



Face Covering Requirements for the 2021-22 School Year

Presented by:
Sloan Simmons

Turlock Unified School District
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Overview

Sloan R. Simmons is a Partner in Lozano Smith's Sacramento office and co-chair of the firm's Litigation Practice Group. His areas of expertise are civil rights and all forms of school district and public agency trial court litigation and appeals, as well as student issues. Mr. Simmons' years of experience on student issues for school districts of all sizes and in all regions of the state has resulted in his expertise in nearly all student related matters. Mr. Simmons was named a Top Lawyer in Schools & Education by Sacramento Magazine in 2020.

Presenter Experience

Mr. Simmons has presented on the intersection of student free speech and other constitutional and statutory rights, discipline, and the technology and several other issues before the California School Boards Association (CSBA), Association of California School Administrators (ACSA), California Small School Districts' Association (SSDA), California Association of Supervisors of Child Welfare and Attendance (CASCWA), and the California County Superintendents Educational Services Association (CCSESA).

Significant Cases

- In *Anderson Union High School District v. Shasta Secondary Home School* (2016) 4 Cal.App.5th 262, Mr. Simmons was part of the Lozano Smith litigation team that successfully argued, in a case of first impression, that the geographic and site limitations of the Charter Schools Act (Ed. Code, § 47600 et seq.) are applicable to all charter schools, including "nonclassroom-based" programs.
- In *Newark Unified School District v. Superior Court* (2015) 245 Cal.App.4th 887, Mr. Simmons successfully obtained appellate writ relief in an opinion where the Court of Appeal held that a public entity may seek the return of and "claw back" documents protected by the attorney-client privilege that are inadvertently disclosed in a response to a Public Records Act request, establishing new precedent on this issue of first impression.
- In *Nathan G. v. Clovis Unified School District* (2014) 224 Cal.App.4th 1393, Mr. Simmons successfully defended the district's involuntary transfer of student to continuation high school and obtained first published opinion interpreting the involuntary transfer statute, appropriate level of review under same, and the nature of other means of correction necessary before imposing an involuntary transfer.
- In *Rimando v. Alum Rock Union Elementary School District* (9th Cir. 2009) 356 Fed.Appx. 989, Mr. Simmons successfully argued that a California public school district is a "State employer" for purposes of the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) and consequently suits against school districts under USERRA must be filed in state court, a decision which is the first of its kind in the Ninth Circuit.

- In *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, Mr. Simmons assisted school district in invalidating audits of several state mandated cost reimbursement claims worth more than \$30 million, based upon the use of invalid, underground auditing documentation rule by the State Controller's Office.
- Mr. Simmons conducted briefing preparation on the published decision *Alex G. v. Board of Trustees* (E.D. Cal. 2005) 387 F.Supp.2d 1119, successfully defending against section 504 and ADA discrimination and retaliation claims in the special education context.
- Mr. Simmons also prepared briefing for *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, in support of the City of Los Angeles on behalf of amicus curiae the League of California Cities and the California State Association of Counties, which is one of several federal and state cases in which Mr. Simmons has prepared amicus curiae briefs.
- In *A.A. v. Raymond* (E.D. Cal. July 22, 2013) 2013 WL 3816565, assisted in successfully defeating a bid to halt school closures by way of preliminary injunction, where the district court agreed that plaintiffs were unlikely to succeed on the merits of their equal protection, American Disabilities Act, and due process claims challenging the school closures.

Articles

Mr. Simmons' article "*Disciplining Students for E-Communications*" was published in the Daily Journal in January 2010. His February 2012 article "*What's Next in ACLU's Student Fee Case*" was also published in the Daily Journal.

Education

While attending law school he received the honor of Outstanding Oral Advocate, was selected as a member of the Order of the Barristers, and as a member of the University of California, Davis, National Moot Court Team. He also held the position of Senior Articles Editor for the 2002-2003 and co-chaired the law school's Advocates for the Rights of Children student organization. As an undergraduate, Mr. Simmons presented his Honors Thesis, "Justice William J. Brennan Jr.: Bringing Justice to Education" at the 2001 Western Regional Honors Conference.

WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, San Luis Obispo, Los Angeles, and San Diego.

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COST CONTROL is important for public agencies and an area we have mastered. We recognize and understand your financial restraints and work tirelessly to provide the best legal representation with those limitations in mind. One of the best ways we keep legal costs to a minimum is through strategic, preventive legal services. These include Client News Briefs to keep you updated on changing laws affecting education. In addition, we offer extensive workshops and legal seminars providing the tools needed to minimize liability, reducing the need for legal assistance down the road.

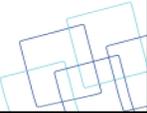
CLIENT SERVICE is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice. Client calls are systematically returned within 24 hours and often sooner when required.

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Overview

- CDPH Mandatory Guidance
- Face Covering Exemptions and Protocols
- Anticipated and Potential Consequences for Non-compliance
- Recent Litigation
- New Guidance?

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COVID-19
Guidance for
Schools

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Obligation to Follow Public Health Orders

Last school year, public health orders, directives, and guidance were legally mandated due to language contained within Governor executive orders issued under the California Emergency Services Act (“ESA”).

Many COVID-19 related requirements, including the requirement to follow public health orders, directives, and guidance were rescinded by the Governor in June 2021.

These were replaced by a State Public Health Officer order issued on June 11, 2021, that became effective on June 15, 2021 with no expiration date.



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Obligation to Follow Public Health Orders

The **State Public Health Officer** has authority under the Health and Safety Code to take measures as may be necessary to prevent the spread of a communicable disease.

The **CDPH** has authority under the Health and Safety Code to adopt and enforce regulations requiring strict or modified isolation or quarantine if necessary to protect public health from a contagious, infectious, or communicable disease.

Local health officials have authority under the Health and Safety Code to issue orders deemed necessary to control the spread of a communicable disease.



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June 11, 2021 State Public Health Officer Order

Requires all individuals to follow:

1. The CDPH face covering guidance;
2. The CDPH mega events guidance; and
3. Any amended guidance for K-12 schools



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Hierarchy of Public Health Orders and Guidance

CA Health Officer Order
Local Health Officer Order
School-specific Recommendations from CDPH and Local County Health

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2021-22 CDPH School Guidance

On July 12, 2021, CDPH released COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year.

- Students **must** wear face coverings indoors.
- Adults **must** wear face coverings whenever sharing indoor space with students.
- These requirements are subject to exemptions.

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Exemptions and Protocols

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Face Covering Exemptions (May Still Need to Wear Face Shield with Drape)

- Children younger than 2 years old
- Persons with a medical condition, mental health condition, or disability that prevents wearing a mask
- Persons who are hearing impaired or communicating with a person who is hearing impaired, and the ability to see the mouth is essential for communication
- "In limited situations where a face covering cannot be used for pedagogical or developmental reasons"



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Face Covering Protocols

The 2021-22 CDPH School Guidance provides that "[s]chools must develop and implement local protocols to provide a face covering to students who inadvertently fail to bring a face covering to school to prevent unnecessary exclusions" and "schools should offer alternative educational opportunities for students who are excluded from campus because they will not wear a face covering."

CDPH and CDE have provided no guidance on what these protocols should look like and how to address existing legal requirements and fiscal impacts of other alternative programs like independent study.



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Consequences of Not Enforcing Mandate

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Anticipated and Potential Consequences of Not Following Law

Includes, but not limited to:

- Liability exposure (student and staff claims)
- Misdemeanor charges
- Public health order to close school(s)
- Loss of future COVID-19 related public funding
- Parent, staff, and student concerns about safety
- Cal/OSHA investigation



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Recent Litigation

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Schools May Be Treated Differently by Health Orders

Ninth Circuit decision regarding reopening restrictions: *Brach v. Newsom* (July 23, 2021)

The Court held that the State's (CDPH) restrictions on schools, even though they were different in scope and severity from other businesses and entities, were rational to justify keeping schools closed.

This decision may be used to justify CDPH face mask regulation, which is arguably less severe a restriction than school closure.



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Open Schools California / Let Them Breathe Lawsuit

Lawsuit by parent groups against the State filed in San Diego County.

- Advocates for mask choice.
- Expresses concerns about student anxiety and depression due to the pandemic.
- Provides citations to scientific studies about the risks and issues with masks for children, including low risk of transmission between children.

CDPH responded publicly to the lawsuit by stating: “the data and science is unequivocal — there’s no substitute for in-person instruction, and California’s COVID-19 prevention strategies are the best way to fully open our schools while protecting students and staff.”



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New Guidance

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July 27, 2021 CDC Guidance

CDC issued new guidance, stating that fully vaccinated individuals should, “[t]o maximize protection from the Delta variant and prevent possibly spreading it to others, wear a mask indoors in public if you are in an area of substantial or high transmission.”

CDC also updated its K-12 Schools guidance and added a recommendation to implement “universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.”

Although the District is not required to follow CDC guidance, this likely will affect subsequent CDPH guidance.



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New CDPH Guidance Expected

CDPH has indicated that it may update its guidance based on any further CDC changes to its K-12 guidance and/or prior to November 1, 2021.

It is unclear whether CDPH will issue further guidance changes in light of the rise of Delta variant cases and/or the push from some school district communities advocating for more local discretion based on local conditions.



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Questions



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Takeaways

- Follow CDPH and local county orders – these are legal requirements and failure to adhere to them may result in consequences.
- Set a good example for kids by directing community concerns to the source of the laws.
- Train staff on face mask protocols.
- Limit visitors on campus and ensure they follow health and safety rules.
- Be on the lookout for new guidance soon.



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