



Vermont
Superintendents
Association



COVID SAFETY RULES GUIDANCE

COVID presents numerous challenging questions for school boards and administrators. Masking and vaccination have proven to be controversial for some community members. Whether and how districts choose to establish and implement safety measures could have a significant impact both in terms of community illness and potential civil liability.

Of course, student and employee safety is the primary concern, but the prospect of legal claims arising from inadequate safety rules or insufficient implementation of those rules should be a significant issue for districts because insurers, including the Vermont School Boards Insurance Trust's (VSBIT) Multi-Line Program, no longer provide any liability coverage for claims based on communicable diseases, including COVID. For example, if a family raised a claim for compensation alleging that the District's failure to require masking was negligent and that negligence caused a student's death, defense costs and any judgment would be paid by the District, not an insurer. Districts should carefully weigh their potential financial liabilities if they choose to decline mask mandates or other safety rules.

The purpose of this communication is to provide broad guidance on the legal issues inherent in mask and vaccination mandates. It is not legal advice and districts should consult their attorneys if they have specific matters of concern.

Guidance on Masking Mandates for Students: The Agency of Education (AOE) has issued recommendations for school officials on masking. Some parents have expressed opposition to required masking, claiming that they have the legal right to prevent mask wearing by their children. Districts have struggled with how best to handle those concerns and still maintain a safe school environment.

School districts and other public agencies have the right to implement reasonable health and safety measures. This is particularly true given the prevailing circumstances with COVID transmission and illness and the unavailability of vaccines for younger students. It is important based on guidance from AOE that Board action be taken to either delegate authority to the Superintendent to establish reasonable, evidence based, safety rules for COVID or to establish policies or protocols for the District.

As indicated by AOE, Districts may impose a mask mandate for students with two potential exceptions. The first mask exemption is based on a disability or impairment. Students may because of mental health or medical conditions be unable to wear masks some or all of the time. With appropriate medical substantiation of the condition and the specific accommodation sought, students may be entitled to some variation to masking requirements or alternative educational programs. Districts will need to give careful thought to how best to

accommodate students while maintaining a safe environment for all students and staff. Those determinations should be made on a case by case basis, under some circumstances through the Section 504 process. Districts should not develop one size fits all rules for accommodation.

It is difficult to predict, but there may be a claim from some parents that their religion bars student masking. If so, schools should engage in communications with parents to better understand their religion and the basis for the claimed exemption to masking. It is unlikely that there will be sufficient basis for an exemption from any COVID safety rule, but the District should first gather the information before declining the request for a religious exemption.

Absent an exemption, Districts may require students to wear masks as they deem appropriate. Recent guidance from AOE indicates that masking may be treated like residency in terms of a student's ability to attend school. Specifically, students who do not wear masks as mandated may be prevented from entering the school. There is also a right to engage in progressive discipline with students who refuse to comply with safety rules like wearing masks at school. District administrators should consider that when students are at school the District stands as *in loco parentis*, meaning the District assumes the rights of the parents.

There is also no right for parents to enter the school for purposes of opposing masking. School officials may restrict parent and community access to school buildings, particularly for anyone refusing to wear a mask.

Guidance on Masking Mandates for Employees: As with students, the District may require employees to wear masks for COVID safety. Employees may seek the ADA and religious exemptions. ADA requests should be handled in the customary manner, with a certification from a competent professional required before any accommodation is considered. It is very possible that no reasonable accommodation will be available for employees who cannot mask. Please remember to offer those employees ADA leave, if reasonable. Reasonable accommodation does not include tolerating unmasked employees who present a danger to others.

In order to qualify for a religious exemption to mandatory masking, the employee must demonstrate that masks are inconsistent with a sincerely held religious belief. If so, the employer may grant an exemption so long as it does not create an undue hardship. In order to make those judgments, the District should obtain a written description of the employee's religion and the manner in which mask wearing is objectionable under the tenets of that religion. Then, the District may assess whether granting an exemption is reasonable.

Although it is unlikely, there may be concerns raised by local Associations about masking requirements. If objections are raised based on labor law issues, it is important for the District to discuss the issue with counsel. Districts may be required under some limited circumstances to negotiate a side letter of agreement to address COVID specific concerns that are not present in the current collective bargaining agreement.

Guidance on Vaccination Mandates for Employees: Courts have given employers the discretion to require proof of vaccination from employees. Although there are no Vermont cases on point, we anticipate that Vermont would support a vaccination mandate with potential exemptions under the ADA and for religious reasons. Otherwise stated, we expect that the Vermont courts would support vaccination requirements for employees.

It is important that any such policies be established by the school board and that vaccinations be offered free of charge to employees. Careful thought should be given to any requests for exemptions. In fact, it is recommended that where there is a request for an exemption under the ADA or because of a sincerely held religious belief the District should discuss the matter with counsel before declining the requested exemption. Although remote teaching may no longer be an available option, there may be other creative reasonable means of accommodating unvaccinated employees. Under the ADA, unpaid leave should always be considered as an accommodation. Accommodation should be decided on a case by case basis.

Some districts have considered mandatory testing for employees who decline vaccination. It is permissible for the District to mandate testing, especially for unvaccinated employees. The District should be certain to make testing easily obtained and cost free to employees working under testing requirements. Testing should be performed during work hours or employees should be paid for time spent getting tested.

Vermont NEA has taken the position that the specifics of any implementation of a vaccination mandate should be discussed with your local association and that it may be an item for mandatory bargaining. We suggest that you raise your procedures with your local association before implementing to determine if you are able to reach agreement. If you are not able to reach consensus on how to implement reasonable rules concerning mandatory vaccination protocols, you should consult with legal counsel.

Guidance on Facilities Use and Mandatory Masking: The ability to promulgate and enforce reasonable safety measures extends to requiring masking at public functions where masking is important or public meetings within the District. Where mandatory masking is implemented, districts are encouraged to maintain, where possible, a robust alternative to in person attendance. Remote attendance through video conferencing and by telephone, particularly to attend board meetings, will substantially limit the ability of any persons not wishing to wear masks to argue that they have been deprived of their rights.