



Face Covering Requirements and the Rights of Students with Disabilities

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Over the past two weeks, as students have returned to school, DRM has received calls from families, case managers, advocates, and others, about the impact of face covering requirements on students who may be unable to comply consistently (or at all) with these requirements. This guidance document is an attempt to provide some basic information regarding these issues.

DRM statement on the importance of face coverings in schools

The use of face coverings is an important health and safety measure. Each and every individual who can wear a face covering should do so. People with disabilities have been disproportionately impacted by COVID-19, and so DRM supports near-universal compliance with current face covering requirements and other health and safety measures. The vast majority of students in school will be able to comply with general requirements to wear a face mask. This includes some students whose families may initially believe they cannot or will not wear a mask. And most students who cannot wear a mask will be able to wear a face shield. But for the relatively few students who will be unable to wear a face covering of any kind or will be unable to do so consistently for reasons related to their disabilities, this must not be a reason to deny them access to a free and appropriate public education in the least restrictive environment.

In addition, schools should be aware of the difficulty that face masks present for students who are Deaf or hard of hearing, as well as other students with disabilities, including autism. And schools must take steps to address any barriers to effective communication through the use of clear face masks, face shields, or other means.

Current Maine guidelines and recommendations (as of 9/18/2020)

MDOE developed the “Framework for Reopening Schools and Returning to In-Person Instruction” (the Framework) to guide schools to reopen this fall. This is a “working draft” and “subject to ongoing development and will evolve as additional information and guidance is provided about the pandemic.” The most recent version contains “six requirements for safely opening schools”, which includes the following with regard to face coverings: a) students age five and above are required to wear a mask/face covering; b) masks are recommended for children ages two to four; and c) face shields are an alternative for students with medical,

behavioral, or other challenges who are unable to wear masks/face coverings.¹ There is an exemption for an individual participating in voluntary school sports during vigorous physical exercise. And most importantly, the Framework states: **“Nothing in this framework’s mask/face covering requirements should be interpreted as preventing a school from making accommodations on an individualized basis as required by state or federal disabilities laws.”**

The Framework outlines a list of things that schools should have done **prior** to the return to school, which include: a) establishing a protocol for face coverings; b) establishing plans for training staff and students about the unique needs of others and their abilities or possible struggles related to maintaining safety protocols; and c) offering kid-friendly videos to teach proper donning and doffing of face coverings.

The Framework references another document, “PK-12 and Adult Education Public Health Guidance”, which is described as “a comprehensive guidance document with requirements and additional considerations and recommendations” developed by public health experts convened by DHHS. Importantly, this document makes clear that **“Alternatives to mask/face covering requirements must be made for those for whom it is not possible due to medical conditions, disability impact, or other health or safety factors.”**²

So, to sum up the generally applicable state level guidance: Face coverings are required for all students age 5 and above, except for anyone who has trouble breathing or related medical conditions, or who is otherwise unable to remove the mask without assistance. Alternatives to face covering requirements must be provided for people for whom compliance is not possible due to a medical condition or the impact of a disability. And nothing in the Framework prevents schools from making reasonable accommodations on an individualized basis as required by state and federal disability rights laws.

Just before schools began to reopen, the Office for Special Services of the Maine Department of Education released a document, “FAQ Update 8-28-2020, Personal Protective Equipment (PPE)”, which led some schools to believe that students who cannot wear either a face mask or face shield due to their disabilities must be completely isolated or excluded from school.³ This was incorrect. And the Framework was updated to address this confusion on 9/15/2020.

¹ “*Framework for Reopening Schools and Returning to In-Person Instruction*”, available at: <https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/Framework%20for%20Returning%20to%20Classroom%20Instruction%209.15.20.pdf>

² “*PK-12 and Adult Education Public Health Guidance*”, p. 6, available at: <http://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/School%20Guidance%209.4.20.pdf>

³ “*FAQ Update 8-28-2020 Personal Protective Equipment (PPE)*”, available at: <https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/PPE%20Reopening%20Guidance%208-28-2020.pdf>

What if my child is unable to wear a mask due to a medical condition?

Some students will not be medically able to wear a mask. For example, all state and federal guidance indicates that individuals who are unable to take off a mask themselves should not wear one. But to be clear, the Maine chapter of the American Academy of Pediatricians (AAP) has taken the position that there should be very few exceptions to mask requirements.⁴ This is reflected in a “Mask Exemption Letter Template” the Maine AAP created, which is available [here](#).

If a student is unable to wear a mask due to a medical condition or for some other disability-related reason, they can ask for a modification or reasonable accommodation to the general policy that students must wear a face mask in schools. While a note from a doctor or other medical professional is not required, it will often be helpful. In some cases, the school nurse or another school professional may be able to document the need for an exception to the policy. This could be done through the IEP team or Section 504 team.

Current state guidance is consistent that, for a student who is unable to wear a mask for a medical reason, a face shield may be an appropriate alternative face covering. So, most students who cannot wear a mask should be able to be accommodated through the use of a face shield instead. If there are difficulties with securing this accommodation, consider calling an IEP team meeting to discuss and resolve any issues that are impacting access to a free and appropriate public education. If that is not successful, look to the dispute resolution options outlined below.

What if my child is unable to wear a face covering of any kind?

If there is a medical condition that prevents or makes the use of both a mask and a face covering unsafe, it will likely be more important to have documentation of this condition and its effects. This will be a rare circumstance. But if it occurs, the family should request a reasonable accommodation (outlined below) to the district’s face covering policy to ensure continued access to the programs and services in the school and continued access to a free and appropriate public education in the least restrictive environment.

More often, students will be unable to comply with face covering requirements for other disability-related reasons. For example, many students with autism have difficulties with face coverings due to sensory needs. Face coverings can cause significant distress in some individuals with anxiety or PTSD. Some students with developmental disabilities may be unable to consistently tolerate a face covering. This is not an exhaustive list. To be clear, most students with developmental disabilities, autism, and/or anxiety will be able to comply with face covering requirements. But for those students who cannot comply for reasons related to their disabilities, reasonable accommodations must be made.

⁴ See: <https://www.maineaap.org/assets/docs/Mask-Guidance-for-School-Aged-Children.pdf>

As the MDOE Framework makes clear, before the start of the school year, schools should have been developing and implementing plans to teach students about the use of face masks. Complying with this new expectation is a skill and for many students it will need to be explicitly taught and regularly reinforced. Some students will need social stories to prepare them for many aspects of the return to school, including what to expect around the use of face masks. Schools should have been working with families to teach these expectations and support students who may have difficulty complying with this new requirement.

Some students will need ongoing support in complying with face covering policies. It will be important to determine whether they can be supported, through the provision of special education and/or related services, to increase their compliance with face covering requirements. A plan should be developed through the IEP team process. For example, the team could enlist the occupational therapist to address sensory needs, perhaps through trials of different types of face coverings. Or the team could work with a behavior specialist to develop a plan to increase compliance through positive behavior interventions and supports. Or the team could engage the social worker or the student's outside therapist to develop a plan to address anxiety around face coverings. Again, this is not an exhaustive list. As part of the plan, the IEP team should consider reasonable accommodations and modifications to the face covering policy to ensure continued access to the programs and services in the school and continued access to a free and appropriate public education in the least restrictive environment.

Finally, some students will be unable, despite coordinated efforts between home and school and related services and supports, to comply with face covering requirements on a consistent basis. In these circumstances, the family should request a reasonable accommodation (outlined below) to the face covering policy to ensure continued access to the programs and services in the school and continued access to a free and appropriate public education in the least restrictive environment.

What if the school refuses to allow my child to attend school because they are unable to wear a face covering?

Alternatives to mask/face covering requirements **must be made** for those with disabilities, which are defined under the ADA as “substantially limiting physical or mental impairments,” and for whom it is not possible due to medical conditions, disability impact, or other health or safety factors. And a refusal to consider reasonable accommodation or modifications is inconsistent with state and federal disability rights law. If your district takes this position, consider taking the following steps:

- 1) Make a written request for a reasonable modification or accommodation to the face covering policy. You should identify the disability and describe why your child cannot consistently comply with the face covering requirement and provide any available

documentation to support this. You could also suggest possible alternatives (some examples are included below).

- 2) Request an IEP Team meeting (or Section 504 team meeting). If appropriate, the IEP team should develop a plan to support increased compliance with face covering requirements, and identify any related services and supports that may be necessary to facilitate progress in this area. The IEP team should consider drafting an IEP goal to address this new area of need. And the IEP team should consider reasonable accommodations and modifications to the face covering policy and include them in the IEP to ensure continued access to the programs and services in the school and continued access to a free and appropriate public education in the least restrictive environment.

During any IEP team meeting to discuss any issues related to face coverings, it is important to remember that the role of the IEP team is to develop a plan to provide a free and appropriate public education in the least restrictive environment. Schools must not use IEP teams in ways that make decisions unrelated to the individual needs of the student. IEP teams must not be used as tools to shorten a student's day for reasons unrelated to the student's specific medical or educational needs, or to otherwise exclude or isolate students because they cannot consistently comply with face covering requirements because of their disability. IEP teams should solve problems; not create them.

What are potential reasonable accommodations for students who are unable to comply with general requirements to wear a face covering?

As the PK-12 Health Guidance makes clear, "No single action or set of actions will completely eliminate the risk of COVID-19 transmission". Face coverings are one way, but not the only way, to mitigate the risk of transmission. For students unable to wear a face covering, some of the following alternatives might be considered in the context of mitigating any related risk:

- Enhanced symptom screening, including entry and regular temperature checks;
- Increased social distancing in areas where the student will be receiving instruction;
- Organizing the room to increase space between desks and/or using a plastic or other clear barrier between the student and the rest of the classroom;
- Exploring the use of rapid testing for COVID-19 at regular intervals;
- Working with the family to document and minimize any contacts outside the school;
- Ensuring that those working closely with the student take additional precautions when warranted; or
- Any other steps that could mitigate any risk while still providing access to the programs and activities of the school and a free and appropriate public education in the least restrictive environment.

What if the school refuses to consider a reasonable modification to the face covering policy and refuses to allow my child to attend school?

Schools can have a policy that requires a face covering. And they can even have a policy that indicates that students or adults without a face covering will not be permitted to enter the school. But they must consider, on an individualized basis, requests for reasonable modifications to that policy. If such a request is made, the failure to consider that request, on an individual basis can constitute disability discrimination. Blanket denials to requests for reasonable modification or accommodation are discriminatory.

It is true that a school may be able to exclude an individual with a disability from participation in the programs and activities of the school if that participation would result in a direct threat to the health and safety of others. However, that assessment must be individualized, based on reasonable judgment that relies on the best available objective evidence, to ascertain:

- a) the nature, duration, and severity of the risk;
- b) the probability that the potential injury will actually occur; and
- c) whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Determining the nature, duration and severity of the risk will likely need to take into account local realities. For example, at this time, all Maine counties, except one, are currently categorized as “Green”, which “suggests that the county has a relatively low risk of COVID-19 spread”. Local positivity rates might also be considered.⁵ And even if there is some increased risk, the question remains as to whether modifications to policies, practices and procedures, or the provision of auxiliary aids and services, could mitigate that risk. This is the type of interactive, deliberative, and individualized process that must be afforded students before schools deny them access to school and school-related activities, or take other adverse action, due to their inability to comply with face covering requirements.

What if my child is removed from school or has their placement changed due to their inability to consistently comply with face covering requirements?

If schools use suspension, or ask parents to pick up children, or isolate students with disabilities who are not compliant with face covering policies, these actions may give rise to procedural protections under the IDEA. Once these removals total all or part of 10 school days, the IEP team (or Section 504 team) should be convened to make a manifestation determination. At that

⁵ For example, the fact that the county in which the school is located has a 0.1% positivity rate over the past 14 days is relevant in determining the nature of the risk and the probability that potential injury will occur if one student, who is not COVID positive and who is symptom free, is not wearing a face covering. For that data, visit: <https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml>

meeting, the team needs to determine whether the student's difficulty in complying with the face covering requirement is either: a) directly and substantially related to the student's disability; or b) directly related to the school's failure to implement the IEP. If the answer to either question is yes, the student must be returned to the placement from which they were removed. The IEP team should also consider the need for a functional behavioral assessment or a positive behavior support plan. The reason a manifestation determination is required is to protect students from having their educational placement changed because of disability related behavior.

For more information about the manifestation determination process, click [here](#). And for more information on the various ways that schools might change a student's placement, and the need for positive behavioral interventions and supports, click [here](#).

I have tried all of this and my school still insists on excluding my child and/or changing their educational placement. What can I do?

If your child has an IEP and you believe that the district's actions are denying your child access to a free and appropriate public education in the least restrictive environment, or if decisions were made outside the IEP team process that significantly limited your ability to participate in the development of your child's IEP, you can utilize one of the dispute resolution procedures available under the IDEA. Information about these processes and the forms you can use to access them, can be found here: <https://www.maine.gov/doe/learning/specialed/duprocess>.

If your child has a Section 504 plan and you believe that the district's actions are denying your child access to a free and appropriate public education in the least restrictive environment, or if the school is discriminating against your child by refusing to provide reasonable accommodations to ensure continued access to the programs and activities of the school, you can utilize one of the dispute resolution procedures available under the Section 504. Information about the complaint process under Section 504 through the Office for Civil Rights can be found here: <https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>.

If you believe that the school district has discriminated against your child by excluding them, segregating them, and/or by refusing to consider reasonable accommodations, you could file a complaint under the Maine Human Rights Act. Information about that process is available here: <https://www.maine.gov/mhrc/file>.

Or you could file a complaint under the Americans with Disabilities Act with the Department of Justice, with information about that process available here: https://www.ada.gov/fact_on_complaint.htm.

You can also contact Disability Rights Maine (DRM) for an intake appointment. DRM provides legal advocacy for children and adults who are discriminated against because of disability. Information about how to contact DRM is available here: <https://drme.org/contact>.

What are other states doing?

As indicated above, the generally applicable guidance in Maine appears to have the flexibility that is required by state and federal civil rights laws. Maine is in good company, as the majority of states recognize that exceptions to generally applicable policies requiring face coverings may need to be made for some students with disabilities. Here are a few examples:

New Hampshire's back to school guidance, which recommends but does not require face coverings, leaves these decisions up to local districts: "Students should wear cloth face coverings in circumstances when physical distancing cannot be maintained (see classroom seating and transportation sections for additional guidance). Ultimate determination of their use will be a local decision. School districts should consider how to address students with disabilities, students with underlying health conditions that prevent effective mask use, or students unwilling to wear face coverings."⁶

Back to school guidance in Massachusetts provides that: "Exceptions to mask/face covering requirements must be made for those for whom it is not possible due to medical conditions, disability impact, or other health or safety factors."⁷

Vermont's back to school guidance makes clear that: "Students who have a medical or behavioral reason for not wearing a facial covering should not be required to wear one. These decisions should be made in partnership with the health care provider and school nurse." And Vermont also stresses that "Stigma, discrimination, or bullying may arise due to wearing or not wearing a facial covering. Schools should have a plan to prevent and address harmful or inappropriate behavior."⁸

Minnesota appears to have taken a comprehensive look at these issues. School reopening guidance there states that: "Face coverings should not be placed on anyone under age 2, anyone who has trouble breathing or is unconscious, anyone who is incapacitated or otherwise unable to remove the face covering without assistance, or anyone who cannot tolerate a face covering due to a developmental, medical, or behavioral health condition." Minnesota also makes clear to schools that "The use of suspension for students as a consequence of not wearing a face covering

⁶ (emphasis added) See: <https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/inline-documents/sonh/k-12-back-to-school.pdf>

⁷ (emphasis added) See: <http://www.doe.mass.edu/covid19/return-to-school/guidance.pdf>

⁸ <https://education.vermont.gov/sites/aoe/files/documents/edu-vdh-guidance-strong-healthy-start-school-health-updated-8-11.pdf> (p. 17)

is strongly discouraged.” And finally, Minnesota indicates that “School leaders should work with students who cannot tolerate face coverings due to legitimate health reasons (e.g. health conditions, disability, etc.) and work to create a school climate that will combat stigma and bullying of these students.”⁹

Oregon has released some guidance for the field on the use of face coverings, which appears consistent with the IDEA and federal civil rights laws. That document, available [here](#), could be useful for families looking for additional information.¹⁰ That guidance contains the following: “Do not exclude students from the classroom if they occasionally fail to wear a face covering, or if a few students in the classroom are consistently unable to wear a face covering, when required. The small increase in risk of disease transmission does not justify classroom exclusion, but students without face coverings should maintain physical distance to the extent feasible.”

DISCLAIMER

This material is presented for educational purposes only. It does not take the place of legal advice in any specific situation, nor is it offered as such by the author. The material is intended to be timely as of the date written and/or originally presented. Due to the rapidly changing nature of the law, the information contained above may become outdated. It is the responsibility of any individual using or relying on this information to confirm its timeliness.

⁹ See: <https://www.health.state.mn.us/diseases/coronavirus/schools/k12planguide.pdf> See also: <https://www.health.state.mn.us/diseases/coronavirus/schools/directsupport.pdf> (“Students are required to wear a face covering and/or a non-medical face shield when receiving direct close contact support services unless they are unable to tolerate a face covering due to developmental, medical, or behavioral health needs, or are a student in kindergarten through grade 8 and wearing a face covering is otherwise problematic for the student.”)

¹⁰ See: <https://www.oregon.gov/ode/students-and-family/healthsafety/Documents/Face%20Coverings%20FAQ.pdf>