



# The State of Masks in Wisconsin School Districts

## THE RUNDOWN

- » **On March 31, 2021, the Wisconsin Supreme Court struck down Wisconsin's Mask Mandate as instituted by Governor Evers.**
- » **Wisconsin's public school districts are authorized to exercise statutory authority to establish policies and rules to manage the district, its students, employees, and others who enter school district buildings.**
- » **Absent a local public health order requiring masking, each Wisconsin's public school districts can institute and enforce its own mask mandate to protect the health and safety of students, staff, and visitors.**

**A school district, through its board of education and administration, has the inherent statutory authority to establish policies and rules to manage the school district and maintain the health and safety of the school community. Nothing within the Supreme Court's ruling invalidating Governor Evers' exercise of emergency delegation authority invalidates or prohibits a local government, such as a school district, from issuing a masking policy or rule prohibiting entry on District property without a mask. A school district is authorized to exercise its statutory authority to establish policies and rules to manage the school district.**

Under Sections 118.001, 120.12(1), 120.13, 120.13(1), and

120.13(35)(a), Wis. Stats., among other statutory provisions, public school districts have broad authority with regard to establishing policies and rules to manage the District.

Specifically, these statutes provide the following:

- » **Section 118.001**, Wis. Stats. provides: "The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this state."
- » **Section 120.12(1)**, provides: "The school board of a common or union high school district shall: Subject to the authority vested in the annual meeting and to the authority and possession specifically given to other school district officers, have the possession, care, control and management of the property and affairs of the school district, except for property of the school district used for public library purposes under s. 43.52."
- » **Section 120.13(1)** and the preamble to **Section 120.13, Wis. Stats.** provide, in relevant part: "The school board of a common or union high school district may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils,

and including all of the following: [ . . . ](1)(a)  
Make rules for the organization, gradation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere, which shall take effect when approved by a majority of the school board and filed with the school district clerk.”

- » **Section 120.13(35)(a)** provides: “A school board may adopt rules applicable to persons who enter or remain in a building operated by the school board, including requirements that such persons identify themselves and sign in when entering or remaining in the building or any specified portion of the building and designating time periods during which such persons may enter or remain in the building or any portion of the building.”

Through these statutes, school boards have wide discretion to implement policies and rules applicable to students, employees, and others who enter school district buildings. Pursuant to the above authority, a district may conclude that masking is required to protect the health, safety, and welfare of all who enter district buildings and premises. Not only can a school district implement a policy requiring masks (provided an exception exists for legitimate medical or religious exemptions), but a school district can also enforce the policy.

A school district may further conclude that masking is required to protect the health and safety of employees. Under Wisconsin’s Safe Place Statute, Wis. Stat. 101.11, a school board may determine that masking is consistent with the requirement that the district provide safe employment and a safe place of employment to its employees. Further EEOC guidance provides that those

who are not wearing masks represent a “direct threat” to others in the employment environment and, as such, such individuals can be removed from the environment if another accommodation does not exist to adequately reduce the threat level.

As to students, the above statutes provide authority for the Board to ensure a safe and healthy environment for learning. If a student does not wear a mask, then a board has authority under Section 120.13(1) to discipline and, if necessary, expel students for repeated violations of school rules and for engaging in conduct while on school property or under school supervision that endangers the health, safety, or property of others. Under this statute and the others cited above, a board also has authority to remove a student from a classroom or other school environment if the student refuses to wear a mask (in such situations, the district could unilaterally assign the student to virtual instruction). If a student presents a legitimate exception, such as a medical or religious need, then those should be dealt with on a case-by-case basis (oftentimes in conjunction with an IEP or 504 Team); however, for those simply refusing to wear a mask, a board has the ability to institute a policy and then enforce that policy to the degree necessary to ensure the health and safety of the school community.

As to all individuals, a school may prohibit access to District property under the authority granted by Wis. Stat. 120.13(35), which provides authority for a school board to adopt rules applicable to all individuals who enter into district buildings. Thus, a school board may implement a masking policy for all individuals entering district buildings. In conjunction with such policy, a school district may prohibit entry to individuals who refuse to wear a mask. If an individual has a legitimate medical or religious exception, the Board may provide alternative arrangements to allow the individual to conduct school district business. For individuals who need to conduct business, an alternative arrangement may be for such business to be conducted online or via telephone. For individuals wishing to attend school district events, athletics, or activities, an alternative arrangement could consist of live-streaming the particular event or activity.

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The Centers for Disease Control (CDC), Wisconsin Department of Health Services (WI DHS), and the Occupational Safety & Health Administration (OSHA), and local health department guidance continues to recommend masking. While this is guidance and not a mandate, if a school district faces a legal challenge related to COVID-19 exposure, one of the best ways to defend the school district's action and demonstrate that it acted reasonably is to demonstrate that the District has continued to comply with health and safety guidance from national, state, and local authorities.

Finally, a school board should consider that 2021 Wisconsin Act 4 provides COVID-19 immunity from civil liability to school districts for death, injury, or damages resulting from acts or omission related to a COVID-19 exposure unless a district engages in reckless, wanton, or intentional conduct (in addition to any "traditional" defenses and immunities school district already enjoy under the law). There is a possible argument that given the guidance issued by the CDC, WI DHS, local health departments, etc., that face coverings are necessary to prevent the transmission of COVID-19, if a school district fails to implement such guidance, a district is reckless, thus nullifying any immunity that may be afforded to school district. Therefore, following applicable COVID-19 related guidance from the CDC, WI DHS, local health departments, etc., will limit a possible argument that a school district has been reckless, wanton, or intentional in its conduct.

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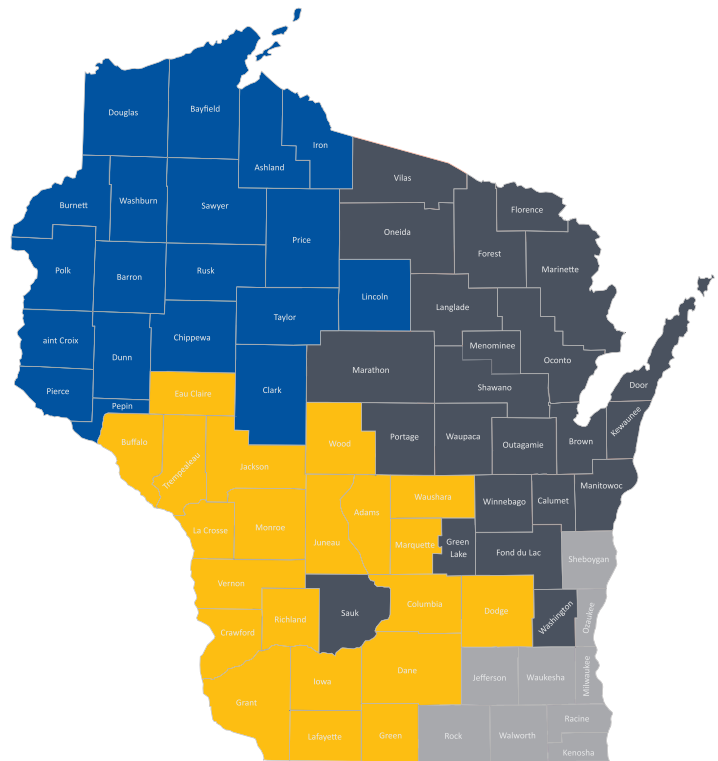
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