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MEMORANDUM

TO: Tom Scott, M.A.S.S.
FROM: Mike Long, Long & DiPietro, LLP
RE: Legal Update: Student Violations of Masking Policies and Related Issues
DATE: August 24, 2021

I. INTRODUCTION / SUMMARY

On July 30, 2021, DESE issued a "strong recommendation" for the fall of the 2021-2022 school year that all K-6 students wear masks indoors, and that unvaccinated students in grades 7-12 also wear masks indoors. On August 5, 2021, the CDC made a recommendation that ALL students returning to school wear masks indoors, regardless of grade level or vaccination status.

On Tuesday, August 24, 2021, the Massachusetts Board of Education authorized Commissioner Riley to convert the "strong recommendation" into a universal mandate for students, at least until October 1, 2021, by amending the Student Learning Time regulations at 603 CMR 27.08(1).

We have received a number of questions concerning district options in responding to student violations of masking policies. We anticipate that the frequency and intensity of such questions will increase as the State Board of Education extended to the Commissioner the mask mandate authority he sought.

These questions are often framed in the context of the Free Exercise clause of the First Amendment to the Federal Constitution and the individual rights of families and students to determine their own appropriate safety measures against COVID-19. We also hear concerns about students who may be exposed to the COVID-19 virus from classmates who refuse to mask. Further, questions are raised regarding whether a district's interest in preserving a healthy and safe learning and work environment for all is sufficient to support a decision to impose discipline on students who fail to comply with mask policies, or to defer the enrollment of those students who continue to refuse to comply.

While many think the answers to these questions should be obvious, they raise significant issues about the effect of mandated policies and rules on a population which is not universally committed to them, particularly in the absence of statutory or regulatory mandate.

We are of the opinion that a school committee may independently adopt mandatory masking policies or rules which meet or exceed minimum Board of Education/DESE requirements, **or** simply implement any requirements set forth by the Board of Education/DESE. Further, school enrollment criteria based on a student being in a condition to enroll, and customary disciplinary rules may be applied to students who violate masking policies.

II. DISCUSSION

A. Individual Rights or the Common Good?

In American society there exists a myth of permissible, principled non-compliance. We see it in war-time, when conscientious objectors refuse to serve. Even then, we have not universally accepted an individual's assertion of conscientious objector status, and have required alternative service or imposed punishment for willfully withholding compliance. Much of the Civil Rights Movement in the early 1960s was predicated on principles of non-violent civil disobedience for which participants expected to be prosecuted and jailed. Less dramatically, Thoreau wrote "Civil Disobedience" in part as a justification for withholding payment of municipal taxes in protest of slavery and the Mexican-American War in 1848-1849. His non-compliance cost him some time in the local lockup, until a friend bailed him out by paying the tax. Even when sincere, defiance courts consequence.

In the era of COVID-19, the issue of compelling compliance with government mandates has primarily played out in the context of vaccines. Typically, state statutes requiring the vaccination of children prior to school admission contain exemptions for medical reasons or for sincerely held religious beliefs. Reliance on the vaccine exemption for religious beliefs implicates the Free Exercise clause of the First Amendment to the Federal Constitution and Article II of the Massachusetts Declaration of Rights.

There are no such statutes establishing rules and exemptions for masking. Districts can evaluate the scope of exemptions to be recognized, such as medical or behaviorally based cases, but many superintendents have already received what appears to be a form letter articulating in argumentative tone various theories of parent rights which permit parents to reject masking. Perhaps recognizing the difficulty of obtaining a medical certificate (although we have seen an uptick of medically certified anxiety or panic attack conditions where masks are required), some parents are framing their objections in terms of religious beliefs.

1. Facially neutral rules of general applicability can survive challenge on religious grounds.

Generally speaking, governmental rules, regulations or statutes which are facially neutral, *i.e.* equally applicable to all similarly situated individuals, withstand challenges brought on religious grounds. For example, the Supreme Court:

> *. . . 'has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for* ***even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'*** *Braunfeld v. Brown, 366 U.S. 599, 603 1931,* ***the conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.*** *See, e.g., Reynolds v. United States, 98 U.S. 145 1879 Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 194; Cleveland v. United States, 329 U.S. 14 1946.*

See, Employment Division v. Smith, 485 U.S. 660, 672, n.14 (1988) (Consumption of peyote as part of religious service common to indigenous people may be basis for denying unemployment benefits if illegal under state law. Case remanded for determination of legality under state law.).

Smith wound its way back to the United States Supreme Court after the Oregon Supreme Court ruled peyote consumption was illegal under Oregon law. The individuals again appealed to the Supreme Court, arguing the Free Exercise cluse permitted their otherwise illegal consumption of the drug. Justice Scalia, no fan of expansive governmental powers, upheld the denial of unemployment benefits based on the criminality of the conduct, writing:

> *if prohibiting the exercise of religion . . . is not the object of the tax, but merely the* ***incidental effect*** *of a generally applicable and otherwise valid provision, the First Amendment has not been offended.* ***We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.*** *Smith v. Division of Employment, 494 U.S. 872, 877, 878-879 (1990) (Smith II) (Emphasis added).*

For our purposes, the question is whether, in light of the public health crisis presented by the COVID-19 virus, the government is free to require masking as a condition precedent to school attendance.

There is a case pending in Michigan about the government's authority to mandate masking in *all* schools, including parochial schools. A religious school sued state officials claiming the masking order violates the First Amendment by requiring its students to wear masks. One of the questions to be addressed is whether the masking rule is facially neutral and has only an incidental effect on the students' practice of religion. Argument in the Sixth Circuit Court of Appeals was heard in late July of 2021. We are not aware of a potential date for a decision, but note the argument for permitting state regulation of masking behavior in a religious school seems less compelling than that which can be made for such a regulation in a public school. The degree of interference with the operation of the private school, often founded and administered by religious organizations for religious purposes, may be deemed excessive even though the risk to students and staff is no less. See, Resurrection School v. Herkel, #20-2256. Another federal court decision in Ohio, also from the Sixth Circuit, from late fall, 2020, granted

a parochial school's motion requesting injunctive relief from state ordered school closings, see Monclova Christian Academy v. Lucas Cn'ty Health Dep't, 984 F.3 477 (2020), in large part because the closing order did not apply to other nearby activities or businesses where people gathered. Similarly, New York's closing order was deemed violative of religious rights because it attempted to regulate the number of people who could attend religious services based on the density of cases in an adjacent area. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, (Nov. 25, 2020).

To survive review on a constitutional basis, regulations must be of general applicability and narrowly drawn, otherwise they will be subject to strict scrutiny. Even so, in upholding the grant of injunctive relief in the New York case, a sharply divided United States Supreme Court said "[s]temming the spread of COVID-19 is unquestionably a compelling [state] interest."

These cases tested the legality of governmental orders directly affecting student attendance in religious schools, not public schools, and the applicability of general laws to religious entities. Applying the masking rule only to public schools, where many younger students are not vaccinated, and the vaccine rate for older students has not reached a percentage likely to stop or drastically slow transmission, does not in our view constitute an overly broad rule which purposely invades the religious prerogatives of students enrolled in a public school.

2. What about parents' rights to direct the education of their children?

No one seriously or credibly disputes that schools must provide a safe learning and working environment for students and staff. At the same time, parents of course retain the right to raise their children free of "unnecessary intrusion by the government." Curtis v. School Committee of Falmouth, 420 Mass. 749, 756 (1995). As then SJC Chief Justice Paul Liacos wrote, those intrusion are most objectionable when interfering with "moral standards, religious beliefs, and elements of good citizenship." Id., at 756. At the federal level, there are long standing precedents protecting family decision-making in foreign language education, decisions to attend school versus home school, recitation of school prayers, or the Pledge of Allegiance, to name a few. In Massachusetts, for example, parents can opt out of sex education classes for their child if they wish to do so.

Parents' rights, however, are not absolute. Certain intrusions are necessary, particularly in the area of public health. In a case from the United States Supreme Court in which the Court *upheld* a mandatory small pox vaccine inoculation order issued by the Board of Health of the City of Cambridge, MA, the Court said: "**There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.**" Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

The Supreme Court has very recently cited the Jacobson case in restating the right of society to protect itself against threats to the public health. Chief Justice Roberts recently wrote in a decision denying a 2020 challenge to California's COVID lock down:

> [o]ur Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905). When those officials "undertake to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

South Bay United Pent. Church v. Newsom, 590 U.S.__ (2020) #20A136 (20-746).

In the area of public health and school attendance, there is no question "fraught" with uncertainty about the state's authority to act on the interests of the public health, or efficacy of many vaccines. As a result, schools have a statutory duty to impose an obligation on parents to vaccinate their children against diphtheria, pertussis, tetanus, polio, measles, mumps and rubella as a means of protecting their child, and the other children with whom they come in contact when in school. See M.G.L. c.76, sec. 15. The law in Massachusetts also permits schools to immediately send home students who exhibit "signs of ill health or of being infected with a disease dangerous to the public health" M.G.L., c.71, secs. 55 & 55A. In a Massachusetts vaccination case, this time specifically addressing the question of parental responsibility to send their children to school after being vaccinated, the Supreme Judicial Court said: "[t]he statutory obligation [of parents in Massachusetts] to cause children to attend school involves an obligation to put them in a condition to attend [by being vaccinated], and cannot be escaped by neglect to qualify them for attendance." Childs v. Commonwealth, 299 Mass. 367, 368 (1938). The case arose out of a prosecution of the parent for failure to ensure his children's attendance in school. The parent was found guilty after trial; his conviction was upheld on appeal.

The statutory vaccination requirements are *conditions precedent* to enrolling in and attending school. But despite the recognized efficacy of vaccines, a theory of compliance exemptions carries over to attendance in school. Schools acknowledge some people have a basis for declining a vaccine based on a medically recognized health endangerment presented by the vaccine, or due to "sincere religious beliefs." M.G.L., c.76, sec. 15. The vaccine protocol contained in the cited statues should dispel any contrary notions, but there is no law on masking. We believe a school can determine that a student is not "in a condition" to attend if they do not mask.

B. Masking is Less Intrusive than Vaccination

In light of the law's silence as to masking, our best source of analogous reasoning lies in the vaccine cases. Further, the most reliable evidence to date is that, if we cannot vaccinate all students and staff in a building or system, masking is the next best prophylactic against transmission of the COVID-19 virus. Masks are not vaccines. They are not injected. For the vast majority of students, masking does not require a third party to physically touch the student. They do not cause a reaction like one might experience with a vaccine shot. Certainly, there may be some localized discomfort, but that does not rise to the level of medical endangerment. Unlike the case with vaccines, there is no statutory exemption available for those who claim medical or

religious objections to masking. Of course, disability laws and common sense lead to crafting exemptions for students with documented behavioral issues, or health issues which impede effective masking. For those students who forget to bring a mask, we should have an ample supply.

There is a practical problem with the religious exemption cases. The courts generally do not inquire into the sincerity of religious claims. In the COVID-19 context, some skeptics may even interpret familial devotion as opportunistic. Even with the "compelling" state interest in stemming the COVID-19 tide, how much time and money should a district dedicate to conflict over someone's religious feelings?

We are of the opinion that, if a district or the Commonwealth adopts a mandatory masking policy, an unmasked student is not "in a condition to attend" school. See, Childs, 299 Mass. at 368. Offer the student a mask. If the student/family refuses, deferring admission should be framed as a student being ineligible to attend, not ready to attend, unprepared to attend, not qualified to enter/enroll, or not having satisfied conditions precedent to attendance. The conversation should be around the common good, not the student's defiance. Focus on the risk of transmission between unmasked and masked students. Review options for home schooling. Think about students working from home, utilizing something like a "blizzard bag." Treating good faith objections as defiance and an opportunity to impose discipline should be a last resort, not the first.

C. Student Discipline Rules and Laws in Massachusetts

There may be no non-disciplinary option. In such cases, remember the United States Supreme Court has repeatedly recognized schools have broad authority to impose on students discipline for violating school rules, particularly if student conduct is disruptive or implicates safety. As recently as June 23, 2021, this authority was again recognized in a student discipline case. See, Mahanoy Area Indep. School District, 594 U.S.___, decided June, 23, 2021. (School may impose discipline for off-campus, on-line student behavior.) In that case the Court, including Justice Alito in his concurring opinion, and Justice Thomas in his dissent, revisited the applicability of the ancient doctrine of *in loco parentis,* which grants to school officials the authority to direct and supervise the activity of students while they are in school as if the school were the parent. This is not new law, Blackstone having observed in 1765 in his Commentaries on the Laws of England, that schools have the right and duty to control student behavior. See, Commentaries on the Laws of England, Vol. 1, ch.16, (2) at 441.

A detailed survey of Massachusetts law on student discipline is beyond the scope of this note. If you are faced with a masking dispute that cannot be resolved through discussion, the statutes and complex procedures applicable to student discipline in Massachusetts must be reviewed with district counsel and administrators prior to imposing consequences or violations of masking rules. Some of those rules are summarized below.

1. Handbooks: MGL, c.71, sec. 37

For example, section 37H of c.71 requires superintendents' publication of rules and regulations relative to the conduct of students and staff. *The terms of a masking policy/rule must*

be included by principals in student handbooks for schools containing grades 9-12. Section 37H requires district policies to include, among other things, "**standards and procedures to assure school building security and safety of students....**" In our opinion, the rules on masking are, whether locally initiated or by implementation of DESE rules, standards and procedures taken to assure student safety. They should be included in the student handbooks. If your handbook has been approved already, you must amend it and distribute the amendment. Also, post it on the district website. The potential consequences for violating those rules, as is the case with other rules, should be spelled out in the policy and publicized in the handbook. There is no "one size fits all" appropriate discipline, and administrative discretion must be demonstrated. The imposition of a blanket consequence akin to the now disdained "zero tolerance" approach would undoubtedly be subject to a successful due process challenge.

If you choose to impose a disciplinary consequence for violations of the masking policy, each case should be considered on its own. Some students may abjure their opposition, others double down. Although not applicable to sec. 37H cases, the standard for considering whether to suspend or expel a student charged with or convicted of a felony under sec. 37H1/2 requires a determination that the "**student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.**" It is hard to conceive of a standard more appropriate for assessing the risks presented by a student who, by refusing to mask, deliberately ignores the potential for COVID-19 transmission. Some may be best served by studying from home while suspended, others may need services in school while serving in school suspension. Keep in mind that sec. 37H(e) *requires districts to provide educational services to a student suspended or expelled for offenses under that section.* Section 21 of C.76 also establishes rules requiring ongoing provision of alternative educational services, depending on the length of a suspension or expulsion.

2. Due Process for Handbook/Masking Violations: MGL, c.71, sec. 37H3/4

Finally, the law has a catch-all provision for student discipline cases not covered by sec. 37H(a) or (b), which address possession of weapons or drugs and assaults on school staff; respectively, or 37H1/2, relative to those students charged with felonies or felony delinquency.

Section 37H3/4 was added to the student discipline laws in 2012 to establish a complex, multi-step procedure for the imposition of discipline in cases often referred to as "handbook violations." We believe a masking violation would be classified as a handbook offense under sec. 37H. As such, it must be identified in the handbook and policy manual. Removal for a mask violation must be accompanied by educational services.

Section 37H3/4 contains very specific time lines for action and detailed requirements for notice to the student or parents. Work closely with local counsel on masking cases.

Among other things, 37H3/4 requires that administrators use discretion in each case rather than applying universal rules or disciplinary consequences. Do not rotely or mechanically apply a uniform penalty for masking violations. Policies should speak to a range of potential consequences. Also, the law requires administrators to consider "other ways to re-engage" the

student. Suspension should be avoided "until other remedies and consequences have been explored."

Section 37H3/4 mandates that a student suspended for fewer than 10 consecutive days be given a chance to make academic progress and earn credits for missed work. Suspensions of more than 10 consecutive days must be accompanied by a notice to parents of "alternative educational services" No student may be suspended or expelled for more than 90 school days.

III. CONCLUSION

The law permits school districts to adopt safety measures to guard the public health. In our opinion, as the state can order vaccines for various reasons, it may also order mask wearing, a less invasive procedure than masking. Local school committees, or Boards of Health are similarly empowered.

If DESE implements a mandatory mask policy, or your district chooses to independently adopt a mandatory masking policy, check with local counsel to ensure handbook and policy provisions address statutory due process requirements, and carefully consider consequences for noncompliance within the parameters of the student discipline landscape.