

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS

HAMPDEN SUPERIOR COURT

THE FAMILY FREEDOM ENDEAVOR, INC.)
and THE PEOPLE'S FREEDOM ENDEAVOR,)
by its individual representatives,)
JUSTIN McCARTHY, MATTHEW HALL,)
ALECIA DePESA, JOSEPH BOCCELLI, II,)
and DANIELLE ASHLEY-SILVA)
Plaintiffs)

21 0494

v.)

CIVIL ACTION: 2179CV_____

JEFFREY C. RILEY, as)
COMMISSIONER OF THE)
MASSACHUSETTS DEPARTMENT)
OF ELEMENTARY AND)
SECONDARY EDUCATION)
Defendant)

HAMPDEN COUNTY
SUPERIOR COURT
FILED

and)

SEP 20 2021

THE MASSACHUSETTS BOARD OF)
ELEMENTARY AND SECONDARY)
EDUCATION)
Defendant)


CLERK OF COURTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This complaint challenges statewide mask mandate implemented by the defendants, who had no authority to do so.
2. On August 24, 2021, the Board of Elementary and Secondary Education (hereinafter, "BESE") allowed a motion to grant Jeffrey Riley, the Commissioner of the

1

Department of Elementary and Secondary Education, authority to issue a statewide mask mandate for all Massachusetts school children.

3. This authority was granted to the Commissioner purportedly in accordance with 603 CMR 27.08, which derives its regulatory authority from G.L. 69 § 1B and § 1G.
4. Neither G.L. c. 69 § 1B nor § 1G provide *any* authority for the BESE nor Commissioner Riley to implement a mandate such as mandatory masking for students.
5. Not a single note of decision from a court in the Commonwealth, nor any secondary source, interpret G.L. c. 69 § 1B or § 1G to give the BESE authority to issue something as intrusive or restrictive as a mask mandate.
6. This is an action for declaratory judgment pursuant to G.L. c. 231A, § 1 to §9; G.L. c. 30A, §7; and all other applicable laws.
7. This Court has the power to decide this matter pursuant to G.L. c. 231A, § 1 to §9 and G.L. c. 30A, §7.

PARTIES

8. The Family Freedom Endeavor, Inc., is a Florida nonprofit corporation with a principal address of 900 9th Ave East, Lot 153 in Palmetto, Florida. The primary mission of the organization is litigating public interest cases on behalf of parents and families. The organization's Secretary, Amanda Melloni-Caracciolo, is an Agawam, (Hampden County) resident and a parent of a minor child, AC, who is eligible to, and otherwise would have attended Agawam schools, but is being kept home due to the defendants' statewide mask mandate.

9. The People's Freedom Endeavor is an unincorporated association consisting of over 300 parents of minor children throughout the Commonwealth who are affected by the defendants' mask mandate and are pursuing the common goal of challenging the defendants' authority to implement it. The association is represented by individuals Justin McCarthy (84 Porter Road, East Longmeadow, Massachusetts), Matthew Hall (10 Sherman Street, West Brookfield, Massachusetts), Alecia DePesa (3 Zaloga Way in Middleton, Massachusetts), Joseph Boccelli, II (22 Essex Street, North Reading, Massachusetts), and Danielle Ashley-Silva (149 Highland Road in Somerset, Massachusetts).
10. Each individually named plaintiff has at least one child eligible to attend school in a district whose school committee has not mandated masks for its students.
11. Jeffrey C. Riley (Commissioner Riley) is the Commissioner of the Massachusetts Department of Elementary and Secondary Education. His office is located at 75 Pleasant Street, Malden, MA 02148.
12. The Massachusetts Board of Elementary and Secondary Education (BESE) is located at 75 Pleasant Street, Malden, MA 02148.

FACTUAL BACKGROUND AND MOTIVE BEHIND THE MANDATE

13. On August 24, 2021 BESE approved a motion authorizing Commissioner Riley to impose a statewide mask mandate on all Massachusetts schoolchildren.
14. The language of the approved motion states: "that the Board of Elementary and Secondary Education, in accordance with G.L. c. 69, § 1B, and consistent with 603 CMR 27.08(1), determines that exigent circumstances exist that adversely affect the

ability of students to attend classes in a safe environment unless additional health and safety measures are put in place, and authorizes the Commissioner to require masks for public school students (age 5 and above) and staff in all grades through at least October 1, 2021.” Exhibit A.

15. The approved motion was based on a memorandum from Commissioner Riley to BESE dated August 20, 2021 and entitled “Recommendation to Authorize Commissioner to Require Masks for Students and Staff in K-12 Schools through at least October 1, 2021, Consistent with Exigent Circumstances under Student Learning Time Regulations, 603 CMR 27.08(1).” Exhibit B.

16. In the said memorandum, Commissioner Riley seeks authority pursuant to “603 CMR 27.08(1), to provide me with the authority to issue a mask mandate for public school students (age 5 and above) and staff in all grades through at least October 1, 2021.”

17. The said memorandum goes on to state,

The mask mandate would also include that, after October 1, 2021, if a school demonstrates a vaccination rate of 80% or more of all students and staff in the school, then it would no longer be subject to the state mask mandate for vaccinated individuals. The 80% threshold has been agreed to by DPH. Schools would be able to submit an attestation form provided by DESE to demonstrate they have met this threshold. Once schools reach the 80% threshold and receive approval to lift the mask mandate, vaccinated students and staff may remove their masks. In

alignment with statewide guidance, unvaccinated students and staff would be required to continue wearing masks.

18. On August 20, 2021, Commissioner Riley made similar statements concerning his desire to impose masks on schoolchildren until certain vaccine quotas were met.

19. That press release is entitled “Education Commissioner Riley to Ask Board to Grant Him Authority to Mandate Masks for All K-12 Public Schools to Provide Time to Increase Vaccinations,” and is attached herewith as Exhibit C.

20. In the said press release, Commissioner Riley states “The purpose of the [mask] policy is to encourage higher vaccination rates among students.”

21. To further his point, Commissioner Riley quotes Lt. Governor Karyn Polito: “Our goal remains to get as many people as possible vaccinated. We hope that by instituting vaccine benchmarks among school populations we will create a real incentive for students and staff to get vaccinated so they can remove their masks.”

22. Thus, the purpose of the statewide school mask mandate is not to eliminate a clear and present risk to the safety of students and staff. Instead, the mandate’s purpose is to encourage and incentivize students and staff to get vaccinated.

DEFENDANTS LACK THE NECESSARY STATUTORY AND REGULATORY AUTHORITY TO ISSUE THIS MASK MANDATE

23. Commissioner Riley and BESE base their authority in this matter on 603 CMR 27.08(1).

24. That regulation states, in pertinent part, that “upon a determination by the Board that exigent circumstances exist that adversely affect the ability of students to attend classes in a safe environment, unless additional health and safety measures are put in place, the Commissioner, in consultation with medical experts and state health officials, shall issue health and safety requirements and related guidance for districts.”
25. The statutory authority for the entirety of 603 CMR 27 (entitled “Student Learning Time”) derives from G.L. c. 69, § 1G and G.L. c. 69, § 1B. See 603 CMR 27.01(1).
26. The full text of G.L. c. 69, § 1G is as follows: “The board shall establish the minimum length for a school day and the minimum number of days in the school year.”
27. G.L. c. 69, § 1B is a much lengthier statute which authorizes BESE to implement a number of functions related to the administration of education, none of which involve the health of students.
28. G.L. c. 69, § 1B does state that “The board shall establish standards to ensure that every student shall attend classes in a safe environment.”
29. However, anyone who reads the sentence in its full paragraph can see that it applies to only the structural environment of the school buildings.
30. The full paragraph is as follows:

The board shall establish minimum standards for all public early childhood, elementary, secondary and vocational-technical school

buildings, subject to the provisions of the state building code. The board shall establish standards to ensure that every student shall attend classes in a safe environment. (Emphasis added.)

31. This does not empower BESE “to establish health and safety standards for schools during...exigent circumstances” as is stated in 603 CMR 27.01(2)(b), unless they are related to building and sanitary code issues (hence the “safe environment” provision).

32. Thus, nothing in G.L. c. 69, § 1G or G.L. c. 69, § 1B authorizes BESE or Commissioner Riley to make policies concerning student vaccination, masking or contagious diseases in school.

33. The legislature has already established laws for these issues:

a. School vaccination is regulated by G.L. c. 76, § 15.

b. Contagious diseases in schools are regulated by G.L. 71, § 55.

34. Neither BESE nor Commissioner Riley has the authority to go beyond the limited duties prescribed for them in G.L. c. 69, §1A and §1B.

35. Neither BESE nor Commissioner Riley has the authority to go beyond the scope of the laws already enacted to regulate student vaccination and contagious diseases in schools.

36. The above stated actions of BESE and Commissioner Riley therefore have no authoritative basis in the statutory laws (i.e., G.L. c. 69, § 1A, 1B, and 1G), therefore 603 CMR 27.08 does not apply to this particular situation.

37. The above stated actions of BESE and Commissioner Riley, in improperly relying on 603 CMR 27.08(1)¹ are invalid because they seek to override or ignore existing laws (i.e, G.L. c. 76, § 15 and G.L. 71, § 55).

DEFENDANTS DO NOT DEFINE “EXIGENT CIRCUMSTANCES,”

38. Additionally, 603 CMR 27 contains no definition for “exigent circumstances.”

39. According to “The Regulations Manual: May 2016” published by the Secretary of the Commonwealth, agencies drafting regulations should “Define terms used in the regulation in a separate section and in alphabetical order.” See page 11 of the manual which is available on mass.gov: <https://www.mass.gov/doc/regulations-manual/download>.

40. The operative phrase “exigent circumstances” has no clearly discernible meaning in 603 CMR 27.08(1).

41. The defendants provided no basis for an 80% vaccination rate requiring immediate aid or action.

STANDING AND CAUSE OF ACTION

42. Individual plaintiffs reside in and have minor children eligible to attend public school in districts that did not mandate masks for school children prior to the defendants instituting the statewide mask mandate.

43. These school committees’ decisions not to mandate masks were consistent with guidelines issued by Commissioner Riley’s July 30, 2021 memorandum entitled

¹ For instance, South Hadley High School sought approval for remote learning due to a serious mold issue, which would have been a significant sanitary code violation. The Department of Elementary and Secondary Education allowed them five days of remote learning to fix the mold issue. See: <https://www.gazettenet.com/South-Hadley-Select-Board-42475162>

“DESE/DPH COVID-19 Guidance for Districts and Schools: Fall 2021.”

Exhibit D.

44. In his Memorandum, Commissioner Riley states that “even for those students not yet vaccinated, the apparent risk of COVID-19 to children remains small.” This statement is followed by *four* citations to sources confirming that COVID is not a significant threat to children. (The sources include data from the Massachusetts Department of Health, the Center for Disease Control, and the New England Medical Journal.)
45. The school committees’ decisions not to mandate masks were consistent with the local needs and efforts of the towns and schools that the respective committees serve.
46. The statewide mask mandate overrides the decisions of the school committees and directly and negatively affects plaintiffs’ minor children.
47. All of the plaintiffs’ minor children are generally healthy children who would not qualify for an exemption under the mask mandate.
48. Nevertheless, wearing a mask for several hours a day is a chronic burden and causes harm to the children who wear them².

² Masks cause headache, drowsiness, dizziness, and reduced concentration, skin irritation/infection/acne: <https://www.bmj.com/content/370/bmj.m3021/rr-6>, also Mask-Induced Exhaustion Syndrome (MIES) that includes respiratory impairment, fatigue, and temperature rise: <https://www.mdpi.com/1660-4601/18/8/4344>. A German-wide registry (not the optimal highest-quality study) used by 20,353 parents who reported on data from almost 26,000 children, found that the "average wearing time of the mask was 270 minutes per day. Impairments caused by wearing the mask were reported by 68% of the parents. These included irritability (60%), headache (53%), difficulty concentrating (50%), less happiness (49%), reluctance to go to school/kindergarten (44%), malaise (42%) impaired learning (38%) and drowsiness or fatigue (37%).": <https://www.researchsquare.com/article/rs-124394/v2>.

49. Further, mask wearing for children causes significant psychological harm³.
50. Imminent and Irreparable harm therefore exist for plaintiffs to bring this suit, in that their minor children will face the harm caused by these masks, or they will remove their child from school to prevent their child from being forced to wear a mask, thereby depriving them of a public education.
51. Plaintiffs all have either individual or organizational standing to challenge this action as unlawful by the defendants.
52. Plaintiff McCarthy sent a demand to the defendants stating that their policy was unlawful and to refrain from implementing the policy or exempt his minor child, which was ignored by the defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests that this Court:

53. Enter a declaratory judgment or decree invalidating the authority granted to Commissioner Riley by BESE on August 24, 2021.
54. Enter a declaratory judgment or decree that 603 CMR 27.08(1) is only lawful as to conditions of school buildings with respect to building and sanitary code issues.

³ See OpEd by Dr. Neeraj Sood, PhD *and* Jay Bhattacharya, MD, PhD, stating that “At the same time, the long-term harm to kids from masking is potentially enormous. Masking is a psychological stressor for children and disrupts learning. Covering the lower half of the face of both teacher and pupil reduces the ability to communicate. In particular, children lose the experience of mimicking expressions, an essential tool of nonverbal communication. Positive emotions such as laughing and smiling become less recognizable, and negative emotions get amplified. Bonding between teachers and students takes a hit. Overall, it is likely that masking exacerbates the chances that a child will experience anxiety and depression, which are already at pandemic levels themselves.”

55. Enter a declaratory judgment, decree or order stating that G.L. c. 69 § 1B and §1G do not grant the defendants the authority to impose infectious disease mandates.
56. Enjoin Commissioner Riley and BESE from implementing a statewide mask mandate on schoolchildren.
57. Enjoin Commissioner Riley and BESE from implementing a vaccine quota as the basis for a mask mandate.
58. Enjoin Commissioner Riley and BESE from imposing a mask mandate on unvaccinated children after the proposed 80% quota has been met.
59. Enjoin the Defendants and all of their agents from requiring children to wear masks in local schools.
60. Grant such other relief as the Court deems just.

Respectfully submitted,

DATED: September 16, 2021


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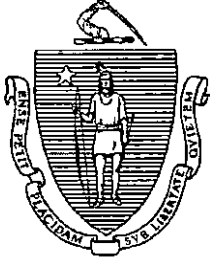

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Exhibit A

Board of Elementary and Secondary Education Meeting: August 24, 2021
Agenda Item: Authorization for Commissioner to Require Masks for K-12 Students and Staff,
Consistent with 603 CMR 27.08 (1) (Student Learning Time regulations)

MOVED: that the Board of Elementary and Secondary Education, in accordance with G.L. c. 69, § 1B, and consistent with 603 CMR 27.08(1), determines that exigent circumstances exist that adversely affect the ability of students to attend classes in a safe environment unless additional health and safety measures are put in place, and authorizes the Commissioner to require masks for public school students (age 5 and above) and staff in all grades through at least October 1, 2021.

Exhibit B



Massachusetts Department of Elementary and Secondary Education

75 Pleasant Street, Malden, Massachusetts 02148-4906

Telephone: (781) 338-3000
TTY: N.E.T. Relay 1-800-439-2370

Jeffrey C. Riley
Commissioner

MEMORANDUM

To: Members of the Board of Elementary and Secondary Education
From: Jeffrey C. Riley, Commissioner
Date: August 20, 2021
Subject: Recommendation to Authorize Commissioner to Require Masks for Students and Staff in K-12 Schools through at least October 1, 2021, Consistent with Exigent Circumstances under Student Learning Time Regulations, 603 CMR 27.08 (1)

At the special meeting of the Board of Elementary and Secondary Education (Board) on August 24, 2021, I will recommend that the Board declare exigent circumstances under the Student Learning Time regulations, 603 CMR 27.08 (1), to provide me with the authority to issue a mask mandate for public school students (age 5 and above) and staff in all grades through at least October 1, 2021.

As described below, in light of the current rise of COVID-19 in Massachusetts, I believe a mask mandate will be an important additional measure to keep students in school safely at this time. Masks remain a simple and effective mitigation measure to prevent the spread of COVID-19.^{1,2} A mandate will also provide more time for students and staff to get vaccinated, as we know vaccination remains the single most important tool in mitigating the impact of COVID-19.³

The Student Learning Time regulations provide that the Board may declare that “exigent circumstances exist that adversely affect the ability of students to attend classes in a safe environment unless additional health and safety measures are put in place.”⁴ Upon such a declaration, I must then, in consultation with medical experts and state health officials, issue health and safety requirements and related guidance for districts. If the Board gives me this authority, having consulted with medical experts and public health officials, I will implement a

¹ Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2. May 7, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html>.

² Maximizing Fit for Cloth and Medical Procedure Masks to Improve Performance and Reduce SARS-CoV-2 Transmission and Exposure, 2021, Feb 19, 2021. <https://www.cdc.gov/mmwr/volumes/70/wr/mm7007e1.htm>

³ Science Brief: COVID-19 Vaccines and Vaccination. Jul 27, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html>

⁴ 603 CMR 27.08 (1)

mask mandate for all students and staff in all grades.

The mandate would be in place until at least October 1, 2021, at which point I would assess the approach based on conditions then in place. The mask mandate would include an appropriate exemption for individuals who cannot wear a mask for medical or behavioral reasons. If the Board votes affirmatively, the Department of Elementary and Secondary Education (DESE) will provide schools and districts with guidance regarding implementation of the mask mandate in the next week.

At the forefront of my recommendation is the best interest of students and staff as they return safely to full-time, in-person instruction this fall. While we have already put in place significant measures to support schools and districts in this regard, I am recommending this additional measure in light of the increasing case rates, and to further encourage and provide additional time for more students and staff to get vaccinated. The mask mandate will complement other measures we have put in place jointly with the Department of Public Health (DPH), including guidance for schools on hosting vaccination clinics and strongly encouraging districts and schools to maintain or establish a robust plan for COVID-19 testing in schools, including both diagnostic testing and surveillance screening for students and staff.

The mask mandate would also include that, after October 1, 2021, if a school demonstrates a vaccination rate of 80% or more of all students and staff in the school, then it would no longer be subject to the state mask mandate for vaccinated individuals. The 80% threshold has been agreed to by DPH. Schools would be able to submit an attestation form provided by DESE to demonstrate they have met this threshold. Once schools reach the 80% threshold and receive approval to lift the mask mandate, vaccinated students and staff may remove their masks. In alignment with statewide guidance, unvaccinated students and staff would be required to continue wearing masks.

I believe having these measures in place will allow for a strong start of the school year and provide additional safety measures until more students and staff are vaccinated. As always, we will continue to monitor developments, consult with medical experts and public health officials, and adjust requirements as appropriate.

I look forward to discussing my recommendation with you at the special Board meeting.

Enclosure: Motion

Exhibit C

A message from the
Massachusetts Department of
Elementary and Secondary Education

August 20, 2021

[View this email in your browser](#)



PRESS RELEASE

For immediate release

Friday, August 20, 2021

Contact:

Colleen Quinn, Executive Office of Education, 617-851-3717

Jacqueline Reis, Department of Elementary and Secondary Education, 781-338-3115

Education Commissioner Riley to Ask Board to Grant Him Authority to Mandate Masks for All K-12 Public Schools to Provide Time to Increase Vaccinations

MALDEN – Education Commissioner Jeffrey C. Riley will ask the Board of Elementary and Secondary Education to grant him authority to mandate masks for all public K-12 students, educators, and staff through October 1 to ensure schools fully reopen safely and to provide time for more students and educators to get vaccinated. After October 1, the commissioner's policy would allow middle and high schools to lift the mask mandate for vaccinated students and staff only if the school meets a certain vaccination rate – at least 80 percent of students and staff in a school building are vaccinated. Unvaccinated students and staff would still be required to wear masks.

The mandate would include exceptions for students who cannot wear a mask due to medical conditions or behavioral needs.

The Commissioner will revisit the mandate in the near future to revise it as warranted by public health data. The purpose of the policy is to encourage higher vaccination rates among students and staff and to implement a uniform policy for all schools to begin the year.

“While Massachusetts leads the nation in vaccination rates, we are seeing a recent rise in COVID-19 cases because we still need more people to get vaccinated. This step will increase vaccinations among our students and school staff and ensure that we have a safe school reopening,” said **Governor Charlie Baker**. “Vaccinations are the best way to keep everyone in the Commonwealth safe, and we will continue to work with school districts to offer vaccination clinics at schools across the Commonwealth.”

“Our goal remains to get as many people as possible vaccinated,” said **Lt. Governor Karyn Polito**. “We hope that by instituting vaccine benchmarks among school populations we will create a real incentive for students and staff to get vaccinated so they can remove their masks.”

The mask mandate will only apply indoors and to children 5 and older.

“The vaccination rates among young people in Massachusetts are among the highest in the nation, with 65 percent of 12-15-year-olds vaccinated, but we still need to do more to make sure our young people and educators are protected from COVID-19,” said **Education Secretary James Peyser**. “Instituting universal masking mandates to further encourage vaccination rates among everyone in our schools is one measure we can take now.”

“Mask wearing in schools, along with hand washing and good personal hygiene, are important public health measures that will help mitigate any potential spread in the classroom, but increasing vaccination in our eligible residents is the most important thing we can do to ensure a safe return to the classroom for this

upcoming school year,” said **Secretary of Health and Human Services Marylou Sudders**.

Commissioner Riley asked the board to meet on Tuesday, August 24, to vote to give him this authority to institute the mask mandate.

“As students and staff prepare to return to school full-time, in-person, our priority is on a smooth reopening. With cases rising, this mask mandate will provide one more measure to support the health and safety of our students and staff this fall,” said **Commissioner Jeffrey C. Riley**.

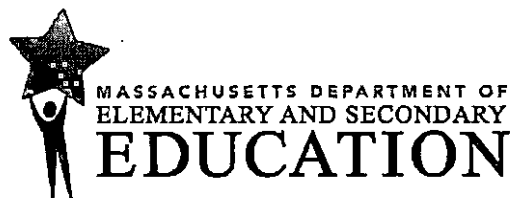
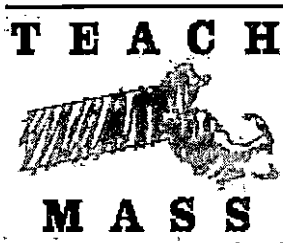
Mobile Vaccination Clinics

The Administration offers mobile pop-up vaccination clinics that take place in a community-based setting, including schools. The clinics are organized to bring vaccines to a community setting and are available to employers, schools and school districts, community organizations, and other groups. An organization can submit a request for mobile vaccination services here.

COVID-19 Testing in Schools

DESE and the Executive Office of Health and Human Services will once again offer screening and diagnostic testing at no cost to all public, private, and parochial schools as an additional mitigation strategy for COVID-19. Last year, the Administration launched the first-in-the nation pooled testing initiative in schools across the Commonwealth that found low positivity rates – far less than 1 percent – among students and staff. Diagnostic and routine (weekly) COVID-19 pooled testing services will be available at no cost to all schools through the end of the 2021-22 school year, under a single contract with the testing provider CIC Health.

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Superintendents, assistant superintendents, principals, and charter school leaders will receive the update automatically. For others wishing to receive this update, [please subscribe](#)

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Exhibit D



Jeffrey C. Riley
Commissioner
Massachusetts Department of
Elementary and Secondary Education



Margret R. Cooke
Acting Commissioner
Massachusetts Department of Public Health

MEMORANDUM

TO: Superintendents, Charter School Leaders, Assistant Superintendents, Collaborative Leaders, Leaders of Approved Special Education Schools
FROM: Jeffrey C. Riley, Commissioner, Department of Elementary and Secondary Education
Margret R. Cooke, Acting Commissioner, Department of Public Health
SUBJECT: DESE/DPH COVID-19 Guidance for Districts and Schools: Fall 2021
DATE: July 30, 2021

Background and context

As noted in the Updates to DESE COVID-19 Guidance released on May 27, 2021, all districts and schools will be required to be **in-person, full-time, five days a week this fall** and all previously-released Department of Elementary and Secondary Education (DESE) health and safety requirements will be lifted.

Recent updates by the Centers for Disease Control (CDC) to its Guidance for COVID-19 Prevention in K-12 Schools emphasize the importance of all students returning to full-time, in-person school this fall. The CDC guidance supports the use of vaccines as the primary mitigation measure in school settings, and also continues to recommend masking in K-12 schools. Additionally, according to the CDC, "Because of the importance of in-person learning, schools where not everyone is fully vaccinated should implement physical distancing to the extent possible within their structures, but should not exclude students from in-person learning to keep a minimum distance requirement."¹

Massachusetts has among the highest vaccination rates of any state in the nation,² and evidence continues to reinforce that the COVID-19 vaccines are highly effective, especially against severe disease.³ At the same time, even for those students not yet vaccinated, the apparent risk of

¹ Guidance for COVID-19 Prevention in K-12 Schools: Physical Distancing: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html#physical-distancing>

² "Data Table for COVID-19 Vaccinations in the United States," CDC 2021. Data as of July 26, 2021. Available at: <https://covid.cdc.gov/covid-data-tracker/#vaccinations>

³ Jamie Lopez Bernal, Nick Andrews, Charlotte Govver, Eileen Gallagher, et. al. July 21, 2021. "Effectiveness of COVID-19 Vaccines against the B.1.617.2 (Delta) Variant." The New England Journal of Medicine. Available at: <https://www.nejm.org/doi/full/10.1056/NEJMoa2108891>

COVID-19 to children remains small.^{4 5 6 7} These factors continue to reinforce that many previously instituted COVID-19 mitigation measures in school settings are no longer necessary.

In a [letter](#) released earlier this month, U.S. Education Secretary Cardona reiterated the importance of COVID-19 vaccine adoption for eligible students. This reinforced the [message](#) sent by Department of Public Health (DPH) and DESE Commissioners Bharel and Riley last school year indicating that vaccination is a critical strategy in mitigating the impact of COVID-19 on in-person learning.

Fall 2021 recommendations

This guidance document was developed jointly by DESE and DPH and outlines recommendations on [masking, COVID-19 testing, and quarantine protocols](#). It also includes information on [back-to-school vaccine clinics, local vaccine sites, and public awareness materials for families](#).

DESE and DPH also continue to encourage schools to maintain ventilation upgrades from this past year as feasible, continue hand hygiene practices, and extend policies for students and staff to stay home when sick. As always, we will monitor the public health situation and may issue additional guidance as needed.

Please note: The DESE COVID-19 Help Center remains open and available for consultation with districts and schools. Please do not hesitate to call with any questions at (781) 338-3500.

DESE and DPH will also issue Frequently Asked Questions (FAQs) related to this guidance.

Masking

- **This fall, DESE and DPH [strongly recommend](#) that all students in kindergarten through grade 6 wear masks when indoors, except students who cannot do so due to medical conditions or behavioral needs.** Masks are not necessary outdoors and may be removed while eating indoors.
- **DESE and DPH also [strongly recommend](#) that unvaccinated staff in all grades, unvaccinated students in grades 7 and above, and unvaccinated visitors wear masks indoors, in alignment with the statewide [advisory](#) on masking.**

⁴ Massachusetts COVID-19 Response Reporting. 2021. <https://www.mass.gov/info-details/covid-19-response-reporting>

⁵ Coronavirus Disease 2019 in Children — United States, February 12–April 2, 2020. MMWR Morb Mortal Wkly Rep 2020;69:422–426. DOI: <http://dx.doi.org/10.15585/mmwr.mm6914e4>

⁶ J L Ward, R Harwood, C Smith, et. al. July 2021. “Risk factors for intensive care admission and death amongst children and young people admitted to hospital with COVID-19 and PIMS-TS in England during the first pandemic year.” medRxiv. *Please note: this is a preprint study that has not yet completed peer review.* Available at: <https://www.medrxiv.org/content/10.1101/2021.07.01.21259785v1>

⁷ Clare Smith, David Odd, Rachel Harwood, Joseph Ward, et. al. July 2021. “Deaths in Children and Young People in England following SARS-CoV-2 infection during the first pandemic year: a national study using linked mandatory child death reporting data.” Research Square. *Please note: this is a preprint study that has not yet completed peer review.* Available at: <https://www.researchsquare.com/article/rs-689684/v1>

- **DESE and DPH recommend that schools allow vaccinated students to remain unmasked.**
- Any individual at higher risk for severe disease from COVID or with a household member who is at high risk is encouraged to mask regardless of vaccination status consistent with the updated DPH Advisory on Face Coverings and Masks.
- Any child or family who prefers to mask at school should be supported in this choice.
- By federal public health order, all students and staff are required to wear masks on school buses at this time.
- All staff and students must wear masks while in school health offices. Additional guidance for school health professionals is forthcoming from DPH.

Please note: DESE and DPH will continue to consult with medical advisors and may update the masking requirements above as we learn more about COVID-19's effects on hospitalizations in Massachusetts and on children.

COVID-19 testing

Districts and schools are highly encouraged to maintain or establish a robust plan for COVID-19 testing in schools, including both diagnostic testing and screening (pooled) testing for students and staff. DESE and the Executive Office of Health and Human Services will continue to offer these services at no cost to districts. These no cost services will include optional support for districts who would like additional staff to conduct testing on-site and/or help with testing logistics and communication.

Diagnostic testing, such as the BinaxNOW rapid antigen test, is an important tool for use in testing asymptomatic close contacts as part of updated quarantine guidance (see below). Diagnostic testing is especially important this year, as we head into cold and flu season. Districts are strongly encouraged to sign up for the statewide COVID-19 testing program as soon as it becomes available later in August to minimize the number of students required to quarantine outside of school.

Further information will be forthcoming.

Contact tracing and quarantine protocols

DESE and DPH will soon release a new version of the "Protocols for Responding to COVID-19 Scenarios" document. **As part of this guidance, districts in the statewide testing program or using other approved diagnostic tests will be able to implement a new "test and stay" protocol in lieu of requiring asymptomatic close contacts to quarantine.** Under test and stay, asymptomatic close contacts will have the option to remain in school and be tested daily with BinaxNOW for at least 5 days. Vaccinated staff and students are exempt from quarantine.

Additional Information

Back to school vaccination clinics

A number of schools have hosted vaccination clinics on campus since May, which have served as an important tool in our collective efforts to vaccinate all eligible Massachusetts residents. Vaccination clinics at schools make vaccinations easier to access and more convenient for students and their families. We urge all schools, and in particular those with vaccination rates below the Massachusetts state average, to host an on-site vaccination clinic during summer orientation events or when classes begin. A DPH-approved mobile vaccination provider, including clinic staff and vaccination administrators, will be provided free of charge. Interested schools can submit their request via our [online form](#).

Local vaccination sites

More than 900 vaccination sites are available across the state and most accept walk-in appointments, including CVS and Walgreens pharmacies, pediatric primary care offices, and community health centers. As a reminder, the COVID vaccine is free for all, and no ID or insurance is needed to obtain the vaccine.

More information on these sites, as well as safety information, and helpful Q&As are all available at www.mass.gov/covidvaccine.

Public awareness materials for families

We encourage districts and schools to use their communications channels including social media, newsletters to parents, and flyers and posters to encourage vaccination.

The successful *Trust the Facts. Get the Vax.* statewide public awareness campaign is now focused on raising awareness and engaging parents. We know many parents and guardians may have questions about their children getting vaccinated and so the [latest TV spot](#) features pediatricians from our community health centers and hospitals on the importance of vaccinating our young people. A [Spanish language version](#) is also available featuring Spanish-speaking clinicians.

Another short, animated message is available [here](#). It is available in 10 languages. You can find these videos and other materials and graphics in multiple languages [here](#).

We continue to urge all school personnel to get vaccinated to protect themselves, their families, and their school community. We appreciate your assistance to keep all of our students, faculty, staff, and volunteers safe and healthy.

Exhibit E

JUSTIN R. MCCARTHY
ATTORNEY AT LAW
310 NORTH MAIN STREET
EAST LONGMEADOW, MA 01028

August 23, 2021

*Sent Via FedEx First Overnight
and emailed to jeffrey.riley2@state.ma.us*

Jeffrey C. Riley
Office of the Commissioner
Mass. Dept. of Elementary and Secondary Ed.
75 Pleasant Street
Malden, MA 02148

RE: Legal Notice Concerning Statewide School Mask Mandate

Commissioner Riley,

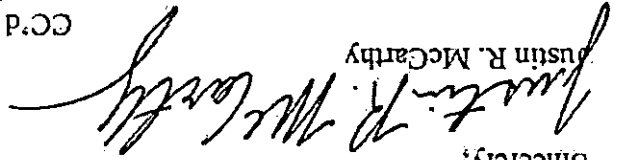
Please be advised that neither you nor the Board of Education has legal authority to implement public health policies. Accordingly, if you impose a statewide mask mandate on Massachusetts' school children, I intend to challenge the policy in court.

The Board's authority is found in G.L. c. 69, § 1B. It states, "[t]he board shall establish policies *relative to the education of students* in public early childhood, elementary, secondary and vocational-technical schools." (Emphasis added.) The Board's duties, according to the statute, are confined to such matters as establishing certification standards for teachers, reviewing federal grant applications, and auditing the academic performance of schools. There is no power granted anywhere in the statute allowing the Board to create policies to slow the spread of a contagious disease or to increase vaccination numbers. The legislature has already established regulations for such matters. See G.L. 71, § 55 and G.L. c. 76, § 15, respectively. You do not have the authority to go beyond the scope of these laws.

Nevertheless, your August 20 press release expressly states that "[t]he purpose of the [mask] policy is to encourage higher vaccination rates among students." To further this point, you quote Lt. Governor Karyn Polito: "Our goal remains to get as many people as possible vaccinated. We hope that by instituting vaccine benchmarks among school populations we will create a real incentive for students and staff to get vaccinated so they can remove their masks." This statement implicitly acknowledges that masks are a chronic burden to students. Since the state of emergency ended in Massachusetts, the executive branch no longer has the authority to impose such a burden on anyone.

I have legal standing in the matter because my daughter, Margaret McCarthy, is soon to be a second grade student in my town's public school. Our town's school committee voted to make masks optional for children. Thus, your mandate would directly and negatively affect us and give me the right to dispute this policy in court. I ask that you either refrain from making such a baseless policy or that you expressly exempt my daughter from the requirement. I look forward to hearing from your office and resolving this matter amicably and without litigation.

Sincerely,



Justin R. McCarthy

CC'D

Board of Elementary and
Secondary Education
75 Pleasant Street
Malden, MA 02148

Governor Charles Baker
Office of the Governor
24 Beacon St., Rm. 280
Boston, MA 02133

(P) 413-525-5600
(F) 413-647-0018
JUSTIN@JRMCCARTHY.COM
WWW.JRMCCARTHY.COM



Justin McCarthy <jrmccarthy.law@gmail.com>

LEGAL NOTICE CONCERNING STATEWIDE SCHOOL MASK MANDATE

1 message

Justin McCarthy <justin@jrmccarthy.com>

Mon, Aug 23, 2021 at 9:03 AM

To: jeffrey.riley2@state.ma.us, Katherine.Craven@mass.gov, James.Morton@mass.gov, Amanda.Fernandez@mass.gov, Matthew.Hills@mass.gov, Darlene.Lombos@mass.gov, michael.moriarty@mass.gov, eoe@massmail.state.ma.us, Paymon.Rouhanifard@mass.gov, MaryAnn.Stewart@mass.gov, MartinMarty.West@mass.gov

Commissioner Riley and Board Members,

The attached notice will be sent out today. I hope to hear from you soon.

Sincerely,

Justin McCarthy

—
Justin R. McCarthy

Attorney at Law

310 North Main Street

East Longmeadow, MA 01028

(p) 413-525-5600

(f) 413-647-0018

www.jrmccarthy-law.com

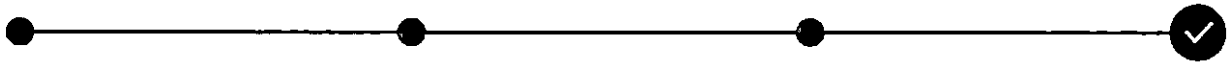
 **DESE - Legal Notice Concerning Mask Mandate.pdf**
211K

774609462243



ADD NICKNAME

Delivered
Wednesday, August 25, 2021 at 10:31 am



DELIVERED

Signature release on file

GET STATUS UPDATES

OBTAIN PROOF OF DELIVERY

FROM

Justin McCarthy

310 North Main Street

EAST LONGMEADOW, MA US 01028

413-525-5600

TO

Jeffrey C. Riley

Office of the Commissioner

75 Pleasant Street

MALDEN, MA US 02148

781-338-3000

Travel History

TIME ZONE

Local Scan Time



Wednesday, August 25, 2021

10:31 AM	MALDEN, MA	Delivered Package delivered to recipient address - release authorized
8:55 AM	PEABODY, MA	On FedEx vehicle for delivery
7:46 AM	PEABODY, MA	At local FedEx facility

Tuesday, August 24, 2021

4:20 PM	PEABODY, MA	At local FedEx facility
10:16 AM	PEABODY, MA	Delay Customer not available or business closed.
8:57 AM	PEABODY, MA	On FedEx vehicle for delivery
7:50 AM	PEABODY, MA	At local FedEx facility
5:59 AM	EAST BOSTON, MA	At destination sort facility
5:16 AM	NEWARK, NJ	Departed FedEx hub
12:56 AM	NEWARK, NJ	Arrived at FedEx hub

Monday, August 23, 2021

10:30 PM	WINDSOR LOCKS, CT	Left FedEx origin facility
4:18 PM	WINDSOR LOCKS, CT	Picked up
2:29 PM		Shipment information sent to FedEx

Shipment Facts

TRACKING NUMBER 774609462243	SERVICE FedEx Priority Overnight	DOOR TAG NUMBER DT106103340439
WEIGHT 0.5 lbs / 0.23 kgs	DELIVERY ATTEMPTS 1	TOTAL PIECES 1
TOTAL SHIPMENT WEIGHT 0.5 lbs / 0.23 kgs	TERMS Shipper	PACKAGING FedEx Envelope
SPECIAL HANDLING SECTION Deliver Weekday	SHIP DATE 8/23/21 ?	STANDARD TRANSIT 8/24/21 before 10:30 am ?
ACTUAL DELIVERY 8/25/21 at 10:31 am		