



8/16/2021

To | Sultan School Board

From | Lance Andree

Re | Frequently Asked Questions regarding School Mask Mandates for Summer 2021 and the 2021-22 School Year

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This summary addresses frequently asked questions related to Washington State requirements for face coverings in K-12 schools for Summer 2021 and the 2021-22 school year, *as well as a specific policy review that was requested by the District, which is addressed at the conclusion of this Document.* Please keep in mind that the below analysis is based on orders in effect on the date of this email. It is possible that subsequent orders or guidance could provide more flexibility, or more restrictions, regarding the requirement around face covering in K-12 schools.

Answers to Frequently Asked Questions

1. What are the current mask requirements in K-12 schools?

On June 29, 2021, the Secretary of Health issued Order 20-03.3,¹ which imposes mask requirements for people living in Washington State. The order exempts people who are fully vaccinated against COVID-19 from the requirement to wear a face covering except in certain settings, including K-12 schools, childcare facilities, camps, or other youth settings in areas where children are present or expected to be present. On July 1, 2021, Governor Inslee amended Proclamation 20-25.14, *Washington Ready*, to incorporate the Secretary of Health's face covering order.² Furthermore, on July 30, 2021, Governor Inslee issued Proclamation 20.09.4, which expressly prohibits all public schools from operating in person learning unless the "school complies with the Department of Health's requirements for K-12 schools."

¹ Order of the Secretary of Health 20-03.3 (June 29, 2021), available at https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.pdf.

² Proclamation 20-25.14 (July 1, 2021), available at https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.14.pdf.

As a result, all school personnel, volunteers, visitors, and students must wear cloth face coverings, or an acceptable alternative, such as a clear face shield with a drape, when indoors at K-12 facilities, as well as outdoors when a minimum of six feet distancing cannot be maintained.³ Staff who are verified fully vaccinated may be indoors without a face covering only when students are not present or expected to be present.

2. Are there any exemptions to the face covering mandate?

Yes, there are limited exceptions to the mask mandate based on age, development, or disability. Guidance from the Washington State Department of Health provides that children who are under two years old and people with a medical condition, mental health condition, developmental or cognitive condition, or disability that prevents wearing a face covering, are exempt from the general face mask mandate.⁴ This aligns with prior guidance from the U.S. Department of Education’s Office for Civil Rights, which acknowledged that there may be some instances in which a child with a disability cannot tolerate wearing a face covering.⁵ In those circumstances, school districts must make reasonable modifications to ensure that enforcing a face covering requirement does not impede a child’s ability to receive a Free Appropriate Public Education, as required by Section 504 of the Rehabilitation Act of 1973⁶ and the Individuals with Disabilities Education Act.⁷

3. Does the Washington State Department of Health have authority to issue a mask mandate for K-12 schools?

Yes. The Secretary of Health may exercise the same authority as local health departments under a state of emergency, including taking measures to control and prevent the spread of any dangerous, contagious or infectious diseases. RCW 43.70.130(7); RCW 70.05.070(3). Pursuant to that authority, the Secretary of Health issued Order 20-03.3, which requires people to wear cloth face coverings in K-12 school facilities to control and prevent the spread of COVID-19. Any person who violates an order “made for the prevention, suppression and control of dangerous contagious and infectious disease by the local board of health or local health officer or administrative officer or state board of health . . . is guilty of a misdemeanor.” RCW 70.05.120(4). In effect, the Secretary of Health’s mask order has the force of law, and therefore cannot be disregarded by local school districts.

³ Dept. of Health, *K-12 COVID-19 Requirements for Summer 2021 and the 2021-2022 School Year* (updated August 10, 2021), available at <https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/820-105-K12Schools2021-2022.pdf>.

⁴ *Id.*

⁵ United States Dep’t of Educ. Office for Civil Rights, *Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment* (September 28, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>.

⁶ 29 U.S.C. § 794.

⁷ 20 U.S.C. § 1400 *et seq.*

When not in a state of emergency, the Secretary of Health only has such power if the local health officer fails to act. RCW 43.70.130(7). When there is an outbreak of contagious disease, such as COVID-19, the local health officer must “take all appropriate actions deemed to be necessary to control or eliminate the spread of the disease,” which could include closing schools or childcare centers.

4. Does the County Local Health Officer have the authority to issue a mandate for mask wearing within the County, even if no similar statewide mandate has been issued?

Yes. In fact, as indicated above, local public health authorities are granted the primary authority to regulate public health issues within their counties, and the state Department of Health is granted a more advisory role by statute in the absence of a state of emergency. See RCW 43.70.130(5)(giving state health secretary duty to “[i]nvestigate outbreaks and epidemics of disease that may occur and advise local health officers as to measures to be taken to prevent and control the same). Local health officers are granted the duty and authority under RCW 70.05.070(3) to “[c]ontrol and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction.” In addition, WAC 246-100-036(3) provides regulatory authority for public health officers to investigate and take measures to control infectious diseases, including when necessary, contamination control measures, isolation, quarantine, “or other measures he or she deems necessary based on his or her professional judgment, current standards of practice and the best available medical and scientific information.” WAC 246-110-020 also provides local public health authorities the authority to order schools closed to control an outbreak. The Governor’s Proclamation 20-25.13 further clarifies that local health authorities may pass stricter regulations than contained in the Governor’s proclamation related to facial coverings. Although the authority of the state DOH increases during a state of emergency, public health officials retain broad statutory authority to control the spread of infectious diseases, including measures such as mandatory quarantine orders that can curtail individual freedoms. Local mask mandates are within this statutory authority.

Disobedience of the local health officer’s orders subjects the offender to criminal prosecution under state statutes. RCW 70.05.120(4) provides: “Any person...violating or refusing or neglecting to obey any of the rules, regulations *or orders* made for the prevention, suppression and control of dangerous contagious and infectious diseases by the local board of health *or local health officer*...is guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars or to imprisonment in the county jail not to exceed ninety days or to both fine and imprisonment.”

5. What authority allows the Governor to impose face covering requirements in K-12 schools?

Both the Washington State Constitution and state law grant the governor broad police power during times of emergency. The governor has a duty under the state constitution to ensure that laws are faithfully executed. Const. art. III, § 5. And the Legislature has specifically delegated authority to the governor to “proclaim a state of emergency” in response to a disaster which threatens “life, health, property, or the public peace.” RCW 43.06.010(12). Once the governor proclaims a state of emergency, this unlocks the governor’s broad emergency powers, which include prohibiting “[a]ny number of persons. . . from assembling or gathering on the public streets, parks, or other open areas of this state, either public or private,” and prohibiting “[s]uch other activities” that the governor “reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.” RCW 43.06.220(b), (h).

The Washington Supreme Court recently reiterated that the governor’s emergency powers are both exclusive and discretionary. *Colvin v. Inslee*, 195 Wn.2d 879, 895-96 (2020) (“The governor’s response to an emergency ‘is clearly one of those discretionary acts that are in their nature political, or which are, by the constitution and laws, submitted to the executive, and inappropriate for mandamus.”). Recognizing the governor’s broad, exclusive authority to exercise emergency powers, the Court held that it had “no authority to oversee the governor’s many discretionary actions to address the COVID-19 outbreak.” *Id.* at 898.

Any person who willfully violates an order issued under the governor’s emergency powers is guilty of a gross misdemeanor. RCW 43.06.220(5). As a result, the governor’s proclamation, which incorporates the Secretary of Health’s face covering order, has the force and effect of law and lawfully cannot be disregarded by local school districts.

6. Does RCW 28A.320.015, which gives school districts “broad discretionary authority” to adopt policies, allow school boards to adopt written policies waiving mask mandates in public schools this fall?

No. Public school districts do not have authority to defy the Department of Health order or the governor’s proclamation requiring students and staff to wear masks in school facilities when children are present this fall. Like other municipal and quasi-municipal corporations, public school districts cannot exercise powers except those expressly granted, or those necessarily implied by their grant of statutory or constitutional authority.⁸

A school board’s discretionary power is expressly limited to adopting policies “not in conflict with other law.” RCW 28A.320.015(1)(a). Although this statutory provision was

⁸ *Hansen v. Lee*, 119 Wash. 691, 694 (1922) (“[i]t is not necessary to cite authorities to support the statement that school districts and their directors have only such powers as are by statute given to them.”)

intended to provide school districts with broad authority to adopt policies that further the school district’s educational mission, that authority is explicitly constrained by otherwise binding legal mandates from other sources.⁹ The statutory language “not in conflict with other law” unambiguously recognizes that public school districts, as an arm of the state, are subject to other statutes passed by the state legislature. No court has ever interpreted this statutory authority to allow public school districts to defy state or federal law—or otherwise lawful orders of state agencies—by adopting a conflicting policy. As discussed above, both the Secretary of Health’s mask order, and the governor’s proclamation incorporating that order, carry the force and effect of law, with criminal sanctions for violations. A school district does not have the statutory authority to waive individual criminal liability nor to adopt a policy in direct conflict with state or local public health orders.

7. Does OSPI have authority to withhold funding if a school district chooses to disregard the Secretary of Health’s order regarding masks?

Although there are questions that could be raised as to OSPI’s authority, there is a very substantial risk of loss of funding or other negative consequences from a failure of school boards to follow statewide mask mandates. On July 29, 2021, Superintendent Reykdal issued a letter warning public school districts that failure to abide by the mask order would result in “an immediate halt to their basic education apportionment, and their federal funds that come through OSPI.”¹⁰ In that correspondence, Superintendent Reykdal cited the Washington State Constitution and state law for his authority to withhold funding if a school district defies mask mandates. Mr. Reykdal announced on Friday, August 13, 2021, that the agency will engage in emergency rulemaking to provide a mechanism for OSPI to withhold funding from school districts that are out of compliance.

The Washington State Constitution grants the superintendent of public instruction supervisory power “over all matters pertaining to public schools.” Const. art. III, § 22. Similarly, under RCW 28A.300.040, the superintendent of public instruction’s powers and duties include “supervision over all matters pertaining to the public schools of the state.” Based on the way courts have deferred to the Governor’s authority during the current state of emergency, it’s likely that state courts would interpret this grant of authority to OSPI as including a relatively broad set of measures to enforce Gubernatorial orders related to the pandemic. *See Colvin*, 195 Wn.2d at 895-96. Courts have not yet interpreted the bounds of the broad supervisory power granted to OSPI, however, and as a result, it remains unclear whether it encompasses the power to withhold funds based on defiance of mask mandates.

What is clear, however, is that defiance of state mask mandates would be unlawful, for the reasons stated above, regardless of whether the *consequence* announced by Mr. Reykdal would sustain a legal challenge. Further, there could be other negative legal and public health consequences for school districts’ refusal to follow mask mandates. These include

⁹ See 2003 Op. Atty Gen. Wash. No. 1 (finding that school districts have statutory authority to engage in fundraising activities related to the educational purposes served by the district).

¹⁰ Letter from OSPI (July 29, 2021).

increased risks of liability for the school district if sued by an individual who contracted COVID-19 as a result of the school district's negligent or willful failure to follow the state-established standard of care; closure of schools by local public health officers or by the state Department of Health under the statutory authority outlined above; or criminal prosecution. In addition, as a practical matter, OSPI does control the flow of funding to public schools and could potentially withhold that funding while the issue was litigated, which would be very harmful to the school district in question and to its educational programs and ultimately, its students. Finally, OSPI could recommend legislative action to reduce funding for school districts that fail to follow mask mandates.

8. Does the District have the legal authority to adopt the proposed policy making facial coverings "optional"?

No. The Board has no legal authority to adopt such a policy and it would violate the legal principles set forth above.

The proposed policy would state as follows:

Where as; The Sultan School District adopted the "Student Well Being Plan," effective for the school years 2020 / 2021 and 2021 / 2022 and,

Where as; The Sultan School Board has full power and lawful authority to amend this plan,

Therefore be it resolved; that after an open public meeting which included public notice and public comment, the Sultan School Board of Directors hereby amends the "Student Well Being Plan" to include the following statement regarding facial coverings: "the use of facial coverings for medical purposes shall be optional, the use thereof to be determined by the individual members of the Sultan School District staff, students and/or the parents/ guardians. Furthermore, the Sultan School District shall not engage in the control or enforcement of the wearing of facial coverings for medical purposes other than what may be required by Washington State Statute as determined by the Sultan School District Board of Directors."

For the reasons outlined above, the Sultan School Board does not have the authority to make masks optional if the Governor and state Department of Health continue to require them. Such a policy would have no legal significance, and would only confuse parents, students and staff who may believe that they would be immune from criminal prosecution under the above standards as a result of the school board's actions.

I also understand that at least one alternate resolution has been considered, which would essentially indicate masks will be optional unless made mandatory by the state. I do not see such an alternate policy as being necessary or appropriate, and politically it suggests

that the school district rather than the state is imposing the mandate. I would instead suggest that it is more accurate to communicate to parents, students, and community members that the District continues to follow state mandates and to direct any concerns about those mandates to state government.

Conclusion

This is an area of law that is quickly evolving and advice from legal counsel is strongly encouraged before taking any action. Attorneys at PFR are following developments and guidance from the state as they evolve, and we are available to address any additional concerns as they arise.