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To | Board of Directors
Oak Harbor School District

From | Lance Andree
District Legal Counsel

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

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. 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.

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." On August 20, 2021, Governor Inslee expanded this requirement when he amended Proclamation 20-25 to adopt DOH Order 20-03.4, which now requires every person in Washington to wear a face covering when in a place generally accessible to persons from outside the household, except for those who meeting specific exemptions.³

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.

³ Proclamation 20-25.15, available at <https://www.governor.wa.gov/sites/default/files/proclamations/20-25.15%20-%20COVID-19%20Washington%20Ready.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.⁴ 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.⁵ 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.⁶ 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 1973⁷ and the Individuals with Disabilities Education Act.⁸

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.

⁴ 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>.

⁵ *Id.*

⁶ 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>.

⁷ 29 U.S.C. § 794.

⁸ 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.

Although some directives issued by local health authorities during the pandemic have specified that they will not carry legal consequences for non-compliance, local health authorities do have statutory authority to pass orders that are binding and enforceable through misdemeanor prosecution. 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.⁹

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

⁹ *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.¹⁰ 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.”¹¹ 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

¹⁰ 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).

¹¹ 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; potential claims for lost educational services by parents of students, and particularly special education students, who lose services due to closures or because schools are deemed unsafe by parents and/or state Administrative Law Judges who hear special education due process hearings; 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, even if courts were to determine that OSPI cannot withhold funding without legislative approval (which is one potential outcome of such litigation), OSPI could recommend legislative action to reduce funding for school districts that fail to follow mask mandates.

8. Does the District have the right to decline to enforce the mask mandate on the basis that it is unconstitutional?

No. Washington courts have not ruled the mask mandate to be unconstitutional. In the absence of a binding decision overturning these mandates, public school districts are legally bound to follow them. Further, the *Colvin* decision discussed above, while not directly addressing the mask mandate, confirmed the constitutional authority of the governor to exercise emergency powers, as well as the courts' hesitancy to limit those powers in the current situation. Finally, the main constitutional arguments that could be raised against mask mandates are the same arguments that have been raised in the past, and failed, with regard to other more invasive measures taken during pandemics such as government-mandated vaccination policies.

In analyzing whether a constitutional challenge to mask mandates might succeed in Washington, it is significant that state-mandated vaccination policies, which arguably involve a much more significant intrusion into the privacy and bodily integrity of citizens than masks, have been upheld for over a century by courts in the face of constitutional challenges. In a seminal case from 1905, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the U.S. Supreme Court upheld a Massachusetts state law that made smallpox vaccines compulsory. The court held that mandatory vaccines are within the state's police power because the state's interest in protecting public health and safety outweighed an individual's constitutional rights to liberty during the smallpox epidemic. Courts have relied on *Jacobson* consistently to uphold the right of state governments to take necessary steps to stop the spread of infectious diseases. In reviewing the constitutionality of such measures, courts apply a two-part test which asks: (1) whether the government action challenged "lacks a 'real or substantial relation' to the crisis" faced by the state; and (2) whether the executive orders are "beyond question, in palpable conflict with the Constitution." See *910 E Main LLC v. Edwards*, 481 F. Supp. 3d 607 (W.D. La. 2020), *aff'd sub nom. Big Tyme Invs., L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628 (5th Cir. Jan.

13, 2021) (applying *Jacobsen* test to uphold Louisiana mask mandates). This test is very deferential to the need of states to act swiftly and decisively to control the spread of infectious diseases. *Jacobsen* predates most seminal constitutional law cases involving alleged deprivations of constitutional rights, but the majority of lower courts continue to follow *Jacobsen* when analyzing challenges to actions taken during public health emergencies. The Court has never reversed the decision, so it continues to be binding legal precedent.

In addition, a review of published decisions arising during the current COVID-19 crisis reveals a judicial consensus that mask mandates and similar measures do not violate state and federal constitutional rights of individuals. See *Denis v. Ige*, No. CV 21-00011 SOM-RT, 2021 WL 1911884 (D. Haw. May 12, 2021)(rejecting challenges to Hawaii mask mandate under First Amendment Free Exercise Clause, and Fourteenth Amendment Due Process Clause); *Stewart v. Just.*, 502 F. Supp. 3d 1057 (S.D.W. Va. 2020)(denying preliminary injunction against mask mandate); *Stewart v. Just.*, No. CV 3:20-0611, 2021 WL 472937 (S.D.W. Va. Feb. 9, 2021)(dismissing same case on merits); *Minnesota Voters All. v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020), *appeal dismissed*, No. 20-3072, 2020 WL 9211131 (8th Cir. Nov. 9, 2020) (denying preliminary injunction against mask mandate); *Let Them Play MN v. Walz*, No. 21-CV-79 (ECT/DTS), 2021 WL 423923 (D. Minn. Feb. 8, 2021) (denying injunction sought against mask mandate for youth athletes); *910 E Main LLC v. Edwards*, 481 F. Supp. 3d 607 (W.D. La. 2020), *aff'd sub nom. Big Tyme Invs., L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021) (rejecting constitutional challenges to mask mandate and discussing extensively the Supreme Court case law supporting its decision).

Finally, the Washington Supreme Court's *Colvin* decision discussed above, while not a direct challenge to the statewide mask mandate, is significant in this discussion because it recognized the authority of the state executive branch to manage the state's response to the pandemic, and announced that state courts would take a very "hands-off" approach to judicial intervention in such decisions. *Colvin* also recognized the broad constitutional authority of the state's executive branch to act under these circumstances. The Ninth Circuit Court of Appeals, which is the federal appeals court with jurisdiction over Washington State, reached a similar conclusion in *Slidewaters LLC v. Washington State Dep't of Lab. & Indus.*, 4 F.4th 747 (9th Cir. 2021), when the court upheld state orders closing businesses including water parks during the pandemic against constitutional challenges.

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.