

PRESENTED AT**37th Annual School Law Conference**February 17-18, 2022
Austin, TX**COVID-19 Update: Litigation****Jonathan G. Brush
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Overview

As noted by the American Bar Association, “[t]he pandemic has changed the way lawyers work – perhaps permanently.”¹ COVID-19 profoundly altered the status quo and norms for legal practice. On one level, COVID-19 has introduced many new rules and requirements for practitioners to keep on top of. For example, as of January 19, 2022, the Texas Supreme Court has issued 47 emergency orders regarding the COVID-19 state of disaster.² The process of practicing law is also different. For many, the courtroom is now just a Zoom call away.

This paper is about COVID-19 litigation, and it focuses on issues related to Texas public schools. Specifically, this paper addresses three broad categories of COVID-19 litigation in Texas: masks, vaccinations, and occupancy limitations. Lastly, this paper explains a few practical lessons learned from COVID-19 litigation.

Masks

Along with vaccines, mask mandates (or prohibitions on mask mandates) are one of the most hotly litigated issues.

On March 13, 2020, Governor Greg Abbott certified that COVID-19 “pose[d] an imminent threat of disaster in the state and declar[ed] a state of disaster for all counties in Texas.”³ He authorized the use of state and local resources to cope with the disaster.⁴ He subsequently issued a series of executive orders related to the disaster. On July 2, 2020, Governor Abbott issued Executive Order GA-29 and mandated that face coverings be worn by every person in Texas, subject to several exceptions.⁵ GA-29 led to some litigation, but the issues are now moot.⁶

On March 2, 2021, Governor Abbott rescinded GA-29 and other executive orders.⁷ This meant that the Governor no longer required Texans to wear masks. On May 18, 2021,

¹ American Bar Association, *Profile of the Legal Profession 2021*, <https://bit.ly/3up3Rg7> (July 2021).

² Texas Supreme Court, Misc. Docket No. 22-9005, *Forty-Seventh Emergency Order Regarding the COVID-19 State of Disaster*, <https://bit.ly/3r7ujbV> (Jan. 19, 2022).

³ Governor of the State of Tex., State of Disaster Proclamation (Mar. 13, 2020), available at, <https://bit.ly/32GZOAF>.

⁴ *Id.*

⁵ Governor of the State of Tex., Executive Order GA-29 (July 2, 2020), available at, <https://bit.ly/3IMTBC5>.

⁶ See, e.g., *Young v. Paxton*, No. 4:20-cv-00839-p-bp, 2020 WL 6528935 (Oct. 8, 2020) (dismissing lawsuit against attorney general for alleged First Amendment violations under GA-29 for want of prosecution), adopted by 4:20-cv-00839-p, 2020 WL 6504669 (Nov. 5, 2020), appeal dismissed No. 20-11124, 2020 WL 9476168 (5th Cir. Dec. 8, 2020).

⁷ Governor of the State of Tex., Executive Order GA-34 (Mar. 2, 2021), available at, <https://bit.ly/3r93sMq>.

Governor Abbott again changed the State’s position and issued GA-34. GA-34 prohibited, by gubernatorial order, governmental entities and officials from mandating face coverings.⁸ However, the Governor encouraged public schools to operate under the minimum standard health protocols found in guidance issued by the Texas Education Agency (“TEA”).⁹ At the time, the TEA’s guidance mandated masks for “every student, teacher, or staff member . . . when inside a school building, school facility, or when in an outdoor space on school property or used for school activities, wherever it is not feasible to maintain six feet of social distancing from another person not in the same household”¹⁰ However, the TEA’s guidance expressly stated that an independent school district’s governing board could modify or eliminate by formal action the mask requirements.¹¹

The Governor changed the State’s position on May 18, 2021, when he issued GA-36. GA-36 provided that “[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering”¹² GA-36 provided extra time – until June 4, 2021 – for schools to comply with this requirement.¹³ Most recently, the Governor issued GA-38 on July 29, 2021, which reiterates the mandate in GA-36 and further states that GA-38 “shall supersede any face-covering requirement imposed by any local governmental official,” except as expressly allowed by GA-38.¹⁴ GA-38 purportedly suspended various portions of the Government, Local Government, and Health and Safety Codes to accomplish this goal.¹⁵

GA-38 is the operative order that Governor Abbott contends prohibits local governmental entities – including schools – from imposing mask requirements. The legal issue in litigation around GA-38, as explained by the Texas Supreme Court, is as follows:

“This case, and others like it, are not about whether people should wear masks or whether the government should make them do it. Rather, these cases ask courts to determine which

⁸ Governor of the State of Tex., Executive Order GA-36 (May 18, 2021), *available at*, <https://bit.ly/3oazzcZ>.

⁹ *Id.*

¹⁰ Texas Education Agency, *SY 20-21 Public Health Planning Guidance*, at 7–8 (Mar. 4, 2021).

¹¹ *Id.* at 8.

¹² Governor of the State of Tex., Executive Order GA-36 (May 18, 2021), *available at*, <https://bit.ly/3o9kkRl>.

¹³ *Id.*

¹⁴ Governor of the State of Tex., Executive Order GA-38 (July 29, 2021), *available at*, <https://bit.ly/3KWrfNV>.

¹⁵ *Id.*

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