



STATE OF INDIANA

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August 14, 2020

The Honorable Eric Holcomb
Governor
Indiana State House Room 206
200 W. Washington Street
Indianapolis, IN 46204

The Honorable Todd Huston
Speaker
Indiana House of Representatives
200 W. Washington Street
Indianapolis, IN 46204

The Honorable Rodric Bray
President Pro Tempore
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

Re: Recommendation of the Attorney General that the Governor call a special session of the Indiana General Assembly to address COVID-19 and restore public confidence in constitutional governance

Dear Governor Holcomb, Speaker Huston, and President Pro Tempore Bray:

When is an emergency no longer an emergency?

In a republican form of government, we do not govern by executive decree. We govern by legislation, enforcement, and adjudication carried out by separately elected (and appointed) officials. The Indiana Constitution so divides government functions to prevent concentration of power and to facilitate public debate.

Yet, in an emergency, unilateral authority allows executive officials to render aid and services in a manner that ordinary constitutional limits would (with catastrophic consequences) prevent. The General Assembly has accordingly authorized the Governor to take limited action

during various exigencies, including public health emergencies, to prevent public disaster and chaos. But the legislature plainly contemplated such authority to be temporary, *not* a long-term substitution for the normal lawmaking process.

Doubtless, an emergency justifying the Governor's use of emergency authority existed in March 2020, when COVID-19 materialized as a serious threat to public health. At that time, officials feared lack of sufficient ICU beds and ventilators to handle the pandemic. If COVID-19 had spread unabated, the number of patients having acute, life-threatening symptoms would have overwhelmed the capacity of the public health system to treat them.

So, understandably, Governor Holcomb, acting pursuant to Indiana Code ch. 10-14-3, issued a series of temporary Executive Orders designed to limit the spread of COVID-19 and to conserve resources useful for fighting the pandemic. On March 6, 2020, the Governor issued Executive Order 20-02, declaring a public health emergency. Over the next few weeks he issued orders limiting the size of gatherings; prohibiting conventions; requiring everyone to stay home except for "essential" business or other activities; prohibiting bars and restaurants from providing on-site dining; canceling or postponing non-urgent medical procedures; closing all schools; and even postponing the primary election. All of this was unfortunate, but it was also justified at the time.

It is debatable, however, whether an emergency continuing to validate non-legislative policymaking *still* exists. While on March 1, 2020, Indiana had 1,940 ICU beds and 1,177 ventilators, we now have 2,270 ICU beds and 2,896 ventilators. And, as it happens, only 290 of those beds are occupied by, and only 89 of those ventilators are being used on, COVID-19 patients. Even the Governor's pandemic-related executive orders—now numbering 38—reflect less urgency than before, lifting or modifying, as they have, the stay-at-home order, the restaurant and bar restrictions, the medical postponements, and even the school closures, among other things.

To be sure, COVID-19 remains a pandemic and a serious public health threat that all should take seriously, including wearing masks and practicing social distancing. But it has been such for nearly six months, which is enough time to re-engage ordinary mechanisms of republican government. The General Assembly did not contemplate that an "emergency" would provide the Governor with untethered executive authority of such duration.

Indiana's Emergency Management and Disaster Law, Ind. Code ch. 10-14-3, defines "disaster" as "an occurrence or *imminent* threat of widespread or severe damage, injury, or loss of life or property resulting from any natural phenomenon or human act" including an "epidemic." Ind. Code § 10-14-3-1 (emphasis added). Merriam-Webster defines an "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." The Governor may declare a "disaster emergency" by executive order, but the order "may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor." Ind. Code § 10-14-3-12. The statute is silent as to the number of permissible renewals, but Governor Holcomb has renewed his disaster emergency decree *five* times. *See* Executive Orders 20-02, 20-17, 20-25, 20-30, 20-34, and 20-38.

By this point, however, COVID-19 and its consequences are far from “unforeseen.” In some ways, unfortunately, they are part of the “new normal,” though one hopes not for long. And while last March “immediate” executive action was necessary to stave off disaster, such actions have now become remote in time from the original disaster-creating conditions. So, without specific statutory authorization to continue renewing emergency declarations indefinitely, the grounds for the Governor’s emergency order renewals become shakier by the day.

In addition, the Governor’s continual issuance of updated orders has produced various suboptimal results, including, at various times, confusion, outrage and uncertainty. In March, when the Governor required all “non-essential” business operations to shut down, business owners and consumers alike became confused over which businesses could justifiably claim to be “essential” and what (if any) limits on business operations such justifications might imply. The Governor at first limited public gatherings to 50 people, but a short while later reduced that to 10 people. In April, the Governor issued “Guidance for Places of Worship,” purporting to “direct” that “Church buildings and other physical locations for worship should be closed, but permitting “drive-in services,” though “only under [specified] conditions,” including no participation by the elderly or infirm, no physical interaction with clergy, only “prepackaged communion” and nine-foot spacing between cars. In May, the Governor announced a period of reopening over five phases, with various target dates. But, when public health metrics were insufficient, the Governor ordered reopening by half-steps, and we now seem to be stuck on phase 4.5, where public gatherings and conventions may now top out at 250 people, while fairs, festivals and parades may take place at 50% capacity, but evictions and foreclosures have remained prohibited (though that is about to expire) and face coverings and 6-foot social distancing in public have become required.

The changing details of such requirements have also created misunderstandings with regard to which provisions are mere suggestions or guidance, which are legally binding, and what the consequences of noncompliance might be. Guidance for Places of Worship used mandatory rhetoric (even though it was not even an Executive Order), but the Governor then clarified it was merely a suggestion. And with face coverings, the Governor first said refusing to wear a mask was punishable as a misdemeanor, then he conceded it wasn’t. Candidly, while Hoosiers at first mostly obeyed the Governor’s emergency orders, as those orders have endured, overreached, mutated, or proven impracticable, many citizens have begun to lose respect for them.

The start of a new school year has crystallized the sense of insecurity and general weariness arising from governance by shifting executive decrees. To educate children, our public schools require clarity, consistency and affirmation of a constitutional process governing both finances and operations. Yet at present, our public school corporations have received very little state level guidance, which forces them to generate ad hoc plans having as many variations as there are schools. Some schools have opened on time with in-person instruction; some have delayed the new school year; others are opening virtually now, with plans to revisit in-person instruction in a few weeks or months; and still others are requiring students to attend school in person some days, but receive virtual instruction other days.

The recent public contretemps over the consequences that virtual instruction may have for the state tuition support our public schools can expect to receive this fiscal year has only exacerbated the situation. All seem to agree that state law currently permits schools to receive only

85% of the normal so-called foundation grant for each student receiving virtual instruction at least half the time. In June, the Governor, at a press conference, assured the public that, even if a majority of public school education during the 2020-2021 school year would occur virtually, all public schools would receive 100% of their expected foundation grants.

Then, on August 6, Senator Bray issued an open letter to “school leaders” warning that, while a “strong appetite” exists for “fully funding students whose families choose virtual instruction” this school year, “there is no guarantee such an exception will be made for schools that don’t give families the option of in-person instruction in a school building,” such that “schools that don’t offer in-person instruction should plan on operating under the current funding policy.” And in response to *that* statement, the Governor (with the support of Senator Bray and Speaker Huston) has urged the Indiana State Board of Education to move the official student census date back to December, with an eye toward (perhaps) maximizing in-person attendance at public schools for purposes of calculating each school’s foundation grant. But already, educational leaders have said taking that step would still leave yawning gaps in many public school budgets.

With apologies to the Kernan-Shepard report, we have to stop governing like this. Press conferences from the Governor saying one thing, and letters from lawmakers saying another—neither of which has any legal force—produce only more uncertainty and anxiety for schools, students, parents and citizens about what the consequences might be in a few months of the decisions they make today.

The remedy is to stop trying to address COVID-19 by temporary stop-gap measures and return to the mode of policymaking set forth in our Constitution. The legislature may discontinue the emergency declared by the Governor and otherwise address the entire panoply of challenging issues arising from the pandemic, from mask wearing to educational funding. The problem, of course, is that the legislature does not convene until late November and will not consider actual legislation until January. But the Governor—and only the Governor—can call a special session. It is past time to do so.

As Attorney General for the state of Indiana, it is my recommendation that the Speaker of the Indiana House of Representatives and President Pro Tempore of the State Senate now request, and that the Governor execute his authority to call for, a special session of the Indiana General Assembly to address public governance challenges arising from the COVID-19 crisis. Doing so is the only way to provide the full measure of constitutional government to which Hoosiers are entitled, ensure consistency in the law governing individual conduct and the operation of public functions, afford certainty in public funding for education and other important government missions, and, critically, restore public confidence in governmental leadership and constitutional governance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Curtis T. Hill, Jr.", written in a cursive style.

Curtis T. Hill, Jr.
Attorney General