

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2021-017

TO: Mayor John Engen, Dale Bickell, Donna Guakler, Shirley Kinsey, Meg Whicher, Angela Simonson, Mike Brady, Leigh Griffing, Marty Rehbein, Eran Pehan, Jaeson White, Scott Hoffman, Laurie Clark, Jeff Brandt, Gordy Hughes, Brad Davis, Jeremy Keene, Ellen Buchanan, Ian Ortlieb, Brian Hensel, City Council

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE September 21, 2021

RE: City parks and recreation staff may prohibit Individuals with a current COVID positive status or a current COVID close contact status from currently participating in city parks and recreation programs while the individual is in such a status. Individuals do not have any right to spread or potentially spread a communicable disease.

FACTS:

City parks and recreation staff have recently been working on a city parks and recreation department policy pertaining to COVID and had concerns about how to address potential participation in parks and recreation by individuals who are currently in a COVID positive status or currently in a COVID close contact status.

ISSUE(S):

Must city parks and recreation staff allow individuals with a current COVID positive status or a current COVID close contact status to participate in parks and recreation programs while the individual is in such a status?

CONCLUSION(S):

City parks and recreation staff do not have to allow an individual currently in a COVID positive status or a COVID close contact status to participate in parks and recreation programs.

LEGAL DISCUSSION:

HB-702 (2021) makes it unlawful discrimination for a person or government entity to refuse, withhold from or deny a person any local services, goods, facilities advantages, privileges, licensing, educational opportunities health care access, or employment opportunities based on

the person's vaccination status or whether the person has an immunity passport. HB-702 (2021) expressly provides that it is not unlawful discrimination for a person or government entity to recommend that an employee receive a vaccination.

HB-702 (2021) does not specifically regulate or address how a person or governmental entity may deal with the presence of an individual who is currently in a COVID positive status or an individual who is in a COVID close contact status. There is no right for a person to spread or potentially spread a communicable disease.

All perceived rights have reasonable limitations or restrictions limiting or restricting those rights. For examples, traffic regulations regulate traffic conduct; no firearms in a court room, regulations limiting or restricting locations where firearms may be discharged, etc. There is no unrestricted right for any individual person to participate in a parks and recreation program if the individual is currently in a COVID positive status or a COVID close contact status. No individual person has a right to spread or potentially spread a communicable disease.

There are several Montana state laws that provide that a municipal government has power and/or is expected to secure, promote and protect the public health, public safety and general welfare of individuals within the municipal jurisdiction. In addition, pursuant to subsection 7-1-4124(22) MCA a municipal government has power to "establish quarantines". The city parks and recreation department is adopting a policy to secure and protect public health, public safety and general welfare of those individuals in the city jurisdiction by adopting a parks and recreation policy that does not allow any individuals currently in a COVID positive status or currently in a COVID close contact status to participate in city parks and recreation programs.

Montana's Constitution pursuant to Article II, section 3 INALIENABLE RIGHTS, creates a Montana Constitutional right that all persons have certain inalienable rights that include; but are not limited to "the right to a clean and healthy environment and the rights of pursuing life's basic necessities and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." A city parks and recreation policy that does not allow individuals who currently are COVID positive or are currently COVID close contact to participate in city parks and recreation programs is providing a lawful opportunity for individuals to have a healthful environment in which individuals may seek their safety, health and happiness in lawful ways.

It must also be noted to city parks and recreation staff that pursuant to the MONTANA OCCUPATIONAL SAFETY AND HEALTH ACT, title 50, chapter 71, part 2 entitled "DUTIES OF EMPLOYER AND EMPLOYEES, pursuant to section 50-71-201 MCA an employer is statutorily required to furnish a place of employment that is safe for each of the employer's employees including furnishing and requiring the use of health and safety devices including protective safety clothing or other health and safety items. Pursuant to section 50-71-202 MCA an employer has a duty to maintain any place of employment as being safe.

Section 50-71-203 MCA is entitled REMOVAL OR REFUSAL TO USE HEALTH AND SAFETY ITEMS PROHIBITED. In part pursuant to this section of the MONTANA OCCUPATIONAL SAFETY AND HEALTH ACT provides that a person may not remove, displace, damage, destroy, carry off or refuse to use any health and safety device, safeguard,

protective clothing or other health and safety item furnished for use by the employer and/or fail to do any other thing reasonably necessary to protect life, health and safety of employees.

CONCLUSION(S):

City parks and recreation staff do not have to allow an individual currently in a COVID positive status or a COVID close contact status to participate in parks and recreation programs.

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/s/ Jim Nugent

Jim Nugent, City Attorney

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