



**February 12, 2021**

**Question:** What factors do school leaders have to consider when adopting a mask or face covering policy in their school district?

**Response:** Governor Gianforte has announced that the [statewide mask mandate will no longer be in effect](#) as of February 12, 2021. In response to this announcement, the MT-PEC partners have prepared an update to Model Emergency Policy 1905 to provide an option for districts to adopt a district policy regarding face coverings while removing language requiring masks or face coverings in certain counties that was required due to then-Governor Bullock's directive. Specifically, the language in Policy 1905 has been replaced with two options regarding face coverings:

- Option 1 is a mask requirement adopted by the board of trustees that will apply to staff, students, and visitors present in school buildings or events along with accepted exceptions to the mask requirement.
- Option 2 is language stating those present in the school may choose to wear a mask in a school building, but it is not required

Board of Trustees may select Option 1 or Option 2 when revising Policy 1905. Explanations of the issues related to both options are included below. [The marked-up version of the policy is available here.](#) A word version of the policy is available in the [community library here.](#)

The Governor's directive does not restrict the authority of local governments to implement mask mandates that are more restrictive than the new state directive. County boards of health have statutory authority to impose restrictions within the exterior boundaries of the county to slow the spread of communicable diseases. If a county board of health adopts a directive requiring masks be worn in public buildings, public schools within that county will be obligated to honor the directive. Boards may adopt a customized version of Option 1 that reflects a county's mandate. It is important to note that a recommendation from a county health board is not a directive and does not have the binding authority of the law.

If a county board of health does not issue a directive, a public school, as a local government, may decide to implement a face covering requirement through the school board's adoption of a policy governing that specific school district by adopting Option 1 in Policy 1905. The Governor's Office stated on February 11, 2021, that local school districts

may pursue this option in email correspondence, "[\(The\) directive allows local jurisdictions, including local school boards, to implement their own mask requirements.](#)" Documentation of this correspondence is attached. This statement supports school board authority to adopt a mask mandate as a local government.

A board adopted policy will help in the event there is a general challenge to a board-adopted mask requirement. The statement from the Governor's Office clarifying the state directive will be an important element of defending against any challenge to a district mask mandate. This is consistent with inherent authority school boards hold under Article 10, section 8 of the Montana Constitution to exercise supervision and control over the school district. Under this authority, if there is a challenge in the courts, the district has the basis to assert the mask rule is subject to the "substantially related" test established by the Montana Supreme Court *State, ex rel., Bartmess v. Helena Board of Trustees*.

In the event of such a challenge, the district would argue the mask rule is reasonable given the board's requirement to adopt policies addressing student health issues as required by ARM 10.55.701(2)(s). Further, Section 20-3-324, MCA, states boards of trustees shall open schools, employ staff, and adopt policies required by the Board of Public Education. The Board of Public Education requires adoption and implementation of policies regarding student health issues. School districts can argue faithfully that a mask requirement is consistent with and substantially related to their powers and duties under state statute and the Montana constitution. While legal outcomes are never certain, the district will have a stronger argument in support of a district mask requirement with a board-adopted policy.

If a school board adopts a mask requirement policy, the next issue is will be whether it is enforceable on students, staff, and visitors. Section 20-5-201, MCA, requires students to comply with the policies of the district and directives of the district staff. Students will be expected to comply with the policy if adopted by the board of trustees. Staff and visitors will also be expected to comply. ARM 10.55.701(2)(d) requires boards to adopt policies delineating the responsibilities of staff in the district. MTSBA Model Policy 5121 applies all policies to all staff when applicable. Further, an employment contract will bind a staff member to the policies of the district. Staff may also be subject to an MOA that requires employees who are covered by a collective bargaining agreement to wear masks in accordance with CDC guidance. Visitors will also be expected to comply. MTSBA Model Policies 4315 and 4332 govern visitor conduct and state those in the school will comply with the policies of the district. Policy 1903F can be posted at the entrance of the school notifying visitors of the expectation to wear masks.

School leaders must be mindful that if no mask mandate is in effect it could also result in claims against the district. Section 10-3-111, MCA, states that personnel in a school district are immune from suit during an emergency except in cases of "willful misconduct, gross negligence, or bad faith." Failure to impose a mask mandate despite guidance from public health officials to do so could satisfy this exception and result in the loss of this immunity.

This interpretation is consistent with the guidance from Montana State Fund which states that an employee may file a workers' compensation claim if they can "demonstrate that their job put them at significantly greater risk for infection than the risk they have already through daily contact and exposure with the population in general." A school district that does not have a mask requirement can also be considered to meet this standard. In anticipation of these claims, districts can consider adopting Option 1 in Policy 1905.

If a district adopts Option 1, there are reasonable exceptions to a mask requirement included. These exceptions can be tailored to a district's specific needs and enforced as deemed necessary by the board and administration. A district may also face questions from those who are concerned about the district adopting a mask rule. A district can accommodate those who may object to a mask or have a medical issue related to mask usage. This accommodation could include teleworking for staff, offsite instruction for students, remote meetings for parents, or electronic correspondence or communication for a visitor. In this situation, a district should handle requests to not wear a mask on an individual basis that reflect the circumstances in the district, but the mask policy will be enforced as adopted by the board.

Option 2 is consistent with the Governor's decision to lift the statewide mask mandate. Boards adopting this option authorize each employee, student, family or visitor to make a personal decision about wearing a mask in a school building or school event. Boards considering this option should take into account any county mask mandate, applicable MOAs with collective bargaining units, and rules governing high school activities that may require masks at certain events or for certain people. Further, a shift from a policy requiring masks to policy making masks optional could result in a claim that the District has unilaterally changed the working conditions. To avoid this claim, schools should be prepared to bargain this issue with unions and document any agreement in another MOA. The Board should also review other emergency policies including Policy 1903F to ensure they reflect the new optional mask provision.

If no mask mandate is in effect at the school under Option 2, there may be some students and staff who are not comfortable being present in the school. A school district remains obligated to provide a reasonable accommodation to a person with a disability, under either the Americans with Disabilities Act or Section 504 of the 1973 Rehabilitation Act. If a district recommends, but does not require masks, a district will have to determine how to reasonably accommodate a staff member or a student that is, due to an underlying disability, at risk for serious complications from COVID-19. MTSBA Model Emergency Policies 1908 and 1909 can be used as a guide in this area.

Regardless of whether a board adopts a mask requirement or a permissive mask option, the MT-PEC partners are prepared to assist districts in assessing requests for accommodations by those affected. The model policies on this topic are attached. A

summary of the statutes and regulations is included below. Please contact the MT-PEC partners if we can be of further assistance.

[A summary of the legal authority cited in this analysis is available here.](#)

Thank you for reading this special MT-PEC Question of the Week.