

## COVID-19 Fact Sheet

# Back-to-School Legal Trends and Challenges Relating to COVID-19

K–12 schools and parents of K–12 students are facing numerous challenges and uncertainties with the widespread return of in-person learning for the 2021–22 school year, given that the COVID-19 pandemic is still ongoing. The return of in-person learning is generally positive—schools provide important [non-academic benefits](#) that make it important for students to physically return to them. In addition, [many teachers feel](#) that remote learning resulted in “significant” learning loss for students,” in terms of both academics and social-emotional progress. However, the continued pervasive presence of COVID-19 implicates public health concerns related to the spread of the communicable disease.

This fact sheet offers a broad-level overview of issues associated with the return to in-person learning during the COVID-19 pandemic. It also serves as a starting point and initial resource for individuals seeking information on what actions can be taken to protect K–12 students, as well as school faculty and staff, from COVID-19 in a school setting.

## State and Local Public Health Actions to Protect K-12 Students, Faculty, and Staff

Around the country, many schools are returning to in-person education. With the COVID-19 pandemic still raging, schools are likely to serve as points of origin for COVID-19 outbreaks (and such outbreaks [have already begun](#)). State and local governments are taking a variety of actions to protect students, faculty, and staff. These actions, as well as examples, are described in the table below. Many of these actions accord with the prevention strategies included in the [CDC’s Guidance for COVID-19 Prevention in K–12 Schools](#).



Action	Description	Local-Level Examples	State-Level Examples
<b>Mask mandates</b>	<p>Studies show that mask-wearing reduces the transmission of COVID-19, so <a href="#">the CDC recommends community masking</a>. In K-12 school settings in particular, <a href="#">the CDC advises universal indoor masking</a> regardless of vaccination status for everyone over age 2. Importantly, <a href="#">schools should provide masks</a> to students who do not have one (e.g., if they forgot or cannot afford one).</p>	<p>Denver (CO) Public Schools <a href="#">requires all individuals in school buildings to wear masks</a>, regardless of vaccination status.</p> <p>Genesee County (MI) Health Department <a href="#">issued a mask mandate</a> for K–6 students and staff.</p> <p><i>*The District Administration provides a <a href="#">more comprehensive list of what various jurisdictions are doing in regard to mandating masks (or prohibiting mask mandates)</a>.</i></p>	<p>The Delaware Department of Health and Social Services <a href="#">has issued an order requiring all individuals in school buildings to wear masks</a>, regardless of vaccination status.</p> <p><i>*The District Administration provides a <a href="#">more comprehensive list of what various jurisdictions are doing in regard to mandating masks (or prohibiting mask mandates)</a>.</i></p>
<b>Vaccination mandates</b>	<p>Currently, children who are 12 years or older can be vaccinated against COVID-19, and the <a href="#">CDC recommends vaccination</a> as the “leading public health prevention strategy to end the COVID-19 pandemic.” Similar to vaccination mandates for other diseases, such as measles, mumps, and rubella, a vaccination mandate for COVID-19 may be issued for children, faculty, and/or staff who are eligible and able to be vaccinated. See the Network’s <a href="#">guidance on COVID-19 vaccine mandates</a> for more information.</p>	<p>The Culver City (CA) Unified School District <a href="#">has issued a universal vaccination mandate</a> for teachers, staff, and students.</p>	<p>Washington’s governor <a href="#">requires that all school faculty and staff be vaccinated</a>.</p>
<b>Remote options and similar accommodations</b>	<p>For parents and students who are hesitant to return to in-person learning, some jurisdictions returning to in-person learning are providing an option for students to learn remotely.</p>	<p>Denver (CO) Public Schools’ <a href="#">remote learning program</a> allows specific groups of students—e.g., some students with IEPs and gifted and talented students—to choose to learn remotely.</p> <p>Kenai Peninsula (AK) Borough School District</p>	<p>California law requires schools to offer remote independent study to children whose “<a href="#">health would be put at risk by in-person instruction, as determined by the parent or guardian of the pupil</a>.”</p>



		provides an <a href="#">option for remote learning</a> at parents' choice.	
<b>Social-distancing requirements</b>	The <a href="#">CDC recommends</a> that distancing of at least three feet be maintained among students in classrooms when combined with masking and that at least six feet be maintained between students and faculty/staff (and between faculty and staff who are not fully vaccinated).	Chicago (IL) Public Schools <a href="#">has said</a> it will enforce three feet of distancing and <a href="#">is setting up</a> buses, classrooms, bathrooms, etc., to maintain social distancing.  Madison (WI) Metropolitan School District <a href="#">includes as a key practice</a> physical distancing of at least three feet (when possible), or six feet if a student cannot wear a mask.	The Washington State Department of Health <a href="#">requires distancing</a> of at least three feet in classrooms “to the degree possible and reasonable” but notes that distancing requirements should not prevent the offering of in-person learning to all students.
<b>Screening testing</b>	Screening testing involves identifying individuals—including those who are asymptomatic or presymptomatic—who have COVID-19. The <a href="#">CDC recommends</a> school screening testing at least once per week for non–fully vaccinated individuals in certain contexts.  Screening that does not involve testing and that consists of temperature checks or symptom checks, which the CDC offers as a strategy for <a href="#">bars and restaurants</a> and <a href="#">non-healthcare workplaces</a> , may also help schools identify symptomatic individuals who have COVID-19.	Los Angeles Unified School District <a href="#">requires testing for all students and employees</a> once per week.  Schohaire (NY) Central School District <a href="#">requires daily temperature checks and health questionnaires</a> for students and employees.	New Jersey <a href="#">requires all school employees to be tested weekly</a> if not vaccinated.  A Utah law <a href="#">requires a “Test to Stay” program</a> , requiring students to be tested in order to attend school in person once a certain case threshold has been met at the school.
<b>Contact tracing</b>	Timely identification of individuals who have been exposed to COVID-19 can aid in preventing its spread. <a href="#">The CDC recommends</a> that schools report cases to the applicable health department(s) and notify students, faculty, and staff who were <a href="#">close contacts</a> with a sick	The Kent County (MI) Department of Public Health <a href="#">has ordered schools</a> to provide to local public health, within one business day, information on close contacts in an educational setting.	The Virginia Department of Health <a href="#">states</a> that “[s]chools will be expected to assist health departments by providing information to identify <a href="#">close contacts</a> of a student or staff member who is



	<p>individual, in accordance with law. <a href="#">FERPA does not pose a barrier to schools' reporting cases to local health departments</a> under its "health and safety emergency" exception.</p>	<p>Baltimore County (MD) Public Schools has a <a href="#">contact-tracing protocol</a> that includes notification of close contacts.</p>	<p>suspected or confirmed to have COVID-19."</p>
<p><b>Isolation and quarantine requirements</b></p>	<p>Even if a school closure is not necessary or appropriate, the isolation of ill individuals and quarantining of exposed individuals can help mitigate COVID-19 transmission in schools. <a href="#">The CDC recommends</a> that close contacts who are not fully vaccinated quarantine for two weeks after exposure or follow an "acceptable alternative"; asymptomatic, fully vaccinated close contacts are not recommended to quarantine (though they should maintain masking for 14 days or until receiving a negative test result).</p>	<p>Douglas County (CO) School District <a href="#">requires</a> 10 days' isolation for individuals ill with COVID-19 and quarantine for individuals potentially exposed to an ill individual in a "higher risk" setting (does not include a routine classroom setting, especially if masks are worn).</p> <p>Cobb County (GA) School District <a href="#">recently changed its quarantine policy</a> from not requiring quarantine after a student was in contact with another student or employee with COVID-19 to requiring a 3-day quarantine.</p>	<p>The Washington State Department of Health has provided <a href="#">isolation and quarantine requirements</a> that K–12 schools must follow.</p>
<p><b>School closures</b></p>	<p>Ceasing in-person education when students, faculty, or staff become ill may be an important way to reduce community spread when it is likely that individuals are becoming or could become infected at school. Closure thresholds or other policies can be implemented to provide clear information to parents on closure protocols.</p>	<p>Fairfax County (VA) Public Schools <a href="#">plans state</a> that it will implement closure of an in-person class or school for public health reasons only if directed to do so by the local health department.</p> <p>The NYC (NY) Department of Education has a <a href="#">detailed plan</a> for closure of classes or schools based on certain thresholds.</p> <p>Lee County (KY) Public Schools <a href="#">recently closed</a> due to high COVID-19 case numbers.</p>	<p>Although during the 2020–21 school year many schools used case (and/or other) thresholds to determine whether a school should be closed, we have not found any schools utilizing such a strategy for the 2021–22 school year.</p>



## Authority to Implement Public Health Legal Interventions

Many different levels and branches of government can be involved in implementing (or prohibiting implementation of) public health legal interventions such as those described above. Determining which entities have legal authority in a given context generally depends on state law. A brief overview of the most probable potential sources of authority is included below.

### Federal Government

In the U.S., the federal government possesses only those powers which are enumerated in the Constitution, while states possess broad general powers to protect the public's health. Notwithstanding this substantial limit on federal powers, the [federal government's legal authority and leadership](#) during a global pandemic is significant and crucial.

In terms of its legal authority, the federal government can incentivize implementation of public health interventions by conditioning federal funding on compliance. Additionally, its ability to regulate interstate commerce allows it to regulate health and safety in some contexts; [this authority forms the basis](#) for the [CDC's public transportation mask order](#), which applies to school buses. The federal government also plays an important role as a protector of civil rights. For example, in response to President Biden's [memo](#) directing the U.S. Department of Education (ED) to assess available tools to ensure state governors and other officials are providing students an opportunity for in-person learning "without compromising their health or the health of their families or communities," the ED's Office of Civil Rights (OCR) [opened civil rights investigations](#) in five states (Iowa, Oklahoma, South Carolina, Tennessee, and Utah) on August 30. The investigations will examine whether "statewide prohibitions on universal indoor masking discriminate against students with disabilities who are at heightened risk for severe illness from COVID-19 by preventing them from safely accessing in-person education." OCR did not open investigations in four other states (Florida, Texas, Arkansas, or Arizona) because restrictions on universal masking requirements in schools were not currently being enforced due to court orders or other state actions. However, ED announced it will closely monitor the situation in those states.

Even when the federal government is not acting with legal authority, it can still influence state action. Recommendations from federal agencies can be persuasive and other levels of government may adopt them. For example, [some states](#) have adopted the CDC's COVID-19 school prevention strategies as their own.


### State Government

The states possess full "police powers" and therefore play a leading role in protecting the public's health, safety, and welfare, including in schools. State legislatures are constrained only by the federal and state constitutions and conflicting federal laws or agreements, and governors and state agencies have the authority that is provided to them by the state constitution and legislature.

State emergency management statutes generally grant governors authority to declare an emergency when certain criteria are met and to exercise expanded emergency powers for the duration of the emergency. [As early as March 15, 2020, all fifty states had declared an emergency of some kind](#), but [in some states](#) these emergency declarations have lapsed. Across the country, health departments and other state agencies continue to play a crucial role as well in state-level pandemic response efforts.

States are using their authority to both further and detract from the public health. For instance, some states [have prohibited](#) schools from enacting mask mandates, while others [have required](#) mask mandates. Other





states have established requirements to foster cooperation and data sharing between school districts and local health departments and with relevant communities. For example, a [California law requires](#) schools to report COVID-19 cases to their local health department, and [the Michigan health department has ordered](#) that any school notified by a local health department of a COVID-19 case associated with the school inform the school's community.

State-level [requirements and prohibitions](#) have been enacted by legislatures, governors, and state agencies, with the specific mechanism likely depending on where legal authority lies and where political will exists.

## Local Government

The powers of local government vary significantly among states and even within states. The local entities most likely to be involved in establishing COVID-19 school policies are local health departments and public school districts.

Local health departments (through their boards or health officers) possess varying levels of legal authority depending on state law, but they often have general responsibility and authority to protect public health within their jurisdiction and may be able to order schools within their jurisdiction to take certain actions.

Local school districts (through their boards or superintendents) may also have a responsibility to keep students safe as well as the legal authority to fulfill that responsibility.


Illustrating the local-level variation relating to [a single public health intervention within a single state](#), multiple Michigan [local health departments](#) have mandated masks in schools, while in other Michigan jurisdictions, mask mandates have come from [school boards](#) or [superintendents](#). In many Michigan communities, local health departments are encountering significant opposition to mask mandates from [local school districts](#), [other local leaders](#), and [state lawmakers](#).

## Conflicts among Different Government Actors

A significant challenge with implementing public health legal interventions in schools is that there are many relevant government actors—both at the same level of government and at different levels—that may or may not have legal authority to take a given action (depending on state laws) and that are or are not using the legal authority they do have. This legal context breeds confusion, finger-pointing, and gaps in action.

With regard to conflicts between state and local governments, which level(s) of government has authority to take a given action is jurisdiction specific; legal authority will likely differ among states and types of local entities. A key source of conflict is that some state legislatures and governors have acted to [limit local government authority](#), such as prohibiting localities from [issuing school mask mandates](#). Nonetheless, some localities have found potential loopholes to circumvent state-level limitations (e.g., [incorporating masks into school dress codes](#) rather than imposing a mask requirement; instituting masking as default while [allowing students \(through their parents/guardians\) to opt out](#) of wearing them), while others are directly contravening state-level bans, giving rise to legal challenges (see below).

Similarly, how state-level actors (e.g., governors, state agencies, legislatures) and local governmental actors (e.g., school districts, local health departments) interact with one another varies by jurisdiction. For example, at the state level, some legislatures have acted to [limit governors' or state health departments' powers](#) as a result of COVID-19. At the local level, there may be jurisdictional variation in terms of which local entities have



authority to implement legal interventions and, if multiple entities have authority, which entity's orders will take precedence if there is a conflict.

As previously discussed, conflicts between federal actions and state or local public health orders are most likely to emerge when the federal constitution, civil rights, or previous agreements (e.g., conditional federal funding) are implicated.

## Lawsuits

Legal challenges may arise in response to actions taken to prevent the spread of COVID-19 in schools and to a government's failure to take such actions. Some of the most fertile ground for lawsuits seems to be related to mask mandates and vaccination mandates.

### Mask Mandates


Litigation has picked up in recent weeks related to mask requirements in schools. In Arkansas, parents and a school district filed separate lawsuits against the state alleging that Arkansas's 2021 Act 1002, a legislative ban on mask requirements, put their children's health at risk. Plaintiffs sought a [temporary restraining order](#). On August 6, the cases were consolidated, and the court declared Act 1002 unconstitutional based on separation of powers and equal protection grounds and issued a preliminary injunction. The court [concluded](#), in part, that the act discriminated "without a rational basis, between minors in public schools and minors in private schools," because mask requirements were permitted in private schools.

Unfair discrimination against public schools was raised in a complaint filed in Arizona on August 12 against House Bill 2898, a budget reconciliation bill that, similar to Arkansas Act 1002, includes a prohibition on school districts requiring masks. Plaintiffs, including the Arizona School Boards Association and the Arizona Education Association, also allege that the legislation violates the state constitution's "[single subject rule](#)."

In Florida, parents filed a complaint and demand for [emergency injunctive relief](#) against the Governor's [Executive Order 21-175](#), which requires the state's Department of Health and Department of Education to execute rules that ensure that safety protocols for controlling the spread of COVID-19 in schools do not violate parents' rights to make healthcare decisions for their children. Governor DeSantis's office announced [the intention](#) that "[t]he Florida Department of Health . . . enter rulemaking in collaboration with the Florida Department of Education to protect parents' freedom to choose whether their children wear masks." Plaintiffs argue the order violates the Florida Constitution and exceeds the authority of the Department of Education. Attorneys for the governor filed a [motion to dismiss](#) the complaint on August 16. In an oral ruling on August 27, a [Florida judge enjoined](#) the Florida Department of Education and the Florida Board of Education from "taking any action to effect a blanket ban on facemask mandates with no parent opt-out by local school boards."

Finally, after multiple lawsuits were filed challenging Texas Governor Abbott's [Executive Order GA-38](#), which restricts school districts from requiring masks, on August 19 the Texas Education Agency issued [public health guidance](#) that included an update that enforcement of GA-38 was halted due to the pending litigation.

### Vaccine Mandates



Back-to-school vaccine mandate challenges to date have largely arisen in the university or college context. Still, [litigation has emerged challenging the legality and constitutionality of vaccine mandates](#), including a mandate that K–12 school employees be vaccinated. This litigation largely consists of arguments that vaccines subject to Emergency Use Authorization (EUA) cannot be mandated pursuant to constitutional protections and federal law. In the first university-related challenge making some of these arguments, [an Indiana federal district court upheld Indiana University’s COVID-19 mandate](#), concluding that it did not violate students’ 14<sup>th</sup> Amendment substantive due process right to bodily autonomy or 1<sup>st</sup> Amendment right to the free exercise of religion. The 7<sup>th</sup> Circuit subsequently [refused to block the district court’s decision pending appeal](#), and [the Supreme Court also refused to intervene](#) and block the mandate.

On August 23, 2021, [the Pfizer-BioNTech vaccine was fully approved by the FDA in persons aged 16 and older](#), which may potentially alleviate some of the EUA-specific legal arguments, though these arguments may persist in the context of younger age groups. Still, the Department of Justice’s Office of Legal Counsel published an [Opinion Letter on July 26, 2021](#), further clarifying that federal law permits EUA vaccine mandates. State-specific arguments and constitutional arguments continue to develop, and [at least one decision has temporarily blocked a mandate](#) on state law grounds.

## Additional Resources

State and local resources on schools and COVID-19 vary and can often be found on the websites for the state health and education departments and on local school district websites.

More in-depth information on how federal laws may protect the rights of students to learn in a healthy, fair environment can be found in the ED’s [FAQs regarding civil rights and school reopening](#), which “provides answers to common questions about schools’ responsibilities under the civil rights laws . . . [that] prohibit discrimination based on race, color, national origin, sex, disability, and age by state and local recipients of [f]ederal financial assistance.” These FAQs include topics such as how potential discrimination should be addressed and how required services should be provided during remote education as well as how certain COVID-19 prevention actions (e.g., mask mandates and physical distancing) should be implemented in regard to students with disabilities.<sup>1</sup> Additional [FAQs regarding services provided to students with disabilities](#) specific to the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) may also be helpful.

School faculty and staff can similarly find more information on their rights to a healthy, fair workplace in the U.S. Equal Opportunity Employment Commission’s [resources for employees](#) regarding their workplaces. One such resource is a [COVID-19 employee fact sheet](#) that provides information for employees who believe they are being harassed, need extra protection from COVID-19, are not being allowed to work, or need a modification of their employer’s safety requirements due to religion or a medical condition. Another is an [explanatory document on laws relevant to employees](#) (e.g., the Americans with Disabilities Act, the Rehabilitation Act, Title VII of the Civil Rights Act) that covers issues including employee disabilities, confidentiality of medical information, reasonable accommodations, furloughs and lay-offs, and vaccinations.





## SUPPORTERS



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<sup>1</sup> Additionally, for an argument on why bans on mask mandates may be discriminatory against individuals with certain disabilities, see [this article](#) from the JAMA Health Forum.