

MEMO

TO: ISBA

FROM: Anderson, Julian & Hull

DATE: Thursday, July 9, 2020

RE: COVID-19 and Face Coverings- i.e., “requiring masks”

This is a brief memo on whether or not districts and charter schools can require masks. This question raises the sub-issue of whether a district or charter school may deny attendance to a student if the child, or the child’s parent, does not comply with any mask-wearing mandate a particular district or charter school may have in place. In sum, districts and charter schools need advice at the current moment on whether they have the ability to require masks.

May a District or Charter School Require Students to Wear Face Coverings?

Probably, yes. The Centers for Disease Control and Prevention (CDC) “Considerations for Schools” says schools should “Teach and reinforce use of cloth face coverings. Face coverings may be challenging for students (especially younger students) to wear in all-day settings such as school. Face coverings should be worn by staff and students (particularly older students) as feasible, and are most essential in times when physical distancing is difficult.”

Idaho Code § 33-512(4) invests the board of trustees of each school district/charter school with the power and duty “to protect the morals and health of the pupils.” In addition, Idaho Code § 33-512(13) is a broad grant of power to the board of trustees to “to govern the school district in compliance with state laws and rules of the state board of education.” While, at the present time, no Idaho state law or rule of the Idaho State Board of Education requires mask wearing, if such laws do go into effect, § 33-512(13) would allow boards of districts and charter schools to require student mask wearing. As it stands, § 33-512(4) is a comprehensive enough grant of power to boards that it imbues them, already, with the ability to require face coverings (including face masks) if the board determines that face coverings will protect the health of the pupils. Thus, students who do not wear a mask (if one is required) may be denied school attendance.

Other states have already determined that masks may be required. For instance, the Illinois State Board of Education has stated that “face coverings must be worn at all times in school buildings, even when social distance is maintained.” The California Department of Education has given guidance that “Students should use cloth face coverings, especially in circumstances when physical distancing cannot be maintained. If an LEA requires students to wear face coverings, then the LEA must provide face coverings to be used.”

While at this point, the Idaho State Board of Education has not weighed in on masks, it has given guidance that “school districts and charter schools are asked to think outside of the box and do their best to meet their student and community needs while keeping their staff and students safe and following the CDC social distancing guidelines.”¹ This guidance, and the provisions of Idaho Code § 33-512(4), appear to allow a district or charter school to make rules to ensure the safety of students, up to and including mask wearing.

The CDC guidance cited above encourages the use of masks for students (and teachers, discussed separately, below). The CDC does caution that “cloth face coverings should not be placed on children younger than 2 years old; anyone who has trouble breathing or is unconscious; anyone who is incapacitated or otherwise unable to remove the cloth face covering without assistance.” For the most part, school students will not typically fall into these categories.

The CDC has noted that “adequate supplies” of “cloth face coverings (as feasible)” should be provided by schools. Thus, while a district or charter school may not be able to enforce the student coming to school with a mask or other face covering, it should be able to enforce the student wearing a mask or other face covering while on a bus or in the school building. If the parents will not provide such face covering at home, the busses and schools should be ready to provide face coverings to unprepared students.

May a District or Charter School Require Employees, Including Teachers, to Wear Face Coverings?

Yes, as employers, districts and charter schools may require employees, including teachers, to wear face coverings. The U.S. Equal Employment Opportunity Commission (EEOC) has issued technical assistance stating that an employer may require its employees to wear personal protective equipment, which it has defined to include “face masks, gloves, or gowns,” upon return to work during a pandemic.

The EEOC has stated that where an employee with a disability needs a reasonable accommodation under the Americans with Disabilities Act, such as, e.g., “non-latex gloves, modified face masks for interpreters,” the employer (here, the district or charter school) should discuss the request and provide the modification if it is feasible and not an undue hardship on the operation of the employer’s business. If the disability is “not obvious or already known,” the employer may ask questions or request medical documentation to determine whether the employer has a “disability” as defined by the ADA.

The Occupational Safety and Health Administration (OSHA) has issued OSHA publication 4045-06 2020, “Guidance on Returning to Work.” Its stated purpose is to “assist employers and workers in safely returning to work During the evolving Coronavirus Disease 2019 (COVID-19) pandemic.” The Guidance provides, among other things, that

1 <https://boardofed.idaho.gov/resources/covid-19-school-operations-guidance-3-27-2020/>

employers should address safe work practices and personal protective equipment by “ensuring workers wear appropriate face coverings, such as cloth face masks, to contain respiratory secretions.”

Based on the EEOC technical assistance and OSHA guidance, it appears clear that districts and charter schools can require employees, including teachers, to wear face coverings. Face coverings do not necessarily have to be cloth face masks. OSHA has noted that “Like cloth face coverings, surgical masks and face shields can help contain the wearer's potentially infectious respiratory droplets and can help limit spread of COVID-19 to others.”

If a City or County Has a Required Mask Ordinance, is There a Legal Obligation on the Part of the District/Charter School to Provide Masks to Those Who Do Not Have Them?

No, the onus will be on the person residing in the City or County which has already ordered mask-wearing in public, to own and use a mask in public. That mask can then be used at school, on the bus, at the district or school office, etc.

There are currently (as of July 6, 2020) five cities in Idaho requiring the wearing of face coverings in public: Boise; Driggs; Hailey; McCall; and Moscow. The effectuating orders were Boise Public Health Emergency Order No. 20-10; City of Driggs Public Health Emergency Order No. 2020-02; City of Hailey Public Health Emergency Order No. 2020-05; City of McCall Resolution No. 20-12; and The City of Moscow Amended Public Health Emergency Order No. 20-03 Face Coverings and 6 Foot Social/Physical Distancing. None require any city or business to provide masks or other face coverings.

The City of Boise had a mask giveaway the day before the order went into effect. The Driggs order states that “The city encourages businesses to provide masks for sale (or free of charge) or make other accommodations for such patrons, such as curbside service.” Even this suggestion and encouragement is voluntary, however.

No state or Federal law requires a business or governmental entity to actually provide the masks that patrons or citizens are required to wear due to either the business’s rules, or a city or state order requiring mask-wearing.

The CDC has issued instructions for making homemade cloth face coverings, either by sewing one or by making a non-sewn face covering out of a bandana or t-shirt. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-make-cloth-face-covering.html> The CDC website includes links to YouTube videos in English, Spanish, and ASL, explaining how to make a mask.

Realistically, if a district or charter school requires the wearing of masks or face coverings, there will still be people who appear at district/school buildings without such face coverings, whether because they are temporary visitors; or through ignorance of the rules; or because they do not possess or cannot afford a mask; or because they or their parents

object to mask-wearing; or due to forgetfulness; or for other reasons. Therefore, if a district or charter school is going to require mask-wearing and/or the wearing of other face coverings, it should have some extra masks handy for such eventualities. However, it does not need to provide a mask for everyone whom it requires to wear a mask.

CONCLUSION/SUMMARY

Face coverings may be required to be worn, and need not be provided free-of-charge to everyone affected by a mask-wearing rule. Please note that this is an evolving, much-discussed issue in Idaho and the United States in general. More guidance and even law may emerge as Summer 2020 goes on. Therefore, the above refers to the state of guidance and the law, in Idaho, in early July 2020. This topic will likely need to be explored again as the 2020-2021 school year approaches, and even as the 2020-2021 school year progresses, and/or COVID-19 develops.