



## MEMORANDUM

TO: Ms. Frances Rabinowitz, Executive Director, CAPSS

FROM: Shipman & Goodwin LLP

RE: Potential Consequences of Defying Mask Mandate

DATE: August 16, 2021

### I. INTRODUCTION

Recently, you shared with us the fact that some superintendents are concerned over stirrings of civil disobedience in their communities, and, in some cases, even with the members of their school boards over compliance with the current mask mandate. At present, wearing a facial covering (mask) in school buildings is a legal requirement, not a recommendation that school board members and other school officials can choose whether to follow. School officials who ignore or even override this mandate have no legal defense, and they may face personal liability as a result. The situation is fluid, of course, and superintendents must stay on top of the latest guidance. However, unless there is a material change in the current mandate, superintendents should work with their district legal counsel to advise their boards of education of (1) their obligations to comply with mask requirements, and (2) of the risks of not complying with such requirements, as described below.

### II. LEGAL ANALYSIS

#### A. The Current Mask Mandate is a Binding Legal Requirement.

On July 13, 2021, Governor Lamont renewed through September 30, 2021, his public health and civil preparedness emergency declarations, which authority the General Assembly approved by resolution dated July 14, 2021. Moreover, pursuant to that authority, Governor Lamont issued Executive Order 13A on August 5, 2021. This Executive Order continues the requirement, which had been previously established under Executive Order 12A, that everyone over the age of two, who is not fully vaccinated for COVID-19 and does not maintain a safe social distance of approximately six feet from others, must wear a mask or cloth face covering while indoors in a public place, unless the person qualifies for the medical exemption described in the order. Moreover, Executive Order 13A reauthorizes and requires the Commissioner of Public Health to issue rules for the wearing of masks in certain settings, including schools.

The Commissioner of Public Health has issued a rule that specifically requires the wearing of face-coverings in different settings, including a rule requiring that “all individuals, regardless of vaccination status, must continue to wear a face-covering mask at all times when: . . . 1) Inside public or private school buildings (PreK-12).” In addition, since September 4, 2020, Executive Order 9, Section 1, has authorized the Commissioners of Early Childhood and Education, in consultation with the Commissioner of Public Health, to issue “binding guidance, rules, or orders for operation of schools or childcare settings that each deems necessary to respond to the COVID-19 pandemic or its effects [, which] may include rules related to the required use of masks or face-coverings in school buildings and child care settings.”

Executive Order 13A confirms that the Commissioner of Education retains the authority to issue such rules. On May 20, 2021, the Connecticut State Department of Education (“CSDE”) issued “Universal Mask Policies in School Buildings,” which continues to provide that schools must require universal mask wearing in their buildings, with limited exceptions. While the document states that the CSDE will continue to monitor updated guidance from the Centers for Disease Control and Prevention (“CDC”) to inform planning for next year, it has not yet revised its position.

In sum, binding guidance issued by the Commissioner of Public Health and the Commissioner of Education, as authorized by the Governor through Executive Order, currently requires all individuals, regardless of vaccination status, to wear a face-covering mask at all times when inside a school building. At present, these requirements will expire on September 30, 2021. However, the Governor could terminate this requirement earlier, or the Governor may extend this mandate as the General Assembly may authorize, either directly or by delegation to the Commissioner of Public Health, the Commissioner of Education, and/or the Commissioner of Early Childhood. Accordingly, in consultation with their district legal counsel, superintendents should stay abreast of the status of this requirement.

B. Actions Inconsistent with the Mask Mandate Could Expose Board Members to Personal Liability.

If a board of education chooses not to follow (or even affirmatively votes to override) binding guidance regarding facial coverings in schools, it exposes itself to liability claims by children or others who claim to have contracted COVID because masks were not required in school. Liability for negligence can be imposed when four conditions are met: (1) there is a duty of care, (2) the defendant breaches that duty, (3) the breach caused an injury, and (4) the plaintiff suffered that injury. A binding mask mandate inside school buildings certainly establishes a duty of care for persons in the school setting, and a failure to abide by that mandate is certainly a breach of duty. To be sure, a person who contracts COVID would then have to establish that the breach of the duty caused him or her to contract the disease. However, that will be a question for the jury, and a school district that has flouted a mask requirement will not be a sympathetic defendant. Finally, the plaintiff with COVID will have no trouble establishing that he or she has suffered an injury.

Governmental immunity often protects public officials, including school board members and other school personnel, from liability for negligence for their discretionary acts. However, the Connecticut Supreme Court has carved out an exception to governmental immunity of direct relevance in the school setting. Government officials are not protected from liability for negligence when a claim is made by a member of “an identifiable class of persons subject to immediate harm.” On many occasions, the courts have found that students in school are members of such a class, starting with *Burns v. Board of Education*, 228 Conn. 640 (1994). More recently, the Connecticut Supreme Court has described the standard for finding an exception to governmental immunity as follows: “whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.” *Haynes v. City of Middletown*, 314 Conn. 303 (2014). Board members should be concerned that a binding mask mandate is such a “clear and unequivocal duty to act immediately” that will expose them and the school district to liability for negligence.

Board members should also be concerned about personal liability if and when such a claim is made. As you know, the indemnification statute (Conn. Gen. Stat. § 10-235) confers extensive protection for school board members and employees from personal liability by making the school district responsible for indemnifying and holding them harmless when claims are made, including reasonable attorneys’ fees to defend against such claims. However, the statute carves out an exception; the protection does not apply when the board member or school employee’s actions are “wanton, reckless or malicious.” If a board member votes to override a legal requirement to implement a mask policy in schools over which the board member has control, one could consider that action in violation of legal requirements to be “reckless,” with the result that the protection of the indemnification statute may be lost.

C. Actions Inconsistent with the Mast Mandate Could Expose the School District to Adverse Consequences, including Loss of State or Federal Funds.

Under Conn. Gen. Stat. § 10-220(a), boards of education have a duty to “implement the educational interests of the state, as defined in section 10-4a,” and that statute provides that the educational interests of the state include the requirement that “the mandates in the general statutes pertaining to education within the jurisdiction of the State Board of Education be implemented.” A mask requirement imposed by the Commissioner of Education as authorized by the Governor would likely be considered such a mandate, and a decision not to adhere to that mandate could lead to proceedings before the State Board of Education in accordance with Section 10-b procedures. Such procedures are triggered when any person or the State Department of Education itself alleges a violation of Section 10-4a, and they include an investigation by an agent of the State Board of Education, a hearing before the State Board of Education, and, where appropriate, the issuance of a remedial order by the State Board of Education. If the board of education refuses to comply with any such order, the State Board of Education may seek enforcement of that order in superior court. It is not clear, however,

whether and to what extent the State Board of Education can withhold state funding in such a case.

In addition, boards of education that fail to implement a mask mandate risk loss of federal funds. Specifically, the American Rescue Plan Elementary and Secondary School Emergency Relief (ARP ESSER) Fund requires that school districts that receive ARP ESSER funds develop a plan for the safe return to in-person instruction. Moreover, the interim final rules of the United States Department of Education provide that a district's plan must include, among other things, how it will maintain the health and safety of students, educators, and other staff through policies that follow the safety recommendations established by the CDC, including "(A) Universal and correct wearing of masks." 86 FR 21195-01, at 21201.

The CSDE ESSER Guidance reiterates these requirements and sets forth a checklist for Connecticut school districts to follow. To aid in the planning process, CSDE has also provided a "Safe Return to In-Person Instruction and Continuity of Services Plan Template," which makes clear that districts must describe their mitigation strategies for various areas, including the universal and correct wearing of masks and social distancing. The CSDE template document provides that the "LEA must implement, to the greatest extent practicable, each element of the most up-to-date guidance listed in the table."

Given these ARP ESSER Fund requirements, there is risk of substantial adverse consequences if a board of education chooses not to develop a plan that includes the wearing of masks in schools. While the law does not explicitly set forth the penalty for failing to create and implement the required plan, presumably the federal government could demand repayment for such funds allocated to the school district, as the aforementioned requirements are conditions for receiving ARP ESSER funds.

## V. CONCLUSION

As we approach the beginning of the 2021-2022 school year, the wearing of masks in schools is legally required. Unless there is a change in this mandate, it is important for school districts, and the boards of education that oversee them, to implement this mandate. A decision not to adhere to this mandate would be more than a symbolic action of protest. Such a decision could have significant adverse consequences for the school district and for board members personally, as described above.

We hope that this information is helpful to you and your membership. Please let us know whether and how we may be of further assistance in this challenging time.