



Non-regulatory Guidance: Face Coverings

On Thursday, Aug. 12, 2021, the Kentucky Board of Education (KBE) issued [702 KAR 1:195E](#), Face Coverings in School Facilities. This emergency regulation, which was issued in light of the rapidly changing circumstances related to the COVID-19 pandemic, outlines provisions for the use of face coverings in all school facilities across the Commonwealth. This non-regulatory guidance document seeks to elaborate upon the regulation and provide support for schools and districts as they work to implement the new requirements.

Face Covering Requirements

702 KAR 1:195E requires that all individuals, including students, school employees, contractors and visitors wear a face covering that covers both the mouth and nose while inside school facilities. Superintendents are required to adopt procedures to implement and enforce the face covering requirements. Districts are required to provide no more than two face coverings to any individual entering a school facility without a proper face covering.

Face coverings are only required while inside a school facility when students are present. Face coverings may be removed for activities that occur outdoors.

This regulation does not override or replace the existing requirement for the use of a face covering on school buses or other forms of public transportation. This requirement is pursuant to the [public health order](#) issued by the U.S. Centers for Disease Control and Prevention (CDC).

The regulation will remain in effect for a maximum of 270 days. The KBE will convene a special meeting of the board to amend or revoke the regulation immediately upon the advice of the Kentucky Department for Public Health (KDPH) or the CDC that universal masking is no longer recommended in K-12 settings.

Definition of a Face Covering

702 KAR 1:195E defines a face covering as “a material that covers the nose and mouth to prevent respiratory droplets from being expelled into the air.” It goes on to specify that a face covering should be secured to the head with ties, straps or loops or be wrapped around the face. Additionally, face coverings must consist of two or more layers of breathable fabric (such as cotton, silk or linen), and may be factory made, homemade or improvised from household items.

Throughout the pandemic, the Kentucky Department of Education (KDE), the KDPH and the CDC have provided best practice guidelines for face coverings. Those guidelines include:

- Ensuring that face coverings are designed in a manner that does not encumber the user’s hands;
- Prioritizing fabric or procedural masks over medical grade N95 masks;

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- Cleaning reusable masks after each use;
- Avoiding masks with holes, grommets or valves; and
- Ensuring the face covering fits securely against the face and does not hang loose below the chin.

Throughout the pandemic, the use of free-hanging bandanas, neck gaiters or t-shirt collars lifted over the mouth and nose has been discouraged. These materials do not consist of two layers of protective fabric and do not fit securely against the face or wrap securely around the chin.

Exemptions from the Face Covering Requirements

The following individuals are exempted from the face covering requirements outlined in 702 KAR 1:195E:

- Children under the age of 2;
- Any person with a disability whose disability prevents the person from safely wearing a face covering, or any person with a physical or mental impairment documented by a medical professional as preventing the person from safely wearing a face covering;
- Any person who is deaf or hard of hearing and is actively communicating, or any person who is actively communicating with someone who is deaf or hard of hearing, and is able to maintain a distance of six (6) feet from individuals who are not members of the person's household;
- Any person engaged in work that a state or federal regulator has concluded would make wearing a face covering a risk to their health or safety;
- Any person who is seated and actively consuming food or beverage;
- Any person who is obtaining a service that requires temporary removal of the face covering in order to perform the service;
- Any person who is required to temporarily remove the face covering to confirm their identify for security or screening purposes;
- Any person who is giving a speech or broadcast to an audience and is able to maintain a distance of six (6) feet from all individuals who are not members of the person's household;
- Any person who is in a swimming pool or other body of water;
- Any person who is actively engaged in exercise;
- Any person who is engaged in a lawful activity where federal or state law prohibits wearing a face covering;
- Any person who is sleeping or unconscious, or who cannot otherwise remove the face covering on their own;
- Any person who is in an enclosed room and no other individuals are located inside the enclosed room, other than individuals who are members of the person's household.

KDE encourages school districts to develop policies or procedures to allow for the clear and consistent documentation of any necessary exemptions. Documented exemptions are protected

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information and should be maintained following the same procedures for any other information protected under the Family Educational Rights and Privacy Act (FERPA) or other district policies, such as personnel records. Exemption policies and procedures should be applied consistently across the district.

Considerations for Non-Compliance

702 KAR 1:195E requires superintendents to implement procedures to ensure face coverings are worn in school facilities as required by the regulation. School districts should review their existing board policies and develop new procedures as necessary to ensure compliance with the face covering requirements outlined in 702 KAR 1:195E. Districts should seek advice from their board counsel when crafting new policies. Potential solutions include:

- Treating a student infraction in the same manner as a dress code violation;
- Managing a staff infraction in the same manner as an insubordination violation;
- Denying access to indoor school facilities to non-essential visitors or contractors that refuse to comply with the regulation.

Schools and districts should implement the same exemptions set forth above for essential visitors, such as parents or guardians attending an Admissions and Release Committee (ARC) meeting. If these essential visitors do not meet one of the exemptions set forth above and are unwilling to wear a face covering, the school district should consider alternate means of meeting, such as video conferencing.

Considerations for Students with Disabilities

In order to prevent students with disabilities from potentially being inappropriately excluded from educational environments due to an inability to wear a face covering and to avoid implementing policies or procedures that may result in a denial of a free and appropriate public education (FAPE), the following nonregulatory guidance is provided to schools and districts about current state and federal guidance requiring face coverings, including allowable exemptions.

It is important to consider the unique needs of all learners. ARCs are responsible for ensuring each student with an Individualized Education Program (IEP) receives the specially designed instruction, supplementary aides and services, accommodations and modifications and any other support and related service necessary to provide a FAPE. Any changes to the IEP or Section 504 plan must be determined by the ARC or 504 team, with the input and involvement of the student's parent or guardian, based on individual data that supports the student's need for a specific service, support or accommodation.

Exemptions and Accommodations



In most cases, students with disabilities should be able to adhere to the requirements for face coverings. However, some students may have a sensory, behavioral or medical condition that prevents the student from safely wearing a face covering. In some instances, additional supports, or mitigation measures, will be needed for staff in order for students who cannot safely wear a face covering to access the curriculum. In other instances, depending on the student's unique circumstances, the student's ARC or 504 team may need to review the student's existing medical information and adjust accommodations accordingly. ARCs and 504 teams may wish to consider whether a student's needs can be met through appropriate accommodations.

For example, some students may be able to wear a face covering if they receive breaks throughout the day where they would be allowed to remove their face coverings. Other students may not be able to wear a face covering for a full school day, but may, through social narratives and other teaching strategies, be able to slowly increase their use and tolerance of a face covering over time. Exemptions from face covering policies or procedures and other face covering accommodations must be based on the individual needs of the student and not be made unilaterally or universally for all students with disabilities.

For students who are unable to safely wear a face covering, it is extremely important to layer the mitigation measures to ensure safety of the student and others. In-person learning should be prioritized, but students who cannot wear a mask due to their disability must not be denied services or disciplined for being unable to comply with mask requirements and must continue to receive instruction on a nondiscriminatory basis.

If a student's IEP accommodations include an exemption from face covering policies, the student's teachers must be notified. There may be additional staff in the building who also should be notified about the accommodation to prevent staff from attempting to enforce general face covering guidance when an exemption applies.

Planning and Intervention

Wearing a face covering is a skill that should be taught using effective instructional practices for students who struggle to wear a face covering. As with any new skill, teaching a student to wear face coverings requires identifying the student's baseline, providing direct instruction, selecting positive reinforcements, identifying benchmarks and monitoring progress toward the goal. Below are reflection questions that may be helpful when planning for individualized instruction.

- Has the student worn a face covering in school before?
- Can the student tolerate the face covering for any length of time or during any specific activity?
- What are the antecedents to the student removing the face covering?
- Why is the student removing the face covering (tactile sensitivity, perseveration, etc.)?
- Does the student have a consistent mode of communication to express the need to remove the face covering?

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- What approaches have led to the student’s success in the past and can they be applied to encourage the student to wear a face covering?

Direct instruction, modeling and practice are proven strategies that can assist a student to achieve appropriate use of a face covering.

Communication

School districts should always consider the communication needs of students with disabilities, but this is a particularly pressing concern when students and staff are wearing face coverings. Face coverings cover the mouth and may inhibit communication. School district leaders may wish to consider providing face coverings that include a clear panel to facilitate communication for students or staff who are deaf, hard of hearing, or who have speech or language disabilities. The Kentucky Commission on the Deaf and Hard of Hearing website has additional information on accommodations for communication and how to obtain clear face coverings . If clear face coverings are not an option, ARCs and 504 teams may wish to consider providing other accommodations for the student including alternate written forms of communication and closed captioning.

U.S. Department of Education’s Office of Civil Rights (OCR) and Denial of Services

The OCR has provided the following guidance document, [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#), which states: “Whether attending school in-person or remotely, students who cannot wear a mask due to their disability must not be denied services or disciplined for being unable to comply with mask requirements and must continue to receive instruction on a nondiscriminatory basis.” The OCR also states students should not be disciplined because they have a disability that impedes their ability to adhere to physical distancing requirements.

Additional Information

The KDE’s guidance to districts will continue to focus on the latest information from the CDC, KDPH and other public health and medical organizations in our ongoing effort to keep our students, teachers, staff and communities as safe as possible. More information on current safety recommendations and mandates for schools can be found in the [CDC’s Guidance for COVID-19 Prevention in K-12 Schools](#), the KDE’s [COVID-19 Updates and Information for P-12 Education](#) or the KDPH’s [Guidance for K-12 School Operations for In-Person Learning](#).



Considerations for Preschool Students

Most preschool and early child education (ECE) programs will have a mixed population of people who are fully vaccinated and people who are not fully vaccinated as preschool programs primarily serve children under 12 years of age who are not eligible for the COVID-19 vaccine at this time.

Below are a few strategies to support preschool students with the use of face coverings:

- Explain why the student must wear a face covering in simple language that is age appropriate.
- As preschool students may have not utilized face coverings previously, introduce how to use a face covering in a non-threatening atmosphere.
- Regular review about when and where wearing face coverings is appropriate and when they are not required (outdoors, while eating).
- Prepare for failures to adhere to face covering guidance. Students will need reassurance and gentle reminders about keeping face coverings on where appropriate.
- Provide a photo button of teachers and/or other students' faces to increase safe social interactions.
- Provide clear face coverings to allow for students to see adult faces.
- Use social media to highlight the use of face coverings.
- Encourage safe outside spaces to be used for specific instructional time where face coverings can be removed.
- Reward positive face covering use.
- Respond positively to students wearing face coverings.

Considerations for Religious Exemptions

Districts may receive requests for a religious exemption to the face covering requirement. These requests may be based on either federal or state law.

Requests for a religious exemption may cite the statutes below:

KRS 39A.100(4)(c) states: Nothing in this section shall be construed to allow any governmental entity to impose additional restrictions on the right of the people to worship, worship in person or to act or refuse to act in a manner motivated by a sincerely held religious belief.

KRS 39A.100(5)(b) states: Nothing in this section shall be construed to allow any governmental entity to impose restrictions on the right of the people to worship, worship in person or to act or

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refuse to act in a manner motivated by a sincerely held religious belief.

There is currently a temporary injunction (a judicial order that restrains a person from beginning or continuing an action) issued by the Franklin Circuit Court for these specific statutory provisions. An appeal was filed to overturn this injunction. However, as of the date of this guidance document, the injunction still is in place.

Individuals requesting religious exemption may cite the Boone Circuit Court case: *Ridgeway Properties, LLC, and Kentucky Attorney General v. Governor Andy Beshear* (Boone Circuit Court case no. 20-CI-00678). The court in that case issued an order (after Franklin Circuit Court) stating the governor shall follow House Bill 1 from the 2021 Regular Session (HB1) which includes the KRS 39A language cited above. The Boone Circuit Court case currently is on appeal as well.

These inconsistent orders produce a conflict in the law. The Kentucky Supreme Court currently is reviewing the constitutionality of KRS 39A.100 and will resolve the conflict and announce the law to be applied.

As for requests for religious exemption under federal law, religious objections to government actions are subject to review under the First Amendment's "free exercise" of religion provisions.

The United States Court of Appeals for the Sixth Circuit has jurisdiction over federal appeals arising from the states of Kentucky, Michigan, Ohio and Tennessee. The Court sits in Cincinnati, Ohio at the Potter Stewart United States Courthouse.^[1]

A case regarding religious exemptions to face covering under the First Amendment currently is pending in the Sixth Circuit Court of Appeals (*Resurrection School, et al. v. Elizabeth Hertel, In Her Official Capacity as the Director of The Michigan Department of Health and Human Services, et al.*). The Sixth Circuit heard oral arguments on this issue at the end of July 2021, and no ruling has been made yet.

When reviewing First Amendment cases of this type, courts typically utilize a balancing test between the asserted right and the public health risk. KDE is unaware of any court judgment or order that has sustained an objection to face covering because that objection is a fundamentally held belief of any religious denomination or belief system.

School districts are encouraged to seek the advice of board counsel in the event religious exemptions are sought. Currently, the Sixth Circuit Court of Appeals has not ruled on the pending issue and KDE is unaware of any court precedent requiring schools to provide religious exemptions to mandatory face coverings. Furthermore, the effectiveness of KRS 39A.100 is

^[1] <https://www.ca6.uscourts.gov/about-court>



pending before the Kentucky Supreme Court. Therefore, KDE is unaware of any absolute right to a religious exemption from required masks at this time.

Impact of the Action Taken by the Administrative Regulation Review Subcommittee (AARS)

On Aug. 17, 2021, the Administrative Regulation Review Subcommittee (ARRS) conducted a special meeting to review 702 KAR 1:195E. Legislative subcommittees review all administrative regulations pursuant to KRS Chapter 13A, the law governing promulgation of regulations. During its meeting, ARRS made a finding of deficiency for 702 KAR 1:195E. However, KRS 13A.330(2) provides:

If an emergency administrative regulation has been found deficient, the legislative committee finding it deficient shall transmit to the governor and the regulations compiler:

1. A copy of the finding of deficiency and other relevant findings, recommendations or comments; and
2. A request that the governor determine whether the emergency administrative regulation shall:
 - a) Be withdrawn;
 - b) Be amended at a legislative committee meeting pursuant to KRS 13A.320 to conform to the finding of deficiency; or
 - c) Remain effective as established in KRS 13A.190(4) notwithstanding the finding of deficiency.

Following the ARRS finding of deficiency, the governor determined pursuant to KRS 13A.330(2) that the regulation remain effective. As such, 702 KAR 1:195E remains in effect as filed.