

Universal Masking: Where Are We Now?

By *Jocelyn P. Kramer, Esq.*

This school year started with a variety of masking policies implemented by school districts across Pennsylvania. Many districts allowed for optional masking for students and staff while others required masking for an array of reasons. The differing policies resulted in multiple lawsuits with conflicting outcomes, including three local suits initiated in late August. In a case involving North Allegheny School District, Judge Horan of the Western District Court, a federal court, ordered North Allegheny to revert to a mandatory universal masking policy. In a case concerning Canon-McMillan School District, Judge Ranjan of the Western District Court declined to require universal masking. In a Peters Township School District case, the Washington County Court of Common Pleas, a state court, rejected a request for an injunction to prevent the implementation of a universal masking policy.



Jocelyn Kramer

Within a week or less of these varying decisions, Pennsylvania's Acting Secretary of Health issued a universal mask mandate for schools. Ultimately, the statewide mandate was overturned on procedural grounds with two options for the Department of Health to lawfully enact a mask mandate for schools.

Courts across the United States are preliminarily split over whether universal masking is a reasonable accommodation required by the ADA and Section 504.

Once the state did not pursue another mandate through the correct process, school districts began lifting their local mandates. In two local districts where the school boards voted to make masks optional, groups of plaintiffs identifying as medically fragile sued the school districts claiming the policies violated the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. In another case involving

North Allegheny, Judge Horan granted a Temporary Restraining Order (TRO) and required that the universal mask mandate be reinstated pending a hearing. In a case against Upper St. Clair School District, Judge Stickman, also of the Western District, denied the TRO and Preliminary Injunction without a hearing. Both cases were appealed to the Third Circuit Court of Appeals. While these Western District cases were pending before the Third Circuit, two similar cases from the Eastern District of Pennsylvania, where preliminary injunctions kept local school mask mandates in place, were also appealed to the Third Circuit.

The crux of the plaintiffs' argument in the North Allegheny and Upper St. Clair cases was that universal masking is the only reasonable accommodation under the ADA and Section 504 that would allow medically fragile students to access their in-person education while the County was designated as having a "high" or "substantial" level of COVID-19 community transmission. Before any decision on the merits could be reached by the Third Circuit, the CDC updated its guidance. The County was redesignated in the new "low" category and the courts dismissed the cases. Neither school district was provided with the opportunity to consider

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Using IEP and 504 Processes to Ensure that In-Person Learning Can Continue for All Students

By *Lynne P. Sherry, Esq.*



Lynne Sherry

After changes to masking guidelines were issued by the Centers for Disease Control and Prevention (CDC), the U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS), released a letter providing guidance to ensure that students with disabilities continue to receive safe, in-person learning and supports. Key points from the letter are highlighted below, and the full letter can be accessed here: <https://www2.ed.gov/documents/coronavirus/letter-to-educators-and-parents-regarding-new-cdc-recommendations-03-24-2022.pdf>.

The IDEA requires that schools address the school-related health needs of eligible students with disabilities who are at increased risk of severe illness from COVID-19. IEP/504 teams may consider including health plans addressing, for example, sanitizing or avoiding shared use of personal and classroom items, and may also address continuing school-wide layered prevention strategies as part of a student's IEP or Section 504 Plan.

Under Section 504, school districts must make reasonable modifications when needed to ensure equal access for students with disabilities, absent a showing that such modifications would constitute a fundamental alteration or undue burden. Depending on individual circumstances, a school may decide that some degree of masking, whether for an individual student or others in the school setting, may be necessary as a reasonable modification to ensure that students with disabilities have equal access to in-person learning.

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WBK Managing Partner M. Janet Burkardt to Retire June 30, 2022

Managing Partner, M. Janet Burkardt, will retire from WBK after a 22-year career there, starting as an Associate and completing her tenure as the firm's Managing Partner. Attorney Burkardt focused her solicitor practice on tax and real estate matters. She developed a statewide practice handling countywide reassessments and commercial tax assessment matters. She was instrumental in the creation of Weiss Burkardt Kramer LLC in 2014 and managing the firm's growth to become one of the region's top municipal and educational law firms and tax collection practice. Attorney Aimee Zundel will assume the role of Managing Partner on July 1, 2022.



M. Janet Burkardt, Esq.

In-Person Learning, *continued*

As the use of masks decrease, schools may decide to increase their use of testing as a core safety and prevention strategy. One approach is through Test to Stay. Additionally, the CDC is making rapid tests available to schools each month for free through our state health department.

The CDC continues to recommend additional prevention strategies to ensure the health and safety of students in school, including physical distancing, handwashing and respiratory etiquette, staying home when sick and getting tested, and cleaning and disinfection.

In adopting these strategies to serve all students, schools must be cautious not to single out or identify students with disabilities. Students with disabilities should not be placed in a segregated setting away from peers without disabilities as the only means to safely deliver FAPE. IEP/504 teams may need to be creative in decision-making, to promote maximum inclusivity for students with disabilities. Where remote learning may be required, teams should continue practices to ensure that all students have access to remote learning and remain engaged and connected.

Our attorneys are available to work with you to ensure appropriate implementation of this OSERS guidance. If you should have any questions, please do not hesitate to contact us.

Universal Masking, *continued*

reasonable accommodations for the individual plaintiffs prior to the initiation of the lawsuits. In Upper St. Clair, the individual plaintiffs were never even identified to the school district so that the process for assessing reasonable accommodations under Section 504, the ADA, and/or the IDEA could be initiated. Although both cases were dismissed as moot, the plaintiffs in each case have sued, seeking over \$100,000 in attorney fees. Decisions on the attorney fees have not yet been issued by the court.

In a slightly different mask-related case, five school board members in the West Chester Area School District were temporarily removed from the school board for allegedly failing to perform their school board duties by not addressing parent objections to the local mask mandate. The board members have been reinstated pending further court hearings.

Questions regarding school mask mandates remain unresolved. Additionally, courts across the United States are preliminarily split over whether universal masking is a reasonable accommodation required by the ADA and Section 504. We are tracking these cases as they continue and anticipate that similar suits could re-emerge in the future. Consult with your Solicitor or the attorneys at WBK if you have questions on how to move forward while navigating this unsettled issue.

We're Speaking...

- Attorneys Jocelyn Kramer, Aimee Zundel, Megan Turnbull, Annemarie Harr, and Lynne Sherry will be presenting at the Dr. Samuel Francis School Law Symposium & Special Education Workshop being held virtually on June 23, 2022. Attorney Kramer will be providing case law updates and speaking on the issue of universal school mask mandates. Attorney Turnbull will be discussing the topic of "Navigating National Politics in Public Schools." Attorney Zundel is slated to cover the issue of "Tracking Child Find, Evaluation, and Reevaluation Compliance Post-COVID School Closures." Attorneys Harr and Sherry are presenting, "You're on Mute: Ensuring FAPE and Meaningful Participation in an Increasingly Virtual World."
- Attorney Megan Turnbull was elected as Chair of the Municipal Law Section of the Pennsylvania Bar Association beginning May 2022. The Section studies legal issues in the field of municipal law, including laws pertaining to school districts and authorities; informs members of relevant developments, and, where necessary, proposes and supports changes in the law governing local government.

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This issue of In Brief: School Law Update is meant to be informational and does not constitute legal advice. Should districts wish legal advice on any matter, they should contact their legal counsel or request a legal opinion from Weiss Burkardt Kramer LLC.

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