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September 2, 2021

**Via Electronic Mail**

**(opinion.committee@oag.texas.gov)**

The Honorable Ken Paxton  
 Attorney General of the State of Texas  
 Attention: Opinion Committee  
 P.O. Box 12548  
 Austin, Texas 78711-2548

**RQ-0429-KP**

**FILE# ML-49013-21**

**I.D.# 49013**

Re: Request for an opinion regarding whether individuals have a right, privilege, power, or immunity created by Governor Abbott's *Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster* which states that no person may be required to wear or mandated to wear a face covering

Attorney General Paxon:

The Williamson County Attorney's Office respectfully requests your opinion on the following issue:

**Question:**

The Court of Criminal Appeals has assumed but not decided that "the phrase 'rights, privileges, powers, and immunities' [in Penal Code section 39.03] is so broad that it covers anything of value to a person." *Sanchez v. State*, 995 S.W.2d 677, 686 (Tex. Crim. App. 1999). Does an executive order which recognizes the ability of Texans to preserve their livelihoods and not be required to wear a face covering grant an individual a right, power, privilege or immunity?

**Background:**

In Governor Abbott's *Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster* (herein referred to as "Executive Order No. GA-38"), the Governor ordered that "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering" so "[t]o ensure the ability of Texans to preserve livelihoods while protecting lives." Tex. Exec. Order No. GA-38 (July 29, 2021), [https://gov.texas.gov/uploads/files/press/EO-GA-38\\_continued\\_response\\_to\\_the\\_](https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_)

COVID19\_disaster\_IMAGE\_ 07-29-2021.pdf. The order further denies any “governmental entity, including a county, city, school district, and public health authority” or “governmental official” the power to “require any person to wear a face covering or to mandate that another person wear a face covering.” Tex. Exec. Order No. GA-38. Several governmental entities in Williamson County have imposed requirements that individuals wear face coverings. See Exhibit A (Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions,” issued Aug. 25, 2021); Exhibit B (“Superintendent: Mask Requirement for all Schools, Effective Aug. 18,” issued Aug. 17, 2021).

Texas Government Code section 418.014(a) provides that “[t]he governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.” Tex. Gov’t Code §418.014(a). Executive orders, proclamations, and regulations or their amendments issued under Chapter 418 of the Government Code “have the force and effect of law.” Tex. Gov’t Code §418.012; see *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020) (“The Texas Legislature has given Governor Abbott the authority to issue executive orders in times of emergencies, and those order have the force of a law.”).

Under Texas Penal Code section 39.03(a)(2), “[a] public servant acting under color of his office or employment commits an offense if he [...] intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.” Tex. Penal Code §39.03(a)(2). While “public servant,” “under color of his office or employment,” “intentionally” and “unlawfully” are statutorily defined, “right, privilege, power, or immunity” are not. See Tex. Penal Code §1.07(a)(41), (48); Tex. Penal Code §6.03(a); Tex. Penal Code §39.03(b).

Government Code section 311.011 provides that statutorily undefined words and phrases shall be “construed according to the rules of grammar and common usage.” Tex. Gov’t Code §311.011(a).

Government Code section 311.011 provides that statutorily undefined words and phrases shall be “construed according to the rules of grammar and common usage.” Tex. Gov’t Code §311.011(a). The common meaning of “right” is “something to which one has a just claim; such as the power or privilege to which one is justly entitled” or “something that one may properly claim as due.” *Merriam-Webster*, “Right” (<https://www.merriam-webster.com/dictionary/right>); see Right, Black’s Law Dictionary (11th ed. 2019) (defining “right” as “[s]omething that is due to a person by just claim, legal guarantee, or moral principal;” “[a] power, privilege, or immunity secured to a person by law;” “[a] legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is wrong”). “Privilege” means “a right or immunity granted as a peculiar benefit, advantage, or favor.” *Merriam-Webster*, “Privilege” (<https://www.merriam-webster.com/dictionary/privilege>); Privilege, Black’s Law Dictionary (11th ed. 2019) (defining “privilege” as “[a] special legal right, exemption, or immunity granted to a person or class or class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.”). “Power” commonly means “legal or official authority, capacity, or right” among other meanings. *Merriam-Webster*, “Power” (<https://www.merriam-webster.com/dictionary/power>); Power, Black’s Law Dictionary (11th ed. 2019) (defining “power” as “the ability to act or not act; esp., a person’s capacity for acting in such a manner as to control someone else’s responses;” “[d]ominance, control, or influence over another; control over one’s subordinates;” “[t]he legal right or authorization to act or not act; a person’s or organization’s ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another.” “Immunity” means “[a]ny exemption from a duty, liability, or service of process; esp., such an exemption granted to a public official or governmental unit;” “[f]reedom of a person against having a given legal relations altered by someone else’s act or omission.” Immunity, Black’s Law Dictionary (11th ed. 2019).

The Court of Criminal Appeals, when addressing the construction of section 39.03 for a constitutional vagueness challenge, assumed but did not decide that “the phrase ‘rights, privileges, powers, and immunities’ is so broad that it covers anything of value to a person.” *Sanchez v. State*, 995 S.W.2d 677, 686 (Tex. Crim. App. 1999). Community complaints and reports received by the Williamson County Attorney’s Office demonstrate that individuals in Williamson County value the requirement that no person will be mandated or required to wear a face covering and that prohibition against governmental face covering mandates.

Does Executive Order No. GA-38 create a right, power, privilege, or immunity for individuals to be free from a requirement or mandate to wear a face covering?

As time is of the essence in determining the enforcement of Executive Order No. GA-38, I ask that your office expedite our request.

If you have any questions concerning this request, please feel free to contact me. Thank you for your review and consideration of this opinion request.

Respectfully submitted,



Dee Hobbs  
Williamson County Attorney

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- Exhibit A—Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions”
- Exhibit B—“Superintendent: Mask Requirement for all Schools, Effective Aug. 18”

"Exhibit A"

## Round Rock ISD Limits Mask Opt-Out to Health or Developmental Conditions

Aug 25, 2021

**Update:** [Mask exemption forms](#) were updated on Aug. 26 in order to comply with medical privacy concerns. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor.

Round Rock Independent School District is tightening its [current mask policy](#), restricting exemptions to health and developmental conditions only, following action by the Board of Trustees at a [special called meeting](#) on Tuesday, Aug. 24, 2021. The stricter policy goes into effect on Thursday, Aug. 26.

Last week, the Board approved a temporary mask requirement set to expire on Sept. 17, 2021. The Board's regular monthly meeting is scheduled for Sept. 16, 2021, and the Trustees could vote to extend the requirement at that time if conditions warrant. The requirement approved last week allowed a broad opt-out provision for staff and students. At Tuesday's meeting, Trustees approved a recommendation by Dr. Hafedh Azaiez, Superintendent of Schools, to limit exceptions to health and/or developmental conditions. For exemptions, parents, guardians and staff must complete their [respective forms](#). Once completed, parents and guardians will submit a PDF copy of their documentation or provide appropriate documentation through the [Mask Exemption Document Form](#). Staff will turn in their completed form and/or appropriate documentation into their immediate supervisor. Parents and staff who plan to apply for a health or developmental exemption will have a week to provide documentation and will not be required to wear a mask in the interim.

"I miss seeing the smiling faces of our students and teachers and I can't wait until we can all put our masks away. But that time is not now," Dr. Azaiez said. "We must do all we can to prevent the spread of COVID-19 and keep our school doors open."

The latest recommendation was precipitated by changes in the legal landscape on whether or not school districts have the authority to require masks. Late last week, the [Texas Education Agency](#) released new guidance that the state is currently not enforcing the governor's executive order banning mask requirements in public schools due to ongoing legal battles in state and federal courts. Also, the Texas Supreme Court declined to overturn temporary restraining orders requiring masks in public schools, including an order that applies to Round Rock ISD schools located in Travis County and the City of Austin.

Under the updated mask protocol, all students, teachers, staff members and adult visitors, including Trustees, must wear masks on buses and while inside school buildings when six feet of distance cannot be maintained. Students and staff have the option to remove their masks while seated in cafeterias and staff lunchrooms and while outdoors. Masks may be removed for activities during athletics, fine arts, and physical education classes if deemed appropriate by the coach, director or instructor.

Local health authorities from Travis and Williamson counties, and the [Centers for Disease Control and Prevention](#), recommend that students, staff, and visitors wear masks at school to mitigate the current community spread of COVID-19, particularly considering the disease's heightened transmission and infection rate primarily caused by the more transmissible "Delta" variant. Also, the [American Academy of Pediatrics recommends everyone older than the age of two wear a mask in schools regardless of vaccination status](#). Currently, local and federal health officials emphasize that masks are the most effective strategy to reduce the chances of transmission and slow the virus' spread.

Round Rock ISD's current [COVID-19 protocols](#) are designed with the guidance of local health agencies and in consideration of the current and developing public health climate. Round Rock ISD will reassess conditions frequently and adjust accordingly.

"Exhibit B"

# Superintendent: Mask Requirement for all Schools, Effective Aug. 18

Aug 17, 2021 | [COVID-19, News & Announcements](#)

Thank you for your patience and support as we opened our 2021-22 school year last week. We know our families and staff share mixed emotions about the school year, especially considering the spread of COVID-19 in our community.

I am announcing an update to our [health protocols](#), as we implement **a temporary districtwide mask requirement effective Wednesday, Aug. 18**. We are elevating our response level to “Red” as we continue to see cases of COVID-19 in our schools and community. We will keep the mask requirement in place through Sept. 10. The Board will meet on Sept. 9 for a regular meeting that may include an extension of the mask requirement.

Under the district’s new mask protocol, all students, teachers, staff members, and visitors, must wear masks when indoors, including buses and all school buildings. Students and staff have the option to remove their masks while eating or when outdoors. We will require masks during athletics, fine arts, and physical education classes, practices, and rehearsals unless students are actively exercising, rehearsing, or performing indoors.

## Why Require Masks Now

- After four days of reporting this week, we have had 87 [reported cases of COVID-19 on our dashboard](#). Our highest count total from last school year for an entire week was 130 cases on Jan. 29, 2021.
- Officials from Austin Public Health (APH) and the Williamson County and Cities Health District (WCCHD) shared their concerns about rising cases in our region. They strongly recommended requiring masks to help reduce the spread across our community.

## Help Keep In-Person Learning Open

We understand our families and staff feel strongly about masks, individual freedoms, and the health crisis. While there may not be common ground on those issues, we can all

agree **in-person learning works best for most students**. We will do everything we can to stay open and keep our students and staff safe.

The following public health and medical organizations have asked schools to require masks:

- [Austin Public Health \(APH\)](#)
- [Williamson County and Cities Health District \(WCCHD\)](#)
- [American Academy of Pediatrics](#)
- [Centers for Disease Control and Prevention](#)

If the spread of a contagious disease like COVID-19 continues in our schools, we may be forced to close portions of buildings or entire schools. It is critical for our entire #1LISD community to come together for the greater good of every student. Our students need us to stay open, and we believe masks can help the cause.

## Red Stage

In addition to requiring masks, the [Red stage](#) includes:

- Cohorting (keeping students in pods or common groups).
- Only essential visitors are allowed at campus/district facilities.
- Cover and close water fountains and use water bottle fillers.

It may take time for schools to implement new protocols. Please give our schools grace as they implement the new guidance as quickly as possible.

## Next Steps

Board President Trish Bode called a Special Meeting of our Board of Trustees for Monday, Aug. 23 at 6:15 p.m. During the meeting, the Board will discuss a resolution to require masks and health response protocols.

Families who are currently enrolled in the district's remote learning program and wish to transition back to on-campus learning may do so by contacting their school's registrar. We designed our current COVID-19 protocols with the guidance of local health agencies and in

consideration of the current and developing public health crisis. We will continue to monitor the situation in our community and schools, and adjust protocols accordingly and with the guidance of our health departments and the law.

We have been working with our principals on processes and procedures for enforcing the mask requirement in our school buildings. We ask for patience, grace, and support from our students, staff, teachers, and families during this transition.

We made this work last year. It was tough, but we came together to stay open and minimize the health risk in our schools. We can do what's best for most students.

Respectfully,

Bruce Gearing, Ed.D.

Superintendent of Schools