

# THE RUTHERFORD INSTITUTE

Post Office Box 7482  
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD  
Founder and President

TELEPHONE: 434 / 978 – 3888  
EMAIL: [legal@rutherford.org](mailto:legal@rutherford.org)  
[www.rutherford.org](http://www.rutherford.org)

October 9, 2020

Via Email

Suzann M. Wilcox, Esq.  
Nelson Mullins Riley and Scarborough LLP  
201 17<sup>th</sup> Street NW  
Suite 1700  
Atlanta, Georgia 30363  
[Suzann.wilcox@nelsonmullins.com](mailto:Suzann.wilcox@nelsonmullins.com)

**Re: Religious Exemption to Mask Requirement at Football Games /  
Fulton County Schools**

Dear Ms. Wilcox:

We have received and carefully reviewed your letter of October 7, 2020 rejecting our request on behalf of Tara Barnett to exempt her from the face covering mandate imposed by Fulton County Schools (FCS) in accordance with the Executive Orders of Georgia Gov. Kemp requiring exemptions based on religious beliefs.<sup>1</sup> Mrs. Barnett has asked us to respond because your letter misconstrues the controlling law and effect of the Governor's orders.

Mrs. Barnett's First Amendment interests are certainly implicated by FCS's refusal to exempt her from the spectator face covering requirement because of her bona fide religious beliefs. Gov. Kemp's decision to require an exemption based on religious beliefs is in keeping with the "best of our traditions" by providing a reasonable accommodation to people of faith.<sup>2</sup> His Executive Orders and the religious accommodation they require are in furtherance of the fundamental guarantee to free exercise of religion established by the First Amendment.

Your reliance on the guidelines of the Georgia High School Association as supporting the refusal to provide Mrs. Barnett with the religious exemption required by Gov. Kemp's order is wholly misplaced. As you admit, GHSA guidelines provide that face coverings for spectators is

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<sup>1</sup> State of Georgia, Executive Order 09.30.20.02 (available at <https://gov.georgia.gov/document/2020-executive-order/09302002/download>).

<sup>2</sup> *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

“highly recommended” that spectators wear a “facemask/covering [if] possible.”<sup>3</sup> Thus, face coverings are not mandated and only recommended if possible. Moreover, the GHSA guidelines for face coverings specifically acknowledge there are situations where masks are not possible. If GHSA guidelines mandated face coverings, then all GHSA member schools and districts would be requiring spectators have face coverings, which is not the case.<sup>4</sup>

Therefore, any face covering mandate FCS imposes can only be pursuant to and in accordance with Gov. Kemp’s Executive Orders. Your assertion that FCS is not a “local government entity” subject to the requirements of the Orders’ face covering provisions, including the requirement for exemptions based on religious objections, is baseless. Not only are a school district and its governing board within the ordinary meaning of a “government entity,” but numerous statutes denominate them as such. Ga. Code § 50-8-2(11) defines “government” as “any governmental unit on the federal, state, or local level, . . . and shall include all local governments [and] school districts.” Ga. Code § 34-4-3.1 provides that “local government entity” “means a county, municipal corporation, consolidated government, authority, board of education, or other local public board, body, or commission.” These are just some examples of the specific recognition in the written law of the obvious: public school districts and their governing bodies, which are created and act under color of state law, are local government entities.<sup>5</sup>

As pointed out in our initial letter, any “[l]ocal rules ordinances, orders or mandates that provide for any action more or less permissive than the recommendations and requirements of this Order will result in an incompatible outcome for the uniform response to COVID-19,” and no such local rule may be inconsistent with the Governor’s Order.<sup>6</sup> Whatever authority FCS relies upon for its face covering mandate, a refusal to include an exemption from the mandate based on bona fide religious beliefs renders the mandate less permissive than and in violation of the Governor’s Order.

The conclusion that FCS is required to exempt Mrs. Barnett from a face covering requirement at FCS-sponsored football games is inescapable. On her behalf, we request that

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<sup>3</sup> Georgia High School Association, “Contest Day Operations,” p. 3 (available at [https://www.ghsa.net/sites/default/files/documents/GHSA\\_Contest\\_Day\\_Operations\\_Recommendations\\_-\\_Finalcx.pdf](https://www.ghsa.net/sites/default/files/documents/GHSA_Contest_Day_Operations_Recommendations_-_Finalcx.pdf)).

<sup>4</sup> Todd Holcomb, “High school football in pandemic: Questions that needed answers,” *Atlant Journal-Constitution* (Aug. 28, 2020) (reporting that most schools only recommending face coverings for spectators at high school football games), <https://www.ajc.com/sports/high-school-sports-blog/high-school-football-in-pandemic-questions-that-needed-answers/OGJE66CD2REGFC5M4TWSWYVKCE/>.

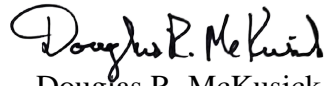
<sup>5</sup> *See also* Ga. Code § 16-11-127(a)(3) (“Government entity” means an office, agency, authority, department, commission, board, body, division, instrumentality, or institution of the state or any county, municipal corporation, consolidated government, or local board of education within this state) and

<sup>6</sup> State of Georgia, Executive Order 09.15.20.01, pp. 5-6 and p 40 (“[A]ny state, county, or municipal law, order, ordinance, rule, or regulation that requires persons to wear face coverings, masks, face shields, or any other Personal Protective Equipment while in places of public accommodation or on public property are suspended to the extent that they are more restrictive than this Executive Order[.]”)

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FCS reverse the decision set forth in your letter and that we receive a response to this request on or before October 14, 2020.

Sincerely yours,

A handwritten signature in black ink that reads "Douglas R. McKusick". The signature is written in a cursive style with a large, prominent "D" at the beginning.

Douglas R. McKusick  
Senior Staff Attorney

Cc: Tara Barnett