

Governor Orders School Masking

On August 6, 2021, Governor Phil Murphy signed Executive Order No. 251 (“EO 251”) which became effective on August 9, 2021, and will remain in effect until revoked or modified. EO 251 requires that all public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools must maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises, including Board meetings and administrative activities, with certain exceptions. The term, “school premises” is not defined in the EO. This may lead to some confusion about what is included, although it seems clear that it would also encompass all Board-sponsored activities that take place on another school district’s premises, and possibly may extend further to all Board-sponsored activities at other locations.

1. Justification for EO 251

Notwithstanding his earlier termination of the Public Health Emergency, the Governor cited his authority to continue to issue orders related to implementation of recommendations of the Center for Disease Control and Prevention (“CDC”) to prevent or limit the spread of COVID-19, noting the high rate of transmissibility of the “Delta” variant. Mandatory masking is intended to stem the tide of the virus in a manner that permits students to resume full, in-person learning. The Governor noted the deleterious effects of remote learning, emphasized by the American Academy of Pediatrics, and that remote learning has been detrimental to the educational attainment of students of all ages and has exacerbated the mental health crisis among children and adolescents.

2. Exceptions to Mandatory School Masking

EO 251 provides that masks need not be worn only when:

- doing so would inhibit an individual’s health, such as in the case of exposure to extreme indoor heat;
- the individual has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove a face mask without assistance;
- the student’s documented medical condition or disability, as reflected in an Individualized Education Program (“IEP”) or Educational Plan pursuant to Section 504 of the Rehabilitation Act of 1973, precludes use of a face mask;

- the individual is under two (2) years of age;
- the individual is engaged in activity that cannot physically be performed while wearing a mask, such as eating or drinking, or playing a musical instrument that would be obstructed by a face mask;
- the individual is engaged in high-intensity aerobic or anerobic activity;
- the student is participating in high-intensity physical activities during a physical education class in a well-ventilated location and able to maintain a physical distance of six feet from all other individuals; or
- when wearing a face mask creates an unsafe condition in which to operate equipment or execute a task.

3. Other CDC Requirements Not Impaired

EO 251 does not impact the obligation of school districts to continue to comply with other requirements issued by the CDC regarding masking on public transportation conveyances, including school district transportation.

4. Duty to Cooperate

Every person or entity in the State or doing business in the State, members of the governing body and every official, employee, or agent of every political subdivision in the State of each member or all other governmental bodies, agencies, and authorities in the State of any nature whatsoever are required to cooperate fully in all matters concerning EO 251, including any Administrative Orders issued pursuant to the Order, such as those as might be issued by the State Department of Education, for example.

5. No Conflicting Orders, Rules, Ordinances or Regulations Permitted

No municipality, county, or any other agency or political subdivision of the State is permitted to enact or enforce any order, rule, regulation, ordinance or resolution which will or might in any way conflict with any of the provisions of EO 251.

6. Penalties for Violations

A person who commits any unauthorized or otherwise unlawful act during the threat or imminence of danger in any emergency that jeopardizes the health, welfare and safety of the people; or otherwise impedes the requirements of EO 251 may be charged as a disorderly person and subject imprisonment for a term not to exceed 6 months or a fine not to exceed \$1,000 or both, if convicted. As a caution, please note that a school board member acting in

their official capacity who disobeys the Order also may commit a violation of the Code of Ethics for School Board Members.

7. Planning Ahead

Schools will need to be prepared to deal with any student (and parent) non-compliance. In order to be fully prepared, the following tasks should be considered:

- Review and update all Board and school policies, administrative regulations, student handbooks and websites dealing with student discipline, especially the student code of conduct, to explain exactly what penalties will be suffered in the event of non-compliance;
- Review and update all Board and school policies, administrative regulations, student handbooks and websites dealing with student absences, clearly defining and differentiating between excused and unexcused absences, and the effect of each on course credits and grades;
- Publish and clearly communicate to the public all requirements and consequences for failure of students to comply with masking requirements;

Conclusion

School districts will need to be prepared to implement the requirements of EO 251. It should not be simply assumed that all parents and students are aware of their obligations under the Order, or that all parents and students will willingly comply. Steps should be taken to review and update pertinent policies, rules and regulations so that they include provisions for addressing required measures, and to adequately publicize all relevant information to the public as soon as possible using available resources, including, for example, school websites. The Busch Law Group will continue to provide legal updates on this and other significant issues related to COVID-19, as necessary. Should you have any questions or concerns, our attorneys are always available to assist you.

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