
Wisconsin Legislative Council



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Director

TO: SENATOR JEFF SMITH

FROM: Peggy Hurley, Staff Attorney

RE: Masks Requirements in Schools

DATE: July 24, 2020

You asked whether a school board or individual school administrator may issue a requirement that school employees and students wear a mask while at school (“mask mandate”). Under state law, a school board may issue a mask mandate that applies inside a school or on school grounds, and a school principal or teacher may likewise issue a mask mandate, with approval from the school board. If a person who is subject to the mask mandate is unable to wear a mask due to a disability, that person should be offered a reasonable accommodation under the Americans with Disabilities Act (ADA).

AUTHORITY OF A SCHOOL BOARD TO ISSUE A MASK MANDATE

School boards are granted relatively broad powers in Wisconsin. Under state law, they may “make rules for the organization, gradation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere.” In addition, a school principal or teacher may establish rules applicable to his or her school or classroom, with the approval of the school board. [s. 120.13 (1) (b) 1., Stats.] The Legislature has stated its intent that those powers be “broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this state.” [ss. 118.001 and 120.13 (1) (a), Stats.]

A school board rule requiring students and employees to wear masks is likely to fit within that broad authority. State law specifically requires most school employees to undergo a physical examination, requires generally that students provide proof of immunization, and, except in Milwaukee County, allows school boards to require students to undergo a physical examination. [ss. 118.25 (2) and (3), 120.12 (16) (a), and 252.04 (2), Stats.] A mask mandate would likely be considered a less invasive requirement than others established in state law and upheld, especially if the mandate is recommended by state or local health officials.¹

¹ The Department of Health Services has statutory authority to close a school for health and safety reasons. [s. 252.02 (3), stats.] The Wisconsin Supreme Court, in *Wisconsin Legislature v. Palm*, 2020 WI 42, upheld the portion of the “Safer at Home” order issued by the Department of Health that closed schools for the remainder of the 2019-2020 school year. The authority of a local health official to close a school is not expressly stated in state law, although a local health official “may do what is reasonable and necessary for the prevention and suppression of disease” and “may forbid public gatherings when deemed necessary to control outbreaks or epidemics.” [s. 252.03 (2), stats.] Wisconsin law anticipates that a school may be closed by order of a local official. [s. 115.01 (10) (b), stats.]

However, a school employee and a student may “opt out” of the physical examination and immunization requirements if the requirement is in conflict with his or her religious beliefs or practices or personal convictions. [ss. 118.25 (2) and (3), 120.12 (16) (b), and 252.04 (3), Stats.] School boards are directed to develop policies that make accommodations, with regard to examinations and other academic requirements, for sincerely held religious beliefs. [s. 115.28 (31), Stats.; s. PI 41.04 (1), Wis. Adm. Code.] To the extent a mask mandate is considered an academic requirement, religious accommodation is necessary. Additionally, a mask mandate should make available accommodations for any person who is unable to wear a mask due to a disability.

ACCOMMODATIONS FOR A PERSON WITH A DISABILITY

Title II of ADA prohibits governments (including schools) from discriminating against individuals with disabilities when providing services. Among other requirements, Title II requires schools to make “reasonable modifications” to school policies or procedures when necessary to avoid such discrimination, unless the modification would “fundamentally alter the nature” of the school’s programming. [28 C.F.R. s. 35.130 (b) (7) (i).]

Whether a requested modification is reasonable is fact-specific, and might depend, for example, on the nature of the disability and the burden that an accommodation might pose for the school. It is unlikely that, in order to comply with the ADA, a school board would be required to simply exempt a student from a mask mandate; however, it may be required to allow the student to wear a face shield or access coursework remotely instead.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

PH:ksm