance on how to safely reopen for in-person instruction during the 2020–2021 school year.⁶ While this guidance by its terms applies only to

¹ *Guidance for Houses of Worship During the COVID-19 Crisis*, <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Third%20Revised%20AG%20Guidance%20for%20Houses%20of%20Worship%20During%20the%20COVID-19%20Crisis%20-%20Final.pdf>. This joint guidance identifies that the recommendations provided to houses of worship for religious services are just that—recommendations—and are the least restrictive means of serving a compelling government interest to protect public health. *Id.* at 5.

² See generally Exec. Order GA-28.

³ See *supra* note 1.

⁴ See Exec. Order GA-29 at 2.

⁵ See Exec. Order GA-28 at 4.

⁶ Tex. Educ. Agency, SY 20-21 Public Health Planning Guidance, July 17, 2020, <https://tea.texas.gov/sites/default/files/covid/Covid-19-SY-20-21-Public-Health-Guidance.pdf>.

public schools, TEA recommended that all “school system leaders should do everything feasible to keep students, teachers, staff, and our communities safe.”⁷ It is important to keep in mind, however, that “research from the Centers for Disease Control (CDC), among others, has found that while children do get infected by COVID-19 and some severe outcomes have been reported in children, relatively few children with COVID-19 are hospitalized or have severe symptoms.”⁸ And as TEA recognized, “the American Academy of Pediatrics notes that COVID-19 risks must be balanced with the need for children to attend school in person, given that lack of physical access to school leads to a number of negative consequences, placing ‘children and adolescents at considerable risk of morbidity, and in some case, mortality.’”⁹ TEA also determined that public schools may provide virtual education in limited circumstances, if the schools satisfy certain conditions.¹⁰ As identified by TEA, schools have many tools at their disposal to safely reopen while also mitigating spread of the virus to students, faculty, and staff.

Recently, however, local public health officials have begun to issue orders restricting or limiting in-person instruction in private and public schools. This guidance is intended to clarify the application of those local orders to religious private schools and institutions.

Local public health orders issued by cities and counties must be consistent with the Governor’s orders and the Attorney General’s guidance. If local public health orders are inconsistent with these authorities, the local orders must yield.¹¹

Under the Governor’s orders, local governments are prohibited from closing religious institutions or dictating mitigation strategies to those institutions. Local governments are similarly prohibited from issuing blanket orders closing religious private schools. Because a local order closing a religious private school or institution is inconsistent with the Governor’s order, any local order is invalid to the extent it purports to do so.

Moreover, local public health orders attempting to restrict the provision of religious instruction through religious private schools violate the United States and Texas Constitutions and the Texas Religious Freedom Restoration Act. As the Supreme Court reaffirmed last week, “[t]he First Amendment protects the right of religious institutions ‘to decide for themselves, free from state interference, matters of church

⁷ *Id.* at 1.

⁸ *Id.*

⁹ *Id.* (quoting Am. Academy of Pediatrics, COVID-19 Planning Considerations: Guidance for School Re-entry, June 25, 2020).

¹⁰ *Id.* at 2–3.

¹¹ See Exec. Order GA-28 (providing that the Governor’s order supersedes conflicting local orders and suspends local authority to impose inconsistent restrictions).

government as well as those of faith and doctrine.”¹² Likewise, the Texas Supreme Court acknowledges that “the government cannot set standards for religious education or training.”¹³

“Religious education is vital to many faiths practiced in the United States.”¹⁴ For example, “[i]n the Catholic tradition, religious education is ‘intimately bound up with the whole of the Church’s life.’”¹⁵ “Similarly, Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation.”¹⁶ Likewise, Judaism, Islam, the Church of Jesus Christ of Latter-day Saints, and the Seventh-day Adventist Church, among others, all have long traditions of religious education that demonstrate the “close connection that religious institutions draw between their central purpose and educating the young in the faith.”¹⁷ In fact, “[m]ost of the oldest educational institutions in this country were originally established by or affiliated with churches, and in recent years, non-denominational Christian schools have proliferated with the aim of inculcating Biblical values in their students. Many such schools expressly set themselves apart from public schools that they believe do not reflect their values.”¹⁸ These principles inform how the State must treat religious private schools, whether in normal times or times of crisis.

In addition to protections afforded to religious communities by the First Amendment to the United States Constitution and article I, section 6 of the Texas Constitution,¹⁹ the Texas Religious Freedom Restoration Act (RFRA) applies to every “ordinance, rule, order, decision, practice, or other exercise of governmental authority” in Texas.²⁰ Texas RFRA prohibits the government from “substantially burden[ing]” the free exercise of religion,²¹ which includes the ability of faith communities to educate their youth,²² unless it can demonstrate a compelling interest for the restriction and prove it applies in the least restrictive way.²³ Even if the government may have a compelling interest in closing certain aspects of society to contain the spread of a virus, blanket government orders closing all religious private schools are not the least restrictive means of achieving that interest.

¹² *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267, 2020 WL 3808420, at *3 (U.S. July 8, 2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

¹³ *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 643 (Tex. 2007).

¹⁴ *Our Lady of Guadalupe Sch.*, 2020 WL 3808420, at *10.

¹⁵ *Id.* (quoting Catechism of the Catholic Church 8 (2d ed. 2016)).

¹⁶ *Id.*

¹⁷ *Id.* at *11–12.

¹⁸ *Id.* at *11.

¹⁹ In *HEB Ministries*, 235 S.W.3d 627, the Texas Supreme Court held that the State’s attempt to regulate the accreditation standards of a postsecondary institution and the use of the name “seminary” violated the First Amendment and article I, section 6 of the Texas Constitution.

²⁰ Tex. Civ. Prac. & Rem. Code § 110.002(a).

²¹ *Id.* § 110.003(a).

²² *Our Lady of Guadalupe Sch.*, 2020 WL 3808420, at *11–12.

²³ Tex. Civ. Prac. & Rem. Code § 110.003(b).

Thus, as protected by the First Amendment and Texas law, religious private schools may continue to determine when it is safe for their communities to resume in-person instruction free from any government mandate or interference. Religious private schools therefore need not comply with local public health orders to the contrary.

Sincerely,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive style with a large, prominent initial "K".

Ken Paxton
Texas Attorney General