



## *School Law FYI*

# ***Masking on School Buses***

DOUGLAS E. WITTE, BRIAN P. GOODMAN | 07.30.21

As schools get ready for the 2021-2022 school year, there appears to be a fair amount of confusion and uncertainty regarding the duty of school districts when it comes to requiring masks on school buses. Like all things related to COVID-19, we continue to live in a fluid environment as variations of the virus develop and spread, and as vaccination rates vary greatly throughout the country. However, at present, schools are required to have persons traveling on school buses wear masks.

Part of the confusion stems from the fact that there are two masking orders concerning masks on “Conveyances and at Transportation Hubs” that have been issued. One order was issued by the Transportation Security Administration (TSA), and the other order was issued by the Center for Disease Control (CDC). The TSA order is scheduled to expire on September 13, 2021, whereas the CDC order does not have a stated expiration date. Either or both of these orders might be extended or modified, or new orders could be issued at any time.

In addition to there being two orders, there is some debate as to whether either order applies to school buses, as well as to the authority of the TSA and CDC to enforce these orders with respect to school buses. However, the CDC has been specific in stating that its order does apply to all public transportation conveyances, including school buses.

### **Is District Enforcement Of This Mask Mandate Really Necessary?**

Under this CDC Order, regardless of the mask policy in a particular district, passengers and drivers on a school bus must wear a mask, regardless of whether the buses are owned and operated by the district or a transportation vendor. There are certain exemptions from the mask requirement, such as individuals with disabilities under the ADA or individuals for whom wearing a mask would create a

risk to workplace health, safety, or job duties. However, for the remaining individuals who are on school buses, masks are required.

This mask requirement applies to all individuals, regardless of their vaccination status.

From a practical standpoint, it may be difficult to convince students, and others, that wearing masks on a school bus is necessary when they may not have to wear masks at school or in other public areas. However, that is the CDC's enforcement position. Therefore, schools should require masks on buses. Schools should provide masks to those students who need them, such as students who forgot to bring their masks or for families who are unable to afford them. These extra masks should be available on school buses, not just in the front office at school. Schools should require their bus drivers to wear masks, and, if they contract out bus services, they should communicate with those companies to make sure the bus companies they use are abiding by this order. Violations of the district's requirements of not wearing masks should be handled like all other rule or policy violations with respect to employees or students.

### **Consequences For Not Requiring A Mask On A Bus**

Failure to follow a mandatory government order (such as the CDC order) could:

- Result in enforcement action by the federal government.
- Affect a district's insurance coverage. That is, some insurance policies may have an exclusion for coverage if a district is not following a specific law, regulation, or government order.
- Eliminate a district's ability to claim immunity under the recently passed Wisconsin COVID-19 Immunity Law. This could be seen as an intentional, reckless, or wanton action which could jeopardize a district's ability to claim coverage under that law.
- Result in districts losing governmental immunity under Wisconsin Statute § 893.80(4). That statute immunizes school districts from liability for acts that involve the exercise of discretion or judgment. However, that law has an exception which provides that if there is a danger that is known and compelling enough to give rise to a ministerial duty on the part of a district, then the immunity can be lost. When there is a law, regulation, or governmental order that requires certain activity and eliminates discretion, and if a district acts contrary to that order, it may jeopardize a district's ability to claim governmental immunity.

Throughout the COVID-19 pandemic, we have been frequently asked whether districts need to follow "guidance" as opposed to an "order." While the subtleties

between “guidance” and “orders” and the risks of not following guidance is a topic for another article, this is a CDC order and should be followed.

If districts are considering not following this CDC order, at a minimum, they should check with their insurance carrier to determine whether they will have coverage from any claim that might arise from the district’s decision not to follow this CDC order. Even though it will likely be difficult for someone to prove how and when they contracted COVID-19, most districts don’t want to be in a lawsuit arguing about whether a particular individual did or didn’t contract COVID-19 on a bus. And if a district is sued, the district likely will want to have insurance coverage to defend that claim and cover that claim in the event of an award of damages.

As mentioned at the beginning of this article, there is no set expiration date for the CDC order. Additionally, the order could be modified at any time. However, given the recent surge of the Delta variant and the CDC recently recommending all students and staff mask at all times while indoors, regardless of vaccination status, it is increasingly unlikely that other health and safety measures will be relaxed any time soon.

If you have any questions regarding this article or masks on a bus, please feel free to reach out to a member of the Boardman Clark School Law Team.

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