

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
www.rutherford.org

September 23, 2020

Via Email

Dr. Mike Looney, Superintendent
Fulton County Schools
6201 Powers Ferry Road NW
Atlanta, Georgia 30339
superintendent@fultonschools.org

Re: Religious Exemption to Mask Requirement at Football Games

Dear Dr. Looney:

Having been denied accommodation for her sincere religious objection to wearing a face covering at junior varsity football games,¹ Tara Barnett has asked The Rutherford Institute to represent her parental² and First Amendment interests in this matter.³

While Governor Kemp's Executive Orders permit government entities to impose face covering requirements, it mandates that any such face covering requirement be inapplicable to persons with bona fide religious objections. Gov. Kemp's order also stipulates that face covering mandates are authorized in situations where social distancing is not possible.⁴

Given that Fulton County Schools (FCS) has already issued rules and regulations for football games to prevent crowding and mandate social distancing among attendees,⁵ Mrs. Barnett's request that she be allowed to attend junior varsity football games without a face covering while social distancing is utterly reasonable and qualifies for an accommodation based on Gov. Kemp's controlling orders.

¹ Mrs. Barnett's son is a student at Milton High School and a member of the school's junior varsity football team.

² As with any parent, Mrs. Barnett wants to be in attendance when her son is competing in athletic contests to provide support and encouragement and to be available should an injury occur.

³ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

⁴ "Social Distancing" is defined as six feet of separation from other non-cohabitating persons.

⁵ Allowable attendance at FCS football stadiums has been reduced to 30% of capacity to prevent crowding and social distancing among attendees is required. *See* Fulton County Athletics: GHSA Return to Play Handbook (Updated 9/14/2020), p. 24.

Our legal analysis of the matter leads us to conclude that the face covering mandate for FCS football games exceeds the authority granted by Gov. Kemp's Executive Orders, is more restrictive than the Orders allow, and thereby violates State law.⁶

Therefore, we ask that FCS acknowledge and affirm its obligations under the controlling Executive Orders to allow exemptions to its face covering rules because of religious beliefs, reverse the decision denying Mrs. Barnett a religious exemption from its face covering requirement, and confirm that it will allow Mrs. Barnett to attend football games at FCS-controlled venues without a mask or face covering.

Background

Since March 2020, Gov. Brian Kemp has issued a series of Executive Orders relating to the statewide response to the COVID-19 pandemic. On August 13, 2020, Gov. Kemp issued an Executive Order that allows government entities to impose “Local Option Face Covering Requirement[s]” mandating that persons “wear face masks or face coverings when not able to maintain Social Distancing from non-cohabitating persons[.]”⁷ The Local Option Face Covering Requirement and related provisions were reissued on August 31, 2020⁸ and September 15, 2020.⁹

Each of the three Executive Orders provides that a Local Option Face Covering Requirement “shall not be applied to . . . , those who have a bona fide religious objection to wearing a face mask or face covering[.]”¹⁰

On September 7, Mrs. Barnett, whose son is a freshman at Milton High School and member of the junior varsity football team, received an email newsletter from the school about attending athletic events which advised that “[e]veryone will be required to wear a face covering.” Additionally, the newsletter advised that “[e]veryone will be required to social distance in the venue you are attending (only sit in designated areas and sit 6 feet apart unless

⁶ 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[.]”)

⁷ State of Georgia, Executive Order 08.15.20.01, pp. 8-9 (available at <https://gov.georgia.gov/document/2020-executive-order/08152001/download>).

⁸ State of Georgia, Executive Order 8.31.20.02, p. 9 (available at <https://gov.georgia.gov/document/2020-executive-order/08312002/download>).

⁹ State of Georgia, Executive Order 09.15.20.01, p. 9 (<https://gov.georgia.gov/document/2020-executive-order/09152001/download>).

¹⁰ See, e.g., State of Georgia, Executive Order 09.15.20.01, p. 40.

sitting with family).” The face covering requirement for spectators at football games is also set forth in a Return to Play Handbook issued by FCS.¹¹

Upon learning of the mask/face covering requirement, Mrs. Barnett emailed Milton High School’s Athletic Director on September 8 requesting, under Gov. Kemp’s Executive Orders, an accommodation from the mask requirement at Milton High School football games because she is unable to wear a mask or face covering due to her religious beliefs. The school’s athletic director responded with an email requesting Mrs. Barnett explain or elaborate on her religious beliefs. She replied with an email that same day, explaining her beliefs in detail, including the following:

As a practicing Catholic, I believe it all begins and ends with your soul. From a very young age we are taught man’s purpose in life is to know, love and serve God in this world so that we can obtain everlasting happiness with Him in heaven.

The Bible tells us of the first existence of our soul..... “And the Lord God formed man of the slime of the earth: and breathed into his face the breath of life, and man became a living soul.” (Genesis 2:7). And so our souls and our lives were created and filled with the breath of God and the Holy Spirit. My very breath keeps me alive. It is the source of my life that comes from God. I cannot willingly allow this gift from God to be impeded by any governmental agency or business or individual. The mask obstructs the soul.

“And God created man to his own image: to the image of God he created him: male and female he created them.” (Genesis 1:27) Because we are made in the image of God the uniqueness of every human face and soul is beautiful. Out of respect for God and His creation I can not accept hiding it behind ugly pieces of cloth and paper.

Mrs. Barnett was then called by the FCS Athletic Director. During a telephone conversation September 11, he informed Mrs. Barnett that no accommodation would be provided because football games were extracurricular events. She thereafter texted the Athletic Director requesting a further explanation of the decision and why the provision of the Executive Orders did not apply. She received a reply message stating “The school districts have always had the authority to implement measures to host events on their campuses. These are our events, so we can establish our protocols.”

FCS’s Face Covering Requirement Exceeds the Local Option Authority

The Local Option Face Covering Requirement provision of Gov. Kemp’s Executive Order authorizes a face covering mandate only in situations where social distancing is not

¹¹ Fulton County Athletics: GHSA Return to Play Handbook (Updated 9/14/2020), p. 24 (available at <https://www.fultonschools.org/cms/lib/GA50000114/Centricity/Domain/222/GHSA%20Return%20to%20Play%20Handbook%20-%20final%20version%207.pdf>).

possible. The Order provides that government entities may impose such a requirement on persons “when not able to maintain Social Distancing from non-cohabitating persons[.]”¹² “Social Distancing” is defined as six feet of separation from other non-cohabitating persons. However, FCS has already imposed rules and regulations for football games that mandate social distancing. Allowable attendance at FCS football stadiums has been reduced to 30% of capacity to prevent crowding and social distancing among attendees is required.¹³ Thus, FCS has already put in place regulations for football games that will ensure social distancing among spectators. Because social distancing is possible and affirmatively mandated at FCS football games, those games do not involve conditions where persons are “not able to maintain Social Distancing.”

Under Local Option Face Covering Requirement, a face covering requirement can be imposed only when persons are not able to maintain Social Distancing. Therefore, the face covering mandate for FCS football games exceeds the authority granted by Gov. Kemp’s Executive Orders, is more restrictive than the Orders allow, and thereby violates State law.¹⁴

Refusal of the Religious Exemption Violates the Executive Orders

Moreover, the decision to deny Mrs. Barnett’s request for an exemption from the face covering requirement FCS has imposed for football game spectators is a plain violation of Gov. Kemp’s Executive Orders on mask and face covering requirements. On three occasions, the Governor has made clear in his Executive Orders relating to COVID-19 responses that any Local Option Face Covering Requirement of a government entity “shall not be applied to . . . , those who have a bona fide religious objection to wearing a face mask or face covering[.]”¹⁵

Mrs. Barnett’s objections to wearing a face covering are undoubtedly bona fide and based on sincerely-held religious beliefs. She bases her objections on specific Bible passages that connect a person’s breath with the soul and with God. Additionally, she believes masks serve to obstruct the image of God inherent in every person’s face as described in the Bible. Because she has bona fide religious objections to using a face covering, she is exempt from any face covering requirement under the express terms of Gov. Kemp’s Executive Orders allowing Local Option Face Covering Requirements.

Gov. Kemp’s Executive Orders on responses to the pandemic health emergency have “the force and effect of law.”¹⁶ 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

¹² State of Georgia, Executive Order 09.15.20.01, p. 8.

¹³ Fulton County Athletics: GHSA Return to Play Handbook (Updated 9/14/2020), p. 24.

¹⁴ 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[.]”)

¹⁵ See, e.g., State of Georgia, Executive Order 09.15.20.01, p. 40.

¹⁶ State of Georgia, Executive Order 09.15.20.01, p. 2 (citing Ga. Code § 38-3-28).

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.¹⁷

Thus, whether FCS purports to be acting pursuant to the Local Option Face Covering Requirement provision of Gov. Kemp’s Order or some independent authority, any decision to refuse to recognize a religious exemption to a face covering requirement is inconsistent with and contrary to State law. Mrs. Barnett is entitled under State law to be exempt from FCS’s face covering requirement for attending football games and athletic events because of her sincerely-held religious beliefs.

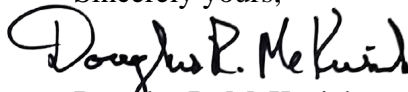
Conclusion

The refusal of FCS to allow Mrs. Barnett to be exempt from the face covering rule for football games at FCS-controlled venues is in direct contravention of Gov. Kemp’s Executive Orders and deprives Mrs. Barnett of the religious liberty those orders are intended to protect. If enforced against her, Mrs. Barnett’s rights to freely exercise her religious beliefs and attend her son’s football games and those of Milton High School’s varsity football team will be infringed.

For the reasons set forth above, Mrs. Barnett is entitled under State law to attend her son’s FCS football games without having to violate her religious beliefs by donning a face covering. She should not be put to the choice of abandoning either her religious beliefs or her son, particularly where the controlling law expressly allows an accommodation of her religious beliefs and the face covering mandate exceeds the authority granted to FCS. On her behalf, we ask that FCS grant Mrs. Barnett an exemption from any face covering requirement imposed as a condition of attending football games at FCS-controlled venues.

Because Milton High School’s junior varsity football team is scheduled to compete against Roswell High School on Thursday, September 24, time is of the essence in this matter. In order that we may advise Mrs. Barnett of her options, we must have a response to her request for an exemption by 1:00 p.m. ET, on September 24, 2020.

Sincerely yours,



Douglas R. McKusick
Senior Staff Attorney

Cc: Dr. Steven Craft (crafts@fultonschools.org)
Felicia Sanders (sandersfm@fultonschools.org)
Tara Barnett

¹⁷ 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[.]”)