



NJSBA Frequently Asked Questions on EO 251 and 253

Recently, Governor Murphy signed two executive orders that will have an impact on operations for the 2021-2022 school year. On August 6, 2021, he issued EO 251 concerning the-wearing of masks in schools. August 23, 2021 issued EO 253 requiring the vaccination or testing of those who work in the schools. Below is a brief FAQ summarizing the requirements and providing guidance for board members:

1. What is [Executive Order 251](#)?

Executive Order 251 (EO 251) requires “All public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools (collectively “school districts”), must maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises” with certain exceptions.

2. What are the exceptions to the masking requirement?

EO 251 contains the following exceptions to the masking requirement:

- a. When doing so would inhibit the individual’s health, such as when the individual is exposed to extreme heat indoors;
- b. When the individual has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove a face masks without assistance;
- c. When a student’s documented medical condition or disability, as reflected in an Individualized Education Program (IEP) or Educational Plan pursuant to Section 504 of the Rehabilitation Act of 1973, precludes use of a face mask;
- d. When the individual is under two (2) years of age;
- e. When the individual is engaged in activity that cannot physically be performed while wearing a mask, such as eating or drinking, or playing a musical instrument that would be obstructed by a face mask;
- f. When the individual is engaged in high-intensity aerobic or anaerobic activity;
- g. When a student is participating in high-intensity physical activities during a physical education class in a well-ventilated location and able to maintain a physical distance of six feet from all other individuals; or
- h. When wearing a face mask creates an unsafe condition in which to operate equipment or execute a task.

3. If a student is seeking a medical exemption from the mask mandate, what documentation is needed?

Per section 9 of EO 253, districts must require individuals seeking a medical exemption from mask wearing to produce written documentation from a medical professional to support the exemption. Self-attestations and parental attestations are not sufficient for this purpose.

4. While there is the medical exception in (a), (b) and (c) above, is there any exception to the masking requirement for religious reasons?

There is no language in EO 251 that specifically provides an exception to the masking requirement for religious reasons. NJSBA is aware of a federal court case concerning Michigan's mask mandate that also had no specific exception for religious reasons. In [*Resurrection School v. Hertel, No. 20-2256 \(6th Cir. 2021\)*](#), the federal U.S. 6th Circuit Court of Appeals ruled that the district court properly denied an injunction against Michigan's masking requirements. The court of appeals rejected the challenge to the Michigan requirements saying that Michigan's masking requirement was neutrally applied, rationally related to a legitimate government purpose, and did not discriminate against the plaintiffs on a religious basis. However, this Michigan decision has no precedential value here in New Jersey. NJSBA is currently unaware of any New Jersey federal or state courts that have issued a ruling concerning EO 251's interaction with the free exercise clause of the U.S. Constitution. If a district is presented with a parental request for a student to be exempt on a religious basis from New Jersey's mask requirement, the board attorney should be contacted.

5. What happens if a student or a staff member comes to school without wearing a mask?

If a student or staff member comes to school without a mask, they should be offered a mask from the district [supply of free masks that has been provided](#) by the New Jersey Office of Emergency Management. If the issue is not that a mask is lost, damaged or forgotten, but is an issue of mask refusal, then the board attorney should be consulted. Since EO 251 requires that boards adopt a policy on masking, a refusal to wear a mask would be a violation of district policy. For students, a violation of policy would be addressed by the district's student code of conduct. For employees who refuse to wear masks, such infractions can be addressed by the employee discipline policies and the collective bargaining agreement.

6. Does EO 251 apply to board meetings and other activities in the school that are held beyond the instructional day?

EO 251 says: "All public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools (collectively "school districts"), must maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises." EO 251 contains no language that limits the masking requirement to the instructional day only. The NJDOE has indicated to the NJSBA that the masking requirement applies anytime the school building is occupied, including board of education meetings. NJSBA is aware of only one exception to the masking requirement. On October 19, 2021, the State Director of Emergency Management issued Administrative Order 2021-3 which temporarily excludes spaces in the schools used as polling places for the upcoming General Election on November 2 from the definition of "the indoor portion of school district premises" as used in EO 251. Note this is a temporary exception for November 2 only. For further information, contact your board attorney.

7. Do board members need to wear masks at board meetings and other times when they are in the building?

Yes. The NJDOE has indicated to the NJSBA that mask should be worn by board members whenever they are in the building. EO 251 does not contain language creating an exception for individuals based on their status as board members.

8. How is EO 251 enforced?

First, EO 251 says: “It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies... to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.” EO 251 continues: “No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.”

Second, failure to follow an executive order is a violation of law, with monetary fines and imprisonment if convicted. Specifically, violation of executive orders is a disorderly persons offense punishable by up to 6 months imprisonment or a fine of up to \$1000 or both at the discretion of the court. It is also a violation to aid someone in violating an executive order. *N.J.S.A. App. A:9-49 and -50*. Please consult with the board attorney for further details.

9. What is [EO 253](#)?

Executive Order 253 requires that boards adopt a policy “that requires all covered workers to either provide adequate proof to the covered setting that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly.”

10. What is a “covered worker?”

According to EO 253, a “covered worker” shall include all individuals employed by the covered setting, both full and part-time, including, but not limited to, administrators, teachers, educational support professionals, individuals providing food, custodial, and administrative support services, substitute teachers, whether employed directly by a covered setting or otherwise contracted, contractors, providers, and any other individuals performing work in covered settings whose job duties require them to make regular visits to such covered settings, including volunteers. Covered workers do not include individuals who visit the covered setting only to provide one-time or limited duration repairs, services, or construction.

11. What is a covered setting?

A covered setting is all public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools.

12. When does the vaccination/testing requirement begin?

The requirement takes effect on October 18, 2021.

13. Are board members included in Executive Order 253?

No. The NJDOE has indicated to the NJSBA that EO 253 was not intended to apply to board members.

14. Could a board include itself in the district vaccination and testing program?

Yes. The policy required by EO 253 establishes minimum standards. A board may, by policy, include itself in the vaccination/testing program with one key difference. A board will not be reimbursed by the state for the testing of its own members because they are not included in the definition of “covered employees” in EO 253.

15. How does a covered employee show that they have been vaccinated?

EO 253 permits employees to show:

- a. CDC COVID-19 Vaccination Card or electronic or physical copy of the same;
- b. Official record from the New Jersey Immunization Information System (NJIS) or other State immunization registry;
- c. A record from a health care provider’s portal/medical record system on official letterhead signed by a licensed physician, nurse practitioner, physician’s assistant, registered nurse or pharmacist;
- d. A military immunization or health record from the United States Armed Forces; or
- e. Docket mobile phone application record or any state specific application that produces a digital health record.

If a district is collecting a copy of the vaccination record, it must make sure that it complies with all applicable federal and state privacy laws.

16. What are the testing requirements under EO 253?

To satisfy the testing requirement, a covered worker must undergo screening testing at minimum one to two times each week. Where a covered setting requires an unvaccinated covered worker to submit proof of a COVID-19 test, the worker may choose either antigen or molecular tests authorized by the U.S. Food and Drug Administration (“FDA”) or are operating per the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services. Where a covered setting provides the unvaccinated covered worker with on-site access to COVID-19 tests, the covered setting may similarly elect to administer or provide access to either an antigen or molecular test. If the covered worker is not working on-site in the covered setting during a week where testing would

otherwise be required, the covered setting's policy need not require the worker to submit to testing for that week. This requirement shall not supplant any requirement imposed by the covered setting regarding diagnostic testing of symptomatic workers or screening testing of vaccinated workers. Covered settings must have a policy for tracking test results from testing required by this Order and must report results to local public health departments.

17. Who pays for the testing of covered workers?

The state [will pick up the cost](#) for the testing of workers until funds are exhausted and then local districts will pay for the remainder. Districts may use appropriate federal funds for this purpose.

18. May districts establish more stringent requirements than those in EO 253?

Yes. A district may establish more stringent requirements, per [section 7 of EO 253](#).

19. What are the labor relations implications of EO 253?

Because EO 253 has the force of law, all districts must implement the provisions of the executive order. However, districts would be under an obligation to negotiate the impact of the vaccination/testing program that is implemented. In a recent case, [Wayne v. Policeman's Benevolent Association Local 136, Dkt. No. CO-2022-032 \(PERC Aug. 27, 2021\)](#) the Public Employment Relations Commission dissolved temporary restraints issued against the municipality's implementation of a mandatory vaccination policy. PERC noted that the municipality had the right to implement such a policy, but also noted that the municipality would have a duty to negotiate the impact of the policy upon receiving a request to do so from the union. In another recent case, [I.M.O City of Newark](#), the Appellate Division held that the city need not engage in any negotiations concerning the implementation, timing, or enforcement of the city's vaccination mandate. Although neither of these cases concern EO 253 directly, boards may find the reasoning in each case to be instructive. Boards of education should consult with their board attorney concerning the impact of EO 253 on their collective bargaining agreements.

20. What are the penalties for violations of EO 253?

First, EO 253 says: "It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies... to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order." EO 253 continues: "No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement."

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