

PSEA ALERT!

ADVICE TO PSEA MEMBERS REGARDING ORDER DIRECTING FACE COVERINGS IN SCHOOLS

Prepared by the PSEA Legal Division
Current as of September 7, 2021

Effective September 7, 2021, the Pennsylvania Acting Secretary of Health directed that all public and private school entities require all persons¹ in school buildings² to wear face coverings. See the Order at: [Order of the Acting Secretary Directing Face Coverings in Schools.pdf \(pa.gov\)](#). The Order provides for limited exceptions³ and reasonable accommodations for persons with medical, mental health conditions, or disabilities making it unreasonable for them to wear a face covering.

The Order requires that school entities enforce the face covering requirement.

The Pennsylvania Department of Education (PDE) issued Answers to FAQs about the Order, available at: [Answers to FAQs \(pa.gov\)](#). PDE likewise states that all school entities must comply with and enforce the Order, and that school officials who fail to adhere to the Order may be exposed to personal liability, fines, and other penalties under law.

PSEA has summarized the Order and the FAQ in an Alert which can be found at www.PSEA.org.

¹ The Order applies to all children/students, teachers, staff, and visitors ages two years or older while indoors working, attending, or visiting a school entity, regardless of vaccination status.

² School entities include public PreK-12 schools, brick and mortar and cyber charter schools, private and parochial schools, career and technical centers (CTCs), intermediate units (IUs), PA Pre-K Counts programs, Head Start Programs, Family Centers, Preschool Early Intervention programs, Private Academic Nursery Schools and locally funded prekindergarten activities, and all childcare providers licensed by the Department of Human Services of the Commonwealth.

³ The exceptions include when: eating or drinking; wearing a face covering creates an unsafe condition in which to operate equipment or execute a task; working in isolation with no expectation of in-person contact; necessary to confirm the individual's identity; needing to see a person's mouth to communicate; participating in high intensity aerobic or anaerobic exercises in a well-ventilated area with six (6) feet of physical distance; and if a child or student is participating in a sports activity or event, whether indoors or outdoors.

PSEA is providing the following advice to members regarding compliance with the Order, to help members protect themselves, their employment, and their licenses. In summary:

- At all times, PSEA members should comply with the Order and wear a mask, subject to the exceptions listed.
- Where schools are acting in good faith to abide by the Order, PSEA members should follow the policies and directives of their administration.
- Where schools are not enforcing the Order, PSEA members should make sure their local association is aware of the noncompliance and should follow the guidance of their local association regarding the reporting and documenting of students in attendance without face coverings.

PSEA stands ready to assist PSEA members and local associations regarding appropriate options and actions where school boards and administrators are not properly implementing the Order.

What if my school does not require staff to follow the Order?

PSEA members should comply with the Order even if their school board has decided to defy the Order or does not otherwise direct them to do so. In this regard, members should wear face coverings when in school buildings as required by the Order. Your local association should be in contact with your PSEA UniServ Representative and PSEA Region Attorney to discuss appropriate action in light of the noncompliance.

What if my school does not require students to wear face coverings?

If your school board decides not to enforce the Order, school employees are not in a position to independently insist that students wear masks. As above, your local association should be following up with your PSEA UniServ Representative and Region Attorney to determine an appropriate response to the noncompliance.

What if my school bypasses the requirement by indiscriminately granting “reasonable accommodations” to students who do not want to wear a mask?

First, the Order states that face shields are an alternative to masks and that all alternatives must be exhausted before any exception is granted. Second, PDE’s FAQ recommends that any exception “be in accordance with eligibility under Section 504 of the Rehabilitation Act or IDEA for such medical or mental health condition or disability.” Furthermore, PDE states that schools should follow their established processes for granting any exceptions and request any medical documentation that they would normally require.

Your local association and UniServ Representative can assist in reminding the school of its obligations under the Order and the FAQ.

What are the potential consequences to my school board or my superintendent if they fail to comply with the Order?

The Secretary's Order can be enforced in several ways.

The Order was issued pursuant to the Secretary's powers under the Pennsylvania Disease Prevention and Control Act of 1955, which gives the Secretary authority to issue orders for isolation, quarantine, and other control measures. *See* 35 P.S. § 521.5. Any person violating a provision of the Act can, for each offense, be convicted of a summary offense and sentenced to pay a fine of not less than twenty-five dollars (\$25) and not more than three hundred dollars (\$300), together with costs, and in default of such payment be jailed for not more than thirty (30) days. *See* 35 P.S. § 521.20(a). Criminal complaints can be filed with the magistrate by the State Department of Health, County Departments of Health, or by any person with knowledge of the violation. *See* 35 P.S. §521.20(b).

The Pennsylvania Administrative Code provides for similar penalties, in that any person who violates any order of the Department of Health may be convicted of a summary offense and sentenced to pay a fine of not less than ten (\$10.00) dollars and not more than fifty (\$50.00) dollars, together with costs, and in default of such payment be jailed for thirty days. *See* 71 P. S. § 1409:

The Pennsylvania Crimes Code provides that a person commits a misdemeanor of the second degree by intentionally obstructing, impairing, or preventing the administration of law by breach of official duty. *See* 18 Pa. C.S. § 5101. An individual convicted may be sentenced to not more than two years in jail. *See* 18 Pa. C.S. §106(b)(7).

School board members are obligated to follow the law and enact policies in a manner consistent with applicable constitutional and statutory authority. *See* 24 P.S. § 5-510. They can be removed from office for neglect of duty, by order of a county court upon petition by taxpayers. *See* 24 P.S. § 3-318.

Under the Educator Discipline Act, the Professional Standards and Practices Commission can revoke or suspend a superintendent's letter of eligibility for several reasons, including negligence. *See* 24 P.S. §§ 2070.1b, 2070.9c(5). In addition, the Commission can publicly or privately reprimand a letter of eligibility for a violation of the Code for Professional Practice and Conduct adopted by the Commission. *See* 24 P.S. § 2070.9c(8); 22 Pa.Code §235.2(c). The Code currently provides that educators must "comply with all Federal, State, and local laws and regulations and with written school entity policies" and that all educators shall "accurately report all information required by the local school board or governing board, State education agency, Federal agency or State or Federal law." *See* 22 Pa.Code §235.5(c). In the event that a complaint is filed with the Department of Education, the Department has the obligation to investigate the alleged misconduct and file a notice of charges where appropriate. *See* 24 P.S. § 2070.9.

Finally, school officials who refuse to enforce the Order face potential personal liability. The Pennsylvania Tort Claims Act provides immunity from liability to elected public officials, except

in certain circumstances. *See* 42 Pa. C.S. §§ 8541 et seq. The Tort Claims Act provides that schools and school officials can be liable for their tortious acts causing injury to persons in cases of willful misconduct. *See* 42 Pa.C.S § 8550. If a school board or superintendent intentionally fails to implement a government Order aimed at protecting their students and employees, they are potentially waiving any immunity they might have as to their liability for students or employees who become sick or die from COVID-19. In this regard, PDE’s FAQ specifically notes that:

School officials who fail to adhere to the order could lose the protection of sovereign immunity and may personally face lawsuits from those who may be affected by any official’s attempt to ignore the order. Failing to implement or follow the control measures may expose individuals to personal liability under 42 Pa.C.S § 8550 (relating to willful misconduct)....

Might similar consequences apply to me if I refuse to comply with the Order?

Yes, which is why PSEA recommends that all members wear face coverings as required by the Order.

Criminal charges can be filed by any persons against school staff. Certified educators might place their certifications at risk if they do not follow the Order. Employees who follow the directives of their school officials and do NOT require masks of students might still claim protections under the Tort Claims Act, including the employer’s obligations to: 1) defend employees against lawsuits when the claims arise from the employees’ job duties, *see* 42 Pa.C.S. § 8547; and 2) indemnify employees for damages assessed against them in those circumstances, *see* 42 Pa.C.S. § 8548.

The Order says that schools may not “restrain, use force, or physically remove” those who refuse to comply with the Order. Does this mean that schools must allow persons to remain unmasked if they wish?

No. The Order directs that while at school, all persons “shall wear a face covering indoors.” PDE states that:

The Order, issued under the Disease Prevention and Control Law, establishes a legal mandate. School entities are expected to enforce the Order as they do other state laws and school rules and policies. Reasonable steps may include developing and implementing a policy, enforcing already existing policies, training staff on conflict management, and monitoring and taking corrective actions in instances of noncompliance among staff, students, or visitors. School entities should follow their local policies and procedures on managing student and staff misconduct.

While schools may not take physical action to eject persons not wearing face coverings from school premises, administrators can direct persons to leave the building or direct that they not return to the building for instruction unless they wear face coverings in compliance with the Order.

Do schools have any leeway in how they implement the Order?

Schools will need to take reasonable actions to help students and staff comply with the Order. For example, PDE's FAQ states that school entities may consider providing "mask breaks" for students during outdoor play, recess, or physical education activities in well-ventilated areas and where six (6) feet of social distancing can be maintained. Schools should also consider PDE's recommendation for additional prevention strategies, such as physical distancing and increased ventilation, to protect everyone when face coverings are not used. Schools will have to consider different factual situations when deciding whether exceptions apply, and if so, what other mitigation strategies might be used. Schools may decide that they need policies or guidelines to provide clarification, training or information sessions for staff, and ways to help parents and students adapt to the Order. Schools will also need to determine appropriate steps to address any circumstances of non-compliance, which may include discipline of employees who do not use face coverings as directed.

In summary, what should I do?

At all times, you should comply with the Order and wear a mask, subject to the exceptions listed. If your school is acting in good faith to abide by the Order, follow the policies and directives of your administration.

If your school is not enforcing the Order, notify your local association representatives. Your local association will follow up with the PSEA UniServ Representative and Region Attorney.

Follow the guidance of your local association regarding the reporting and documenting of students in attendance without face coverings.

If you have questions about whether or how your school is implementing the Order, contact your local association for assistance.

We recognize that there has been, and will continue to be, significant public debate regarding the Order, and that there are strong emotions on both sides of this issue, from parents, students, school board members, superintendents, and even PSEA members. However, everyone has the obligation to follow the law and following the law is the best way to protect yourself, your job, and your license.