



USE OF FACE COVERINGS TO ADDRESS MITIGATION OF COVID-19 EXPOSURE

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The Center for Disease Control (CDC) and the Arizona Department of Health Services (ADHS) have recommended that cloth face coverings be worn by individuals over two years of age when other social distancing measures are impractical or impossible. Face coverings should not be used by anyone who has trouble breathing, is unconscious, incapacitated or is unable to remove a mask without assistance. See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>.

APPLICABILITY OF LOCAL GOVERNMENT ORDERS

Inclusion of Schools in Orders – “Place of Public Accommodation”

Each school district will need to review their local jurisdiction’s orders to see if the order requiring face coverings applies to school district personnel and students. In general, the orders adopted require face coverings in places of public accommodation. Some of the orders will define this. For instance, the Maricopa County order states as follows:

“Place of Public Accommodation” means facilities, buildings, establishments, accommodations, services, commodities, or uses offered to or for use by the general public in Maricopa County, including public places where food or beverages are offered for sale, public places operated for temporary lodging, use or accommodation of those seeking health or recreation and all establishments offering good or facilities, communal outdoor spaces such as sidewalks, trails, and parks, and entities soliciting patronage from the general public.

<https://www.maricopa.gov/DocumentCenter/View/61311/Regulations-on-Face-Coverings>. The County order does not specifically address schools.



Arizona state law defines places of public accommodation as follows:

[A]ll public places of entertainment, amusement or recreation, all public places where food or beverages are sold for consumption on the premises, all public places which are conducted for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation and all establishments which cater or offer their services, facilities or goods to or solicit patronage from the members of the general public. Any dwelling as defined in § 41-1491, or any private club, or any place which is in its nature distinctly private is not a place of public accommodation.

A.R.S. § 41-1441(2)

The Americans with Disabilities Act (ADA) defines places of public accommodation specifically to include elementary, secondary and undergraduate private schools and other places of education. 42 U.S.C. § 12181(7)(A-F).

If a school does not allow members of the general public onto its campuses, the school district may not be a place of public accommodation such that it must comply with the local government orders.

Inclusion of Schools in Orders – “Present In”

Some city orders use broader language that potentially encompasses school districts. For example, the declaration of the Phoenix City Council provides:

All persons six years old or older who are present in the City of Phoenix shall have possession of a face covering described in Arizona Department of Health Face Covering guidance issued on May 21, 2020 ... when they leave their home or place of residence and shall wear the face covering whenever they are within six feet of another persons who is not a member of their family or household.

https://www.phoenix.gov/newssite/Documents/Mayor%27s%20Declaration_06-19-20.pdf

The language of this order and similar orders applying to “all individuals within the jurisdiction of the City” (Tempe) would appear to include any school building within the limits of the city or town issuing the order, and the school would be required to comply with the order, assuming the city or town has the authority to regulate the affairs of the school district (see below).



Authority of Local Government to Regulate Schools

Arizona School Districts are political subdivisions of the state and are therefore generally exempt from the regulations of other political subdivisions. Ariz. Op. Atty. Gen. 183-052 (reaffirmed in Ariz. Op. Atty. Gen. 115-001). However, when a statute includes regulation of a school district in the authorizing legislation, another political entity may include a school district in its regulations. *See id.*

The general rule that a political subdivision cannot regulate another applies only when the purportedly regulated political subdivision is acting in its governmental capacity, not when it is acting merely in a proprietary capacity. *See Pinetop Lakes Ass'n v. Ponderosa Domestic Water Imp. Dist.*, 1 CA-CV 09-0395, 2010 WL 2146415, at *3 (App. May 27, 2010). For example, if a school district rents facilities to third parties, such use would be proprietary and not governmental. In this case, counties, cities and towns have authority to issue ordinances, orders, etc. mandating the use of masks in public under statutes that apply generally, and do not specifically give authority to regulate school districts. *E.g.* A.R.S. § 11-251 (giving counties authority to adopt provisions necessary to preserve health).

Certain statutes and regulations give county Boards of Health the power to quarantine, isolate or take other actions to fight communicable diseases, but those powers apply to actions to isolate “an individual or group of individuals.” A.A.C. R9-6-303; *see also* A.R.S. § 36-136 *Maricopa County Health Dept. v. Harmon*, 156 Ariz. 161, 750 P.2d 1364 (App. 1987) (dealing with specific orders to particular children and families). While a county Board of Health would clearly have the power to order a specific person or group of people to quarantine or take “other measures” as necessary, the regulations do not mention powers to issue generally applicable orders and do not mention school districts specifically.

Because a county, city, or town requires statutory authority to regulate another political subdivision, and the relevant statutes do not grant that authority, a school district would not be obligated to follow the provisions of city or county orders even if their language includes school activities, so long as the district activity is a part of the district’s governmental capacity. For example, regular classes, governing board meetings, and other activities directly associated with the district’s governmental purpose would be exempt from city or county orders, but the use of rented school facilities by third parties would not be exempt.

The most conservative course of action is to develop a face covering procedure that complies with the local jurisdiction’s most recent order, proclamation or regulation.



POTENTIAL ELEMENTS OF DISTRICT'S PLAN REGARDING FACE COVERINGS

If a school district decides to create procedure regarding face coverings, we recommend that the district's plan include the following considerations:

- Time and Place Considerations
 - Where are face coverings required? (e.g., hallways, restrooms, classrooms, buses)
 - Are there other social distancing measures that may be equally or more effective? (e.g., glass barriers, prohibiting gatherings, not mixing groups)
- Type of Face Coverings
 - What type of face coverings are required?
 - What coverings/PPE should be used for nurses or those providing medical care?
 - What coverings should be used by district personnel when working with medically fragile or high-risk students?
 - What coverings should be used by district staff when working near high risk staff?
 - What coverings should be used by district staff when working with a student who is deaf?
- Supply and Storage
 - Who should supply the face coverings? How will the district ensure equity?
 - How should face coverings be stored while at school?
- Enforcement
 - What are the repercussions if a student, employee or guest fails to wear face coverings?
 - What is the procedure reporting and investigating a violation of the plan?
 - What is the procedure if an individual informs the district that they are unable to wear a face covering?

The Trust has issued guidance entitled COVID 19 Protocols for Re-Opening Schools that addresses multiple issues upon returning to school, including use of face coverings. Currently, the guidance prepared by Udall Shumway provides options for school districts to require or not require face coverings. This guidance is on the Trust's website.

The Arizona Department of Health Services (ADHS) participated in a webinar on June 10, 2020. ADHS recommended that students wear cloth face coverings when physical space does not permit the maintenance of six feet physical distancing.



EXAMPLE FROM STATE OF WASHINGTON

The state of Washington has mandated face cloths as follows:

Cloth Face Coverings Wearing cloth face coverings may help prevent the spread of COVID-19 and is required for staff and students. See the Washington State Department of Health Guidance on Cloth Face Coverings and CDC Recommendation Regarding the Use of Cloth Face Coverings for more information. All students, volunteers, or guests must wear cloth face coverings at school. For staff, cloth facial coverings must be worn by every individual not working alone at the location unless their exposure dictates a higher level of protection under Department of Labor & Industries safety and health rules and guidance. Refer to Coronavirus Facial Covering and Mask Requirements for additional details.

Cloth face coverings should not be worn by:

- Those with a disability that prevents them from comfortably wearing or removing a face covering.
- Those with certain respiratory conditions or trouble breathing.
- Those who are deaf or hard of hearing and use facial and mouth movements as part of communication.
- Those advised by a medical, legal, or behavioral health professional that wearing a face covering may pose a risk to that person.

Students may use face shields as an alternative to a cloth face covering. Younger students must be supervised when wearing a cloth face covering or face shield and will need help putting them on, taking them off, and getting used to wearing them. Even when cloth face coverings are worn, continue practicing proper physical distancing.

LEGAL CONSIDERATIONS AND GUIDANCE

The Equal Employment Opportunity Commission (EEOC) has specifically stated that employers may require employees to wear personal protective equipment during this pandemic. This includes requirements regarding face masks.

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

The Occupational Safety and Health Organization has also published guidance on use of face coverings in the workplace as one step in reducing spread. OSHA indicates that face coverings are not “personal protective equipment” and that employers may choose to



ensure that cloth face coverings are worn as a feasible means of abatement in a control plan. <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>

The CDC states as follows regarding cloth face coverings in its guidance for the reopening of school districts:

Cloth Face Coverings

- 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. Individuals should be frequently reminded not to touch the face covering and to wash their hands frequently. Information should be provided to staff, students, and students' families on proper use, removal, and washing of cloth face coverings.
 - Note: 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
- Cloth face coverings are meant to protect other people in case the wearer is unknowingly infected but does not have symptoms. Cloth face coverings are not surgical masks, respirators, or other medical personal protective equipment.

<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html>

State law specifically permits school districts to require the use of uniforms. A.R.S. §15-342(22).

Governing Board policy does not specifically address the issue of face cloths. Governing Board Policy JICA regarding Student Dress authorizes the Superintendent to develop and enforce school regulations that “present a hazard to the health or safety of students or to others in the school”. The regulation implementing that policy states: “The safety dress code as prescribed for shop, home economics, physical education, and chemistry classes shall be followed.” Governing Board Regulation JICA-R.

The Governing Board also has a statutory obligation to develop an emergency response plan for each school in accordance with minimum standards developed by the Arizona Department of Education and the Division of Emergency Management. A.R.S. §15-341(31). ADE’s Roadmap for Reopening Schools issued this month specifically discusses the adoption of a continuity of operations plan (COOP); ADE intends to issue a



template later this month. Requirements regarding the use of face coverings good be included within any COOP developed.

CONCLUSION

In our opinion, the Governing Board has authority to require the use of face coverings for both students and staff under its power to develop an emergency response plan and to address safety concerns in the development of a dress code.

An amendment of the District's Governing Board Policy JICA may not be required. The District could amend Governing Board Regulation JICA-R to include any requirements adopted. The District could also include any plan developed regarding the use of face coverings in its COOP and/or amend its staff and student handbooks to communicate the procedure.

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