RELIGIOUS OBJECTIONS TO COVID-19 PROTOCOLS

By Lisa F. Tanselle, Esq., General Counsel

As the number of positive cases of COVID-19 increases in our schools, school boards across the state are debating whether to impose mask mandates. Many school boards have already taken this measure to protect the health and well-being of students and employees and to keep students in school as much as possible. Others are still considering the necessity to implement such a mandate.

For those school corporations that have elected to require students to wear masks while at school, school administrators are now receiving letters from parents advising administrators of religious objections to a mask mandate, thereby seeking an exemption to wearing a mask. While many believe having a religious objection to the mandate automatically exempts them from it, as explained below, school officials have the discretion to approve or deny these requests.

STATE LAW

Some assert that IC 20-34-3-2 exempts students from wearing masks if a parent expresses a religious objection in writing, signs the paper or form that asserts the objection, and delivers it to the school principal. It is true that this statute exempts students from certain immunizations, medical tests, and/or treatments based on a parent's religious objection, but it does not exempt a student from wearing a mask. The statute speaks specifically about exemptions for (1) immunizations required under IC 20-34-4, such as diphtheria, pertussis, mumps, and measles, and (2) testing, examination, and treatment under IC 20-34-3. The tests referred to in this chapter, i.e. IC 20-34-3, include vision tests, hearing tests, sickle cell anemia tests, and lead poisoning tests.

Clearly, the General Assembly has decided to allow parents to have their children exempted from these specific health measures. However, the wearing of a mask is not an immunization, medical test, examination, or treatment specified under either of these two chapters, and therefore this statute does not allow a parent to have a child exempted from a mask mandate.

CONSTITUTIONAL LAW

In absence of a state statute providing a religious exemption to wearing a mask in school, school officials need to recognize the right granted by the First Amendment to the U.S. Constitution to all citizens to freely exercise their religious beliefs. The Free Exercise Clause, as it is commonly known, guarantees a person the right to believe and profess whatever religious doctrine he/she desires.[1] Because of these religious guarantees, persons may not be compelled to engage in conduct that violates their religious beliefs.[2]

Yet the courts have also concluded that the right to freely exercise one's religious beliefs does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that a person's religion proscribes (or prescribes). In such cases, the government may be able to demonstrate sufficient interests that outweigh a person's freedom of religion. Where the burden on religious beliefs is substantial, the government must demonstrate a compelling interest in application of the law. In cases where the law has an incidental effect on a person's religious beliefs, the government need only show a rational basis for it.

In the well-known case of Wisconsin v. Yoder,[3] the U.S. Supreme Court invalidated Wisconsin's compulsory attendance law as applied to Amish parents who refused on religious grounds to send their children to school beyond the 8th grade. The parents argued that the law compelled them, under the threat of criminal sanction, to perform acts contrary to their religious beliefs. The Supreme Court recognized the state's interest in education for its citizens and the fact that the compulsory attendance law applied to all and did not discriminate against religion or a particular religion, but concluded the law unduly burdened the religious beliefs of the Amish parents.

In a Texas case,[4] a student objected to the school's requirement

25 YEARS

SERVING INDIANA EDUCATION










GIBRALTAR

DESIGN

architects · engineers · interior design

to wear a name badge with a radio frequency identification chip for religious reasons. The school offered to remove the chip as an accommodation to the student, but she still refused to wear the badge. The student and her father filed a motion for a preliminary injunction against the school, but it was denied. The district court concluded the government rule in this case was neutral and of general applicability and had an incidental effect of burdening a particular religious practice. Thus, the school needed only to prove that the rule was rationally related to a legitimate government interest to survive a constitutional challenge. Finding that the school had a legitimate need to easily identify its students for purposes of safety, security, attendance, and funding, the court concluded the school had a rational basis for requiring students to wear the badges with the chip. The court went on to say that the student failed to show that wearing the badge imposed a substantial burden on the observation of a religious belief and that, even if she had, the school's interest in the safety and security of its students and educators was a compelling governmental interest that justified compliance with the mandate.[5]

While not a school case, a few years ago an Indiana court had to engage in this balancing test in the case of Cosby v. State.[6] A police officer pulled over a motorist for excessive speed. The motorist did not have a valid driver's license and was charged with and subsequently convicted of driving a vehicle without a license. Before the Indiana Court of Appeals, the driver asserted that he was driving to church when he was arrested and therefore his conviction violated his constitutional right to worship. The court opined that the law requiring a person to obtain a driver's license in order to drive motor vehicles on public highways was a neutral law of general applicability and that the law was enacted for reasons of public safety and not to interfere with persons' rights to travel to their chosen place of worship. Thus, the court concluded the driver's free exercise of religion rights were not infringed by the conviction.

RECENT COURT DECISION RELATED TO COVID RESTRICTIONS

Over the past year, as the coronavirus pandemic spread throughout the United States, we witnessed many governors and state legislative bodies address the public health emergency in a variety of ways. In September 2020, the Michigan Department of Health and Human Service ordered all persons in the state to wear face masks in indoor public settings, including students in grades K-5 who attended public and private schools.

A private religious school and two parents with children enrolled in the school sued the Department, alleging that the order violated their rights to free exercise, equal protection, substantive due process, freedom of speech, and freedom of religion. The principal of the private school asserted that the mask requirement violated the school's sincerely held religious beliefs because it interfered with the school's religiously oriented disciplinary policies. The parents asserted that the mask mandate conflicted with their right to choose a school for their children that corresponds to their own convictions. The district court denied the school's motion for a preliminary injunction. The court found that the order was neither motivated by animus against people of faith nor limited to regulating only religious activity and thus concluded the order was neutral and generally applicable because it applied to all individuals over the age of 5. The court further found that the exceptions to the order were narrow and discrete, and apply to public and private schools equally, and apply to secular schools and religious schools equally. Thus, the district

Anthem BlueCross BlueShield

Bringing easier back to your plan and your life

Building better tools to help employees get healthier, faster

We know that sometimes things can get a bit complicated when it comes to getting healthy and managing a health plan. That's why we're creating solutions with "easier" in mind.

Here's how our solutions are making things easier to manage:

- **Mobile Health app.** Find an urgent care clinic, see ID cards, check claim status and get appointment reminders.
- **LiveHealth Online.** See a doctor 24/7 using a smartphone, tablet or computer with a web cam.
- **Find a doctor and Estimate your costs tools.** Find health care providers and get an idea of how much care may cost.

Our solutions are more than just health tools. They're designed to help your employees get the care they need, when they need it. So they can get back to work faster, healthier and at a cost that makes better sense for you and them.

Talk to your broker today or visit **anthem.com** for more information.

Anthem Blue Cross and Blue Shield is the trade name of: In Colorado: Rocky Mountain Hospital and Medical Service, Inc. HMO products underwritten by HMO Colorado, Inc. In Connecticut: Anthem Health Plans, Inc. In Indiana: Anthem Insurance Companies, Inc. In Kentucky: Anthem Health Plans of Kentucky, Inc. In Maine: Anthem Health Plans of Maine, Inc. In Missouri (excluding 30 counties in the Kansas City area): RightCHOICE® Managed Care, Inc. (RIT), Healthy Alliance® Life Insurance Company (HALIC), and HMO Missouri, Inc. RIT and certain affiliates administer non-HMO benefits underwritten by HALIC and HMO benefits underwritten by HMO Missouri, Inc. RIT and certain affiliates only provide administrative services for self-funded plans and do not underwrite benefits. In Nevada: Rocky Mountain Hospital and Medical Service, Inc. HMO products underwritten by HMO Colorado, Inc., dba HMO Nevada. In New Hampshire: Anthem Health Plans of New Hampshire, Inc. HMO plans are administered by Anthem Health Plans of New Hampshire, Inc. and underwritten by Matthew Thornton Health Plan, Inc. In Ohio: Community Insurance Company. In Virginia: Anthem Health Plans of Virginia, Inc. trades as Anthem Blue Cross and Blue Shield in Virginia, and its service area is all of Virginia except for the City of Fairfax, the Town of Vienna, and the area east of State Route 123. In Wisconsin: Blue Cross Blue Shield of Wisconsin (BCBSWi), underwrites or administers PPO and indemnity policies and underwrites the out of network benefits in POS policies offered by Compcare Health Services Insurance Corporation (Compcare) or Wisconsin Collaborative Insurance Corporation (WCIC). Compcare underwrites or administers HMO or POS poilicies; WCIC underwrites or administers Well Priority HMO or POS policies. Independent licensees of the Blue Cross and Blue Shield Association. ANTHEM is a registered trademark of Anthem Insurance Companies, Inc. The Blue Cross and Blue Shield names and symbols are the registered marks of the Blue Cross and Blue Shield Association. Independent licensees of the Blue Cross and Blue Shield Association. ANTHEM is a registered trademark of Anthem Insurance Companies, Inc. The Blue Cross and Blue Shield names and symbols are registered marks of the Blue Cross and Blue Shield Association.

65255MUEENABS 2/17

court concluded the school was not likely to succeed on the merits of the free exercise claim. The court also dismissed the equal protection claim, finding nothing in the order that treats similarly situated groups different.

The school and parents appealed to the Sixth Circuit Court of Appeals.[7] The appellate court noted a previous decision of the court wherein parents alleged that an order by the Kentucky governor temporarily prohibiting in-person instruction at public and private schools violated their free exercise rights. In Commonwealth v. Beshear,[8] the Sixth Circuit found that the order was neutral and of general applicability because it applied to all schools in the state. Because of that finding, the court concluded the order need not be justified by a compelling governmental interest. Deferring to the governor's determination regarding the health and safety of the Commonwealth, the court concluded the plaintiffs were not likely to succeed on the merits of their free exercise claim. The court found this same rationale would apply in the Michigan case.

The private school and parents argued that the court should apply strict scrutiny to the Michigan order since it violated both their free exercise rights and their rights as parents to direct the education of their children. While acknowledging that the "hybrid-rights theory" has been recognized by other circuit courts, the Sixth Circuit concluded that it has consistently declined to recognize hybrid-rights claims.

Thus, the court applied a rational basis review to the health department's order. Finding that the department had a legitimate state interest in controlling the spread of COVID-19 in Michigan and that the department submitted more than ample evidence that requiring masks in the school setting minimizes the spread of the virus, the court concluded the department had satisfied the rational basis test.[7]

As to the equal protection claim, the Sixth Circuit noted that the school and parents had to show that the government treated them disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis. The court found that the plaintiffs failed to show that the state has treated similarly situated persons differently than them. Thus, the appellate court affirmed the district court's denial of the private school's motion for a preliminary injunction.

IMPACT OF INDIANA'S RELIGIOUS FREEDOM RESTORATION LAW

While the Sixth Circuit decision confirmed the rational basis of the health department's mask mandate, Indiana school officials will also have to take into consideration our state law entitled the Religious Freedom Restoration Act.[9] This statute was passed by the General Assembly in 2015 and applies to all governmental entity statutes, ordinances, resolutions, regulations, customs, and usages. The definition of a governmental entity includes political subdivisions and thus public school corporations are subject to this law. In essence the statute states a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. In light of this language, a school may have to defend a mask mandate by arguing that it does not substantially burden a student's exercise of religion.

If a judge would conclude that wearing a mask does substantially burden a student's exercise of religion, the school would have to demonstrate that "application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest."[10]

This is a higher standard than what the Sixth Circuit required in the Resurrection School case discussed above, but perhaps an Indiana court will find a school's interest in the health and well-being of its students and employees a compelling governmental interest and that wearing a mask is the least restrictive means of furthering that interest.

REFERENCES

1. Employment Division, Department of Human Resources of Oregon v. Smith, 110 S.Ct. 1595 (1990)
2. For a case wherein the Seventh Circuit Court of Appeals ruled that requiring students to participate in a reading series offered by the school did not compel the students to do anything or refrain from doing anything of a religious nature, see Fleischfresser v. Directors of School District 200, 15 F.3d 686 (7th Cir. 1994)
3. 92 S.Ct. 1526 (1972)
4. A.H. v. Northside Independent School District, 916 F.Supp.2d 757 (W.D.Tex. 2013)
5. 916 F.Supp.2d 757, 771
6. 738 N.E.2d 709 (Ind.App. 2000)
7. Resurrection School v. Hertel, ___ F.4th___, 2021 WL 372 1475 (Aug. 23, 2021)
8. 981 F.3d 505 (6th Cir. 2020)
9. IC 34-13-9
10. IC 34-13-9-8