



February 17, 2022

Board of Trustees  
Roseville Joint Union High School District  
1750 Cirby Way  
Roseville, CA 95661

Re: District Action: Refusal to Enforce Mask Mandates

Schools Risk and Insurance Management Group (SIG) was created in 1978 as a collaborative effort amongst its members to form a self-insured risk pooling Joint Powers Authority (JPA) to provide financial protection against liabilities according to a coverage document, the Memorandum of Coverage. JPA's like SIG have achieved success on behalf of their members due to the cooperative basis between members in partnership with excess and reinsurance carriers and risk management resources. This is accomplished by providing comprehensive consultation and coverage to transfer losses from the member to the JPA and/or carrier partners, therefore preserving individual member assets.

Various governing documents form and mold the relationship between members of the JPA. The Joint Powers Agreement is the contract between members which outlines membership governance and member obligations. The Bylaws provide an operational framework, while the Program Documents establish the rules for participation in the individual programs offered to members. Policies and Administrative Regulations provide more details and clarify rules and responsibilities for SIG and its members. The Memorandum of Coverage is the coverage contract that outlines the liabilities that are/are not covered, the conditions for coverage, and the responsibilities of the members. SIG has adapted these documents through the years according to member needs, changes in statute or regulation, and coverage partner requirements. As a result, SIG's members have benefited not only from the transfer of losses to SIG and its carrier partners, but also from extremely competitive rates and coverage that is more broad than that provided by other programs.



On February 10, the Board of Trustees of the Roseville Joint Union High School District (the District) voted to stop enforcing the state's mandate that students and staff wear masks at school. It is imperative that the Board understand that this action renders the District and individual Board members vulnerable to liability that may not be covered by SIG. Individual claims, after investigation and coverage counsel review, will not be covered under SIG's Property/Liability Program if found to fall outside the Memorandum of Coverage. Moreover, to protect the JPA's assets, SIG may be forced to consider a reaction that may result in involuntarily terminating the District's membership in SIG. Please note the reasons outlined in the following sections.

### **The Risks Created by the February 10 Action**

Various legal consultants have warned that refusing to enforce state mandates could open up districts and board members to lawsuits, imperil their funding, and even risk potential criminal liability for willful failure to follow the state's public health orders. This information has been distributed by a variety of educational trade organizations to the extent we believe it is widely known. In addition, as early as May, 2020, and several times again during the pandemic, SIG provided legal opinions regarding general liability coverage exclusions that could be encountered for claims and litigation as a result of not following CDPH guidelines or state mandates applying to K12 public schools.

The Lozano Smith law firm in a memo widely distributed to educational agencies pointed out that refusal to comply with Executive Orders or orders of the California Department of Public Health has serious potential consequences, including:

- Potential civil liability for injuries due to Covid-19 infections, which may not be covered by insurance programs.
- Possibility that negligence may be presumed if there was a violation of a statute or regulation intended to prevent such harm.
- Potential individual liability, which would not be covered by the school district or SIG, for employees and officials who are proven to have committed a crime, acted outside of the scope of their employment, or acted with "actual fraud, corruption or actual malice."
- Potential liability to District employees who reported violations or refused to violate state law and allege they were retaliated against as a result.



- Possibility that fines and penalties may be assessed by Cal/OSHA or other agencies. Also, discretionary immunity may not apply to the failure to carry out non-discretionary obligations.
- Possible criminal sanctions.
- Possible loss of Covid-19 disaster relief funding.

Obviously, a claimant would have to prove all the elements of a claim to recover, but SIG believes the District's actions increase the likelihood and risks of such claims.

The District's actions created risks not only for the District and its individual Board members, but also for SIG. As discussed below, SIG has coverage defenses for some or all of the exposures created by this action, but it is not fair to SIG or other members to intentionally put them to the expense of having these defenses analyzed and potentially forcing SIG to dispute these issues. Further, if for any reason SIG is found to have coverage for the District's liability arising from the action of February 10, the resulting loss to SIG will have been one that was entirely avoidable by the District and entirely outside SIG's reasonable underwriting assumptions. This results in additional risk being placed on the other members of SIG.

The District's action may have wider implications that just SIG and its members. Reinsurers and excess insurers that partner with SIG to provide higher limits of liability may also be impacted in what again is an extremely challenging renewal marketplace. This action could potentially have a negative impact on both the availability and pricing of excess and reinsurance coverage for all SIG members which is currently being negotiated for renewal on 7/1/2022. Coverage is provided under the expectation that actions will be in alignment with not only industry best practices, but also statute, regulations, ordinances, and other matters of law. SIG's coverage partners have weighed in with concern for the District's action due to the potential implications for the upcoming 2022-2023 program year.



## Coverage Issues Created By Board's Action

SIG has several potential defenses to coverage for liability created by the willful refusal to comply with the law. Coverage Part A of SIG's liability Memorandum of Coverage (MOC) excludes:

- **"Bodily injury or property damage** either expected or intended from the standpoint of the **Covered Member.**" (Exclusion 1.) Intentionally eliminating mask enforcement arguably means that any resulting injuries were necessarily expected or intended.
- "Punitive or exemplary damages because of **bodily injury to your** employee while employed by **you** in violation of the law with your actual knowledge or the actual knowledge of **your** elected or appointed officials." (Exclusion 4.) Employing teachers and other staff while refusing enforcement of mask mandates may arguably involve employing them in violation of law.
- **"Personal injury or advertising injury:** ... c. Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the **Covered Member.**" (Exclusion 8.) As noted above, there are criminal sanctions for refusal to implement the masking mandates, and the Board's vote not to require masks may be found to be a willful violation of a penal statute or ordinance.

Coverage Part B of SIG's liability Memorandum of Coverage (MOC) excludes **loss:**

- Brought about or contributed to by the fraud, dishonesty or bad faith of a **Covered Member** or arising from the deliberate violation of any federal, state, or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of the **Covered Member.**

No part of SIG's liability coverage applies to fines, penalties, criminal sanctions, or loss of funding.

Section 13 of the Property and Liability Program Plan Document provides for resolution of coverage disputes as follows:

If a Covered Party has a dispute regarding rights and obligations under this document, or the Memorandums of Coverage for



Property, Liability, or Auto Physical Damage, such dispute shall be taken to the Executive Committee for resolution. The Executive Committee shall make such findings and determine actions to resolve the dispute at a regular or special meeting of the Executive Committee. The Covered Party may appeal such decision to the Joint Powers Board. The decision of the Joint Powers Board shall be final and binding on the Group and the Covered Party.

### **Membership Issues Created By Board's Action**

In view of the District's willful refusal to enforce state law, which exposes SIG to avoidable liability exposures and coverage disputes, SIG unfortunately has no alternative but to consider whether the District should continue to participate and receive the benefits of the cost-effective and broad coverage through SIG. Continued participation may present unanticipated and avoidable risks to SIG's assets to the detriment of its members. This is not a consequence taken lightly by SIG or its other members, in fact it is a situation that has the potential to create unnecessary conflict and division. This is a situation SIG would like to avoid, however at this time, with the District's current stance, SIG is put in a position that requires reconsideration of the District's membership.

Article V, Section B of the JPA Agreement provides that a **Member** can be expelled with or without cause, on 90 days' notice:

**SRIMG** may expel a **Member**, with or without cause, by a two-thirds affirmative vote of those **Representatives** voting at a regular or special meeting of the **Joint Powers Board**. Such expulsion shall not be effective for at least ninety (90) days after the vote of the **Joint Powers Board**."

Expulsion would not entitle the District to any refunds, and the District would continue to be responsible for assessments or other obligations of membership. Article V, Section C provides:

In accordance with California Government Code section 6512.2, the expulsion or withdrawal of a **Member** shall not be construed as



the completion of the purpose of this **Agreement** and shall not require the repayment or return to the **Member** of all or any part of the contributions, payments or advances made by the **Member**. A **Member** who withdraws or is expelled shall remain liable for any obligations arising out of the period during which the **Member** participated in **SRIMG**.

The Bylaws provide for involuntary termination (expulsion) for refusal to abide by an amendment, and for any reason if approved by the required percentage of the Joint Powers Board. Article 12 of the Bylaws states:

**ARTICLE 12 - INVOLUNTARY TERMINATION** A **Member** shall be involuntarily terminated if it refuses to abide by an amendment which has been approved by two-thirds of the **Representatives** or alternates voting at a regular or special meeting of the **Joint Powers Board**. A **Member** may be involuntarily terminated for any reason if such termination is approved by two-thirds of the **Representatives** or alternates voting at a regular or special meeting of the **Joint Powers Board**. The **Joint Powers Board** shall provide the terminated Member with a minimum of ninety (90) calendar days' written notice, and such involuntary termination shall be effective at the end of that fiscal year, if possible.

Instead of expelling the District from SIG, the participants in the Property and Liability Program could expel the District from that program. Section 11 of the Property and Liability Program Plan Document provides for expulsion upon a two-thirds votes of the Participants:

The Participants, with a two-thirds vote by their Representatives at a Joint Powers Board meeting, may expel a Participant from the Program provided the Participant is given notice of such expulsion at least ninety (90) days prior to the effective date of such expulsion.



## **Conclusion**

SIG's Joint Powers Board will be discussing at an upcoming meeting potential consequences for members who take action to defy federal, state, or local statute, ordinances, rules or regulations. We are working with legal counsel to better understand requirements under governing documents and how that translates to consequences for the District. Involuntary termination is one of the consequences being considered. Although this is an extreme action, it is one that may be required by SIG's governing documents. This is an unfortunate position for SIG as a result of the District's decision. More information will be forthcoming. In the meantime, please contact me if you need additional information about the potential consequences faced by Roseville Joint Union High School District as a SIG member.

Sincerely,

Cynthia M. Wilkerson  
Executive Director  
Schools Risk and Insurance Management Group

Cc: SIG Joint Powers Board