

Vote Explanation—Senator Sara Gelser
HB 4402, Third Special Session 2020
December 22, 2020

Although I believe getting Oregon students back to school as soon as safely possible is an urgent priority, I voted NO on HB 4402. This bill would have provided school districts a shield from liability related to COVID related claims. This is because I believe people disproportionately impacted by the dangers of the virus should not be put at greater risk by community pressure to open schools before it is safe for everyone.

It is true that granting a liability shield to schools costs our general fund nothing. Instead, it shifts the financial and health related costs of COVID risks directly to a smaller number of Oregonians with the most to lose. It also changes the risk analysis for districts, which will leave them susceptible to increasing pressures to open schools before it is safe.

I was not alone in this belief. Organizations representing those most devastated by the virus and likely to suffer significant complication or death—those with disabilities and chronic illness, low income communities and organizations representing the interests of Black, Indigenous and other people of color-- raised the alarms about the measure. These organizations included Disability Rights Oregon, the Oregon Developmental Disabilities Coalition, Unite Oregon, The Arc of Oregon, The Arc of Multnomah County, FACT Oregon, the Autism Society of Oregon, NextUp, and the Oregon Justice Resource Center. Although I was aware it was likely that this measure would pass, I believed it was critical that the concerns of these organizations and the communities they represent be acknowledged by my No vote. The concerns they voiced are urgent and a unanimous vote on this measure would have failed to recognize the validity of these concerns.

I am also concerned that the definition of “emergency rule” is too vague in this legislation. It does not strictly define compliance with rules set by the state of Oregon. Instead, it provides an immunity shield to a district that was “in compliance” with rules, statements or guidance in effect at the time of the alleged violation. However, the legislation does not address what to do when existing policies, guidance, rules and statements contradict each other. Over the course of this pandemic, state and federal guidance and regulations have been in. Which guidance, rules, statements or policies ultimately define what grants liability to a district? The legislation does not state that it is the strictest current regulations. Instead, it is ANY regulation or statement or policy or guidance from any state or federal official in effect at the time of the alleged negligence.

While I appreciate supporters of the bill believe this language will encourage more schools to voluntarily institute rigorous compliance with the rules, I am not convinced. My work over the past two years looking at residential facilities for children revealed that programs can easily demonstrate compliance with policies and rules in writing. However, inadequate training or lax enforcement are often not recognized until it is too late. In one case, this led to the death of a 16 year old due to an inappropriate restraint. The organization has argued they are not liable

for his death because staff were not in compliance with written policies—even though the organization had not uniformly enforced those policies or adequately trained their staff prior to the child’s death.

It should not be enough for school districts to simply have written policies that are compliant with emergency rules because the stakes are too high. District leaders must demonstrate how they will ensure strict compliance with these protocols from staff, students and parents. For instance, how will a district ensure a COVID exposed student does not come to school? How will they ensure that in a staffing crisis, a teacher or teaching assistant won’t face pressure to come to school before their quarantine is over because they are concerned they will be disciplined? How will mask compliance be enforced in hallways and classrooms? Will a student be sent home if he has symptoms on the day of his AP exam? Will he agree to leave? And how will violations be enforced?

These are all difficult issues that rely on the judgement and confidence of individual staff, parents and students that may face competing academic, financial, emotional and employment pressures. These are also issues that are difficult for any individual to enforce because COVID prevention relies on what most of us consider very personal choices. A district could have excellent COVID related written policies, but without adequate training and enforcement it would be impossible to ensure these were implemented with fidelity. And, as we know, even what seem like modest errors related to COVID can have grave consequences. Just this month, one person in Douglas County went to work while ill. As a result, there have been 300 people quarantined and 7 deaths. It is not hard to imagine a similar seemingly small violation in a school district by a single employee or student resulting in the same sequence of events. Is it really appropriate that the financial burden of this violation should fall on those who suffer illness and death?

Returning Oregon kids to school is not about liability shields. It is about all of us coming together for a few months to make necessary sacrifices like avoiding gathering with those outside our homes, wearing masks when outside our homes or cars, washing our hands and staying home when ill. This will allow us to reduce transmission in our communities. Lower transmission rates coupled with strict compliance with COVID protocols could allow schools to open this school year. A liability shield, I am afraid, will simply push schools to open too fast before they have worked out the details of implementation because they do not have to be concerned about being held accountable for errors if they can point to some statement, rule, or proclamation from any state or federal official. Not only might this lead to death and illness for others in the community, it will lead to further disruption of the learning experience when entire classrooms or schools are forced into quarantine.

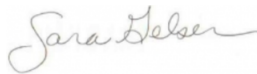
I may have been able to vote YES on this bill with the following three changes:

- If the definition of emergency rule was narrowed to be compliance with the **strictest rule in effect** through official action (official rulemaking, executive order, etc) at the time of the alleged violation

- If it was clear that the district would not be eligible for liability protection if an individual employee or student or group of employees or students failed to comply with or implement a written district policy with fidelity
- If the impact on COVID vulnerable populations had been mitigated with an effective date that was delayed until completion of distribution of vaccines to the very vulnerable Phase 1a populations.

I honor and respect the intentions of my colleagues who introduced and passed this bill. I know they are motivated by a deep desire to meet kids' needs.

Kids need to be back in school. Safely. When kids return we need to be sure that students, teachers and staff have all the resources they need to resume learning safely and to make up for lost time. In the 2021 Session, we must pass policies and allocate the resources necessary to to prioritize vaccinating at risk educational staff and 16 and 17 year old students with underlying conditions. We must ensure there are resources and will to make PPE available in adequate supply to every school in the state. We also must be ready to ensure that a school employee that is exposed to COVID at school has presumptive eligibility for workers compensation. Finally, we must be prepared to allocate significant additional resources to our schools so they can allow students the desperately needed additional learning time and experiences to recover from this major disruption to their education.



Senator Sara Gelser
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