



1851 CENTER FOR CONSTITUTIONAL LAW

August 13, 2020 Order Forcing Masks on School Children is Largely Unenforceable

Columbus, OH - The August 13, 2020 *Director's Order Requiring the Use of Facial Coverings in Child Education Settings* should be viewed as advisory rather than mandatory: parents and schools remain free to decide the path forward for themselves.

At first glance, the Order appears exceptionally broad and intrusive applying not just to “school buildings,” but “at all times” to “any child care setting” and thus to Ohioans’ private homes.

However, mindful parents, children, and schools may avoid the facial covering mandate by taking advantage of any one of its vague and poorly-written exemptions:

1. Any child with **any medical condition** is exempt from the Order. Notably, the grammar of this exemption does not limit it to respiratory conditions alone.
2. Facial coverings may be removed **when “necessary for instructional purposes.”** Notably, there is no standard for determining necessity.¹
3. Facial coverings need not be worn **when “a mask break is deemed necessary by the educator** supervising the educational setting.” Notably, there is no limit on the timing or duration of any “mask break.”
4. Facial coverings need not be worn **“when an established sincerely held religious requirement exists** that does not permit a facial covering.” Notably, the religious belief giving rise to the objection may be that of the school, the parent, or the child.²

These exemptions are particularly broad when considering that (1) the Ohio Supreme Court requires that any ambiguity in the text of a regulation must be construed against the administrative agency that drafted that regulation; and (2) the State provides no administrative hearing or appeals process for determining the validity of these exemptions.

Further, penalizing a school, parent, or child for failing to meet one of the foregoing exemptions, would result in a flurry of further constitutional problems:

1. **Violation of Separation of Powers.** In several prior 1851 Center cases, Ohio courts have concluded that the Director of Health lacks the authority pursuant to the statute the Director relies upon again here (R.C. 3701.13) to impose any penalties for non-compliance with his sweeping health orders. See *Rock House v. Acton*, *Kalahari v. Acton*, *Cattlemans Restaurant v. Ashtabula County Health Department*.³

¹ Montessori education, as just one example, requires educators to observe the facial expressions of children.

² For instance, practicing Christians are entitled to assert that God has given authority to Christian parents alone to shepherd, discipline and protect their families. See *Deuteronomy 6:6-9*, *2 Samuel 12:16*, *Proverbs 22:6*, *29:15-17*, *John 4:46-54*, *Ephesians 6:4*, *1 Timothy 5:8*. As such, Christians are unable to relinquish to governmental authorities this God-given decision-making authority to care for the entire well-being of their children. And Christian schools are obliged to honor the choice parents make in exercising this dominion.

³ Each of these decisions is available online at www.OhioConstitution.org.

2. **Violation of Parental Rights.** The Ohio Supreme Court has long-acknowledged that “[p]arents enjoy a well-established legal right to make important decisions for their children,” and “the State is simply not an adequate surrogate for the judgment of a loving, nurturing parent.”⁴ The liberty interest infringed upon when overruling the educational and health choices parents make for their children—“the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by the U.S Supreme Court.”⁵
3. **Violation of the Right to Bodily Integrity and Autonomy.** In *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, the Ohio Supreme Court held that “[t]he right to refuse medical treatment” is “rights inherent in every individual,” and Section 1, Article I of the Ohio Constitution ensures that every Ohioan is provided with “personal security, bodily integrity, and autonomy.”⁶
4. **Violation of the Right of Religious Conscience.** The Ohio Constitution contains a section devoted entirely to the freedom of religion: “All men have a natural and infeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted.” See Section 7, Article I. The Supreme Court of Ohio has determined that the Ohio Constitution's Free Exercise Clause “goes beyond that provided by the federal Constitution's Free Exercise Clause.” *Humphrey v. Lane*, 89 Ohio St.3d 62, 67, 2000-Ohio-435 (“the standard for reviewing a generally applicable, religion-neutral state regulation that allegedly violates a person's right to free exercise of religion is whether the regulation serves a compelling state interest and is the least restrictive means of furthering that interest”).
5. **Violation of the Right to Procedural Due Process.** The Ohio Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest. *State v. Hochhausler*, 1996-Ohio-374. Despite the important liberties at stake, the Director’s Order masking others’ children provides no opportunity for a hearing when access to an exemption is denied.

Ohio schools and parents are entitled to disobey the general rule requiring masking by utilizing one of the foregoing exemptions, and if unsuccessful, exercising their constitutional rights. Ohioans threatened with penalties for noncompliance with the Director’s Order Masking School Children, *after thoroughly attempting to exercise one of the exemptions above*, should email us.

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[The 1851 Center for Constitutional Law](#) is a nonprofit, nonpartisan legal center dedicated to protecting the constitutional rights of Ohioans from government abuse. The 1851 Center litigates constitutional issues related to property rights, regulation, taxation, and searches and seizures.

⁴ *In re Guardianship of Stein*, 105 Ohio St.3d 30, 2004 -Ohio- 7114 (“Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made, and that a court must accord ‘special weight’ to a fit parent’s determination of the child’s best interests.”⁴

⁵ See *Troxel v. Granville*, 530 U.S. 57 (2000)(so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children”). More than 90 years ago, in *Meyer v. Nebraska*, the Supreme Court held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). Two years later, in *Pierce v. Society of Sisters*, the Court again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control,” explaining that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” 268 U.S. 510, 534–535 (1925).

⁶ 90 Ohio St. 3d 176, 180-81 (2000).