

**To:** Wake County Public Schools Board of Education and Superintendent Cathy Q. Moore  
**From:** Jonathan Blumberg and Jason Weber  
**Date:** July 30, 2021  
**Re:** Legal Questions Raised by July 29, 2021, NCDHHS StrongSchoolsNC Public Health Toolkit (K-12)

Dear Board Members:

As you know, Governor Cooper and the North Carolina Department of Health & Human Services (NCDHHS) released a new version of the StrongSchoolsNC Toolkit on July 29, 2021 (available [here](#)). It is effective July 30, 2021 at 5:00pm. The new Toolkit does not directly require school districts to adopt any specific health and safety practices. Instead, it provides strategies for school districts to consider when developing their own local COVID-19 related health and safety measures. The strategies are organized into two different categories: (1) those that SHOULD be implemented by all schools, and (2) those that school leaders COULD CONSIDER adopting. Note that “should” does not mean “shall” in this context. According to the Toolkit, “NCDHHS strongly advises that school leaders adopt all the strategies in the SHOULD sections.” The strategies in the COULD CONSIDER category “provide additional layers of prevention and that, if implemented, will further reduce the risk of COVID-19 exposure and spread.”

Board members and staff have raised a number of legal questions with respect to the new/revised Toolkit. These questions primarily center around face coverings, vaccines, and testing. The purpose of this memorandum is to provide answers to these questions and help guide the Board and administration as you develop local requirements for the Wake County Public Schools. This analysis is up to date as of July 30, 2021, but is subject to change if local, state, or federal authorities adopt new legal mandates impacting public schools.

### FACE COVERINGS

**1. Are there currently any federal or state legal requirements to wear face coverings in public school buildings?**

No. In its [most recent guidance](#), the CDC *recommends* “universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.” In the new [Toolkit](#), NCDHHS states that schools “*should*” “require all children and staff in schools K-12<sup>th</sup> grade to wear face coverings consistently when indoors (unless an exception applies).”

However, these are recommendations, not mandates. The CDC frames its recommendations as “key prevention strategies.” The NCDHHS “strongly advises” that schools adopt strategies in the “should” category of the Toolkit but does not require it. Therefore, school districts have discretion to decide whether, and to what extent, they will require face coverings in schools and other school system buildings.

**2. Are there currently any federal or state legal requirements to wear face coverings on school transportation?**

Yes. The CDC issued an [Order](#) on January 29, 2021, that requires all passengers on public transportation as well as operators to wear a face covering regardless of their vaccination status. According to the CDC, the Order applies to public and private schools (see [FAQ](#) updated on June 10, 2021, which includes the following question and answer: “Are masks required on school buses? Yes, passengers and drivers must wear a mask on school buses, including on buses operated by public and private school systems, subject to the exclusions and exemptions in CDC’s Order”). Those exemptions include individuals who, because of a disability, cannot safely wear a mask.

The CDC’s Order was published in the [Federal Register](#) on February 3, 2021 and is in effect until it is modified or rescinded. The Order has not, to our knowledge, been challenged through litigation, and we are not aware of any legal authority to the contrary. Furthermore, the NCDHHS Toolkit expressly references the CDC’s Order. As stated in the Toolkit, all passengers and drivers on school transportation vehicles should wear a mask “regardless of the mask policy at school.”

**3. Do school districts have independent authority to require face coverings?**

Yes. Local boards of education have broad authority over the management of schools in their districts. G.S. 115C-36 gives local boards “[a]ll powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other official” and further grants to local boards “general control and supervision of all matters pertaining to the public schools in their respective administrative units.” This authority has been repeatedly recognized by the courts. See, for example, *Coggins v. Bd. of Educ. of City of Durham*, 223 N.C. 763 (1944) (“It is generally held that local school authorities have the inherent power to make rules and regulations for the discipline, government, and management of the schools and pupils within their district.”) See also *Wake Cares v. Wake County Bd. Of Educ.* 190 N.C.App. 1 (2008), which itself cites to *Coggins*, (“[T]he General Assembly may delegate to local administrative units the power to make such rules and regulations as may be deemed necessary or expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions.”).

This authority is broad enough to encompass a district’s ability to establish health and safety requirements for their schools, so long as those requirements do not contravene applicable law. As of the date of this memo, we are not aware of any state or federal laws, regulations, or court decisions that would restrict a North Carolina school district’s authority to require face coverings. Furthermore, the recommendations from the CDC and NCDHHS, which leave final decision-making to local school districts, support and recognize this authority.

**4. Does the Federal Food, Drug, and Cosmetic Act (FDCA) prohibit school districts from requiring face coverings?**

No. The argument that the FDCA prohibits an organization from requiring face coverings centers on 21 U.S.C. 360bbb-3. This is a section within the FDCA that governs when and how the U.S. Secretary of Health and Human Services may authorize the “emergency use” of a drug, device, or biological product that has not gone through the FDA’s full approval process. Subsection (e) of 21 U.S.C. 360bbb-3 requires the Secretary of HHS to establish certain conditions on emergency use authorizations, if determined necessary and appropriate by the Secretary. However, it does not expressly apply to any other individual or entity, and therefore does not apply to the WCPSS. It also does not create any individual rights. Furthermore, there is nothing in the text of Section 360bbb-3 that indicates it was intended to supersede, prohibit, or otherwise restrict any state and local emergency response measures and requirements, such as a local school district’s requirement that face coverings be worn.

Finally, the [U.S. Department of Justice](#) recently issued an opinion stating that the EUA status of COVID-19 vaccines does not prevent government entities from imposing vaccination requirements. While the USDOJ opinion refers only to vaccine requirements, the rationale would apply to face covering requirements as well.

**5. Does the Free Exercise Clause of the First Amendment prohibit school districts from requiring face coverings?**

No. The law in this area does not require religious exemptions from COVID-19 face covering requirements and does not prohibit school districts from requiring face coverings in their schools. While the First Amendment protects an individual’s right to free exercise of religion, that right is not unlimited. It is well-settled that the First Amendment does not exempt citizens from complying with religion-neutral laws of general applicability, particularly with regard to laws and rules designed to limit the spread of disease. (See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)). So long as a school district’s face covering requirements do not single out religion and obligate all students and other individuals in the district’s schools to the exact same generally applicable requirements, the requirements will likely withstand a First Amendment challenge.

**6. Is there any pending legislation that school districts should be aware of that would impact their authority to require face coverings?**

Yes. [Senate Bill 173](#), the “Free the Smiles Act” limits the Governor’s authority to require face coverings in public schools and gives exclusive authority to determine the use of face coverings to local boards of education. Among other things, the bill would require local boards that adopt a policy requiring face coverings to revisit and vote at least once a month on whether the policy should be repealed or modified for so long as the policy remains in effect. SB 173 was referred to a conference committee made up of House and Senate members and has not been ratified by the General Assembly or presented to the Governor.

Districts should also be aware of [House Bill 96](#). HB 96 would require health care providers to obtain written parental consent before administering a vaccine that has been granted emergency use authorization (such as the current COVID-19 vaccines) to an individual under the age of 18. The bill was most recently referred to the Senate Rules Committee.

Finally, [House Bill 572](#) which has been dormant since May 11, 2021 remains on the watch list. The bill is entitled “An Act to Prohibit the Creation of a Vaccine Mandate by Use of an Executive Order or the Rulemaking Process.” The bill includes language in keeping with its title.

### **VACCINES**

#### **7. Do school districts have the authority to require students to provide proof of vaccination in order to receive an exemption from general face covering requirements?**

Yes. Remember, school districts have broad discretion to decide whether and to what extent they will require face coverings. If a district decides to exempt vaccinated students from its general face covering requirements, the district may require students to provide proof of vaccination against COVID-19 in order to receive an exemption. We are not aware of any law or regulation that prohibits this.

Individuals who object to requirements to provide proof of vaccination have generally cited to G.S. 130A-152 and 130A-155. G.S. 130A-152 requires children to receive certain immunizations identified in the statute and any others required by the Commission for Public Health. G.S. 130A-155 prohibits a child from attending school (preK-12) unless the child’s parent provides a certificate indicating that the child has received the immunizations required by G.S. 130A-152. The fact that COVID-19 is not listed in the immunizations required by G.S. 130A-152 or by the Commission for Public Health is not determinative of the question. The statutes impose vaccination requirements on parents/guardians and establish consequences if they do not comply. The statutes do not in any way limit or prevent school districts from requesting and/or requiring proof of any additional immunizations as a basis for obtaining an exemption to a face covering requirement.

It is also important to put this question in context. If a school district decides to exempt vaccinated students from its general face covering requirements, students who voluntarily choose not to provide proof will not be excluded in any way from attending school in-person or from otherwise participating in in-person school activities. They will just have to comply with the general requirement to wear a face covering.

#### **8. Do school districts have the authority to require staff to provide proof of vaccination against COVID-19 in order to receive an exemption from general face covering requirements?**

Yes. According to the EEOC, employers may ask employees to provide proof of vaccination against COVID-19. See below for an excerpt from the [EEOC’s guidance](#):

**“K.9. Under the ADA, is it a “disability-related inquiry” for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-**

**19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic? (12/16/20, updated 5/28/21)**

No. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic, the employer is not asking a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply. However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential."

**9. Do school districts have the authority to require students and staff to provide proof of vaccination in order to reduce the amount of time they must quarantine if exposed to COVID-19?**

Yes. See analysis for Questions 7 and 8 above, which would also apply to a requirement to show proof of vaccination in order to reduce the period of quarantine consistent with CDC and NCDHHS guidance.

**10. Do school districts have the authority to require students to become vaccinated against COVID-19?**

No. In North Carolina, certain vaccinations are statutorily required for students, and others can be required by the Commission for Public Health (see G.S. 130A-152). As stated previously, local boards of education have broad general statutory authority over matters not expressly conferred to other government bodies under G.S. 115C-36 and 115C-40. However, the authority to mandate additional student vaccinations as a condition of school attendance has been expressly conferred by G.S. 130A-152 to the Commission for Public Health. Schools can certainly encourage student vaccinations, and the NCDHHS Toolkit recommends that schools encourage vaccination. But, in our opinion, school districts cannot require students to be vaccinated against COVID-19 unless the Commission for Public Health does.

**11. Do school districts have the authority to require staff to become vaccinated against COVID-19?**

Generally, yes. Employers may require employees to become vaccinated against COVID-19, subject to consideration of employee requests for medical/disability-based accommodations under the ADA and requests for religious accommodations under Title VII. This position is supported by the EEOC in its [guidance](#) (see Question K.1).

## TESTING

### **12. Do school districts have the authority to require COVID-19 testing of student as a condition on participation in athletics?**

Yes, as long as the district considers requests for disability-based accommodations. Participation in sports and other extracurriculars is optional, and students do not have a general right to participate in them. As such, school districts may place generally applicable conditions on participation.

Furthermore, the CDC recommends screening testing for student athletes, coaches, and other staff who are not fully vaccinated who participate in and support athletic activities. The recommendations are broken down by the level of community transmission in the district and the level of transmission risk associated with the sport. For districts with low or moderate transmission, the CDC recommends testing for both high-risk sports (e.g., football) and low/intermediate-risk sports (tennis and baseball) at least once per week. For districts with substantial or high transmission, the CDC recommends testing for high-risk sports on a twice per week basis, and testing for low/intermediate risk sports on a once per week basis. The NCDHHS Toolkit also states that schools may consider screening testing for student athletes and staff who are not fully vaccinated. Informed parent consent would be required for testing, but a district could choose to not allow participation in athletics for any student whose parent does not consent.

### **13. Do school districts have the authority to require staff to be tested for COVID-19?**

Yes. According to the EEOC, employers may require employees to be tested for COVID-19 before initially permitting them to enter the workplace and/or periodically to determine if their presence poses a direct threat to others. See below for an excerpt from the EEOC's guidance:

***“A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee’s initial or continued presence in the workplace? (4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)***

The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following [recommendations by the CDC](#) or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing

administered by employers consistent with current CDC guidance will meet the ADA’s “business necessity” standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review [information](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require—to the greatest extent possible—that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.”

**14. Do school districts have the authority to require students and staff to submit proof of a negative COVID-19 test in order to reduce the amount of time they must quarantine if exposed to COVID-19?**

Yes. We are not aware of any law or regulation that would prohibit this approach and believe it is reasonably related to valid health and safety concerns.

**MISCELLANEOUS**

**15. Do school districts have flexibility to allow or limit visitors?**

Yes. Remember, the new Toolkit is designed to give school districts flexibility. It contains strategies that school leaders “should” adopt/require, as well as strategies that school leaders “could consider”, but it does not itself contain any requirements. NCDHHS “strongly advises” school leaders to adopt all strategies in the “should” category.

Regarding visitors, the new Toolkit removed from the prior version of the Toolkit the requirement to “Limit nonessential visitors”. Finally, the Toolkit includes a provision that states all schools should consider “allowing visitors and volunteers to resume normal activities if they follow the same protocols as staff and students.”

**16. Does the Toolkit require physical distancing for students and staff?**

No. Page 11 of the Toolkit states that schools should:

- Maintain a minimum of three (3) feet of distance between K-12 students who are not fully vaccinated within school settings to the greatest extent possible without excluding students from full-time, in-person learning.
- Maintain a minimum of six (6) feet between adults (teachers/staff/visitors) and students and between adults (teachers/staff/visitors) who are not fully vaccinated within school settings to the greatest extent possible.

Please note that the recommendations for physical distancing include a caveat that it should be implemented “to the greatest extent possible without excluding students from full-time, in-person learning.” Note also that these recommendations do not distinguish between masked and unmasked individuals. The recommendations simply apply to individuals who are not fully vaccinated. Based on the plain language, and the text box immediately preceding the recommendation (which references distancing “combined with indoor mask wearing”), we believe NCDHHS’s intent was for the recommendation to apply to individuals regardless of whether or not they are wearing a face covering.

**17. Do school districts maintain limited immunity from claims related to COVID-19?**

Yes. G.S. 99E-70 through 72 (which was enacted last year) provides that no person (including school districts) shall be liable for “any act or omission alleged to have resulted in the contraction of COVID-19” so long as the person (1) provides reasonable notice of the actions taken “for the purpose of reducing the risk of transmission of COVID-19 to individuals present on the premises;” and (2) does not act with “gross negligence, willful or wanton conduct, or intentional wrongdoing.” The statute applies to claims made no later than 6 months after the expiration or rescission of Governor Cooper’s declared State of Emergency. Even though the statewide mask mandate in EO 220 is expiring, the state of emergency will continue.