



## THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

### COMMITTEES:

Appropriations  
Appropriations Subcommittee on Health and  
Human Services  
Health Policy  
Rules

**SENATOR GARY M. FARMER, JR.**

*Florida State Senate*  
34th District

# MEMORANDUM

**Subject:** Purported Emergency Orders RE: Masks in Schools

**Date:** August 9, 2021

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Please see below for a detailed list of bullet points on the unconstitutional and illegal nature of Governor Ron DeSantis' Executive Order and the related Department "emergency rules" related to face masks in schools.

- Executive Order 21-175 and the related "emergency rules" issued by the Department of Health and the Department of Education are unconstitutional overreaches of Executive authority by the Governor, and as such there is no legal mechanism through which school districts can be forced to uphold them.
  - **The role of the Governor and the State's executive departments is to enforce laws, not to enact new ones. This is a power that is solely vested with the State Legislature.** Florida's Administrative Procedures Act (Chapter 120) is clear that rules can only be adopted in instances when such rulemaking authority has been specifically authorized by the Legislature. While both the Executive Order and the rulemakings by DOH and DOE cite the "Parents Bill of Rights" as authorizing authority, there is no such authority granted within the text of the statute itself.
  - **As Rule No. 64DER21-12 issued by the Department of Health mandating a parental opt-out for school mask policies on 08/09/2021 has been justified by the Department utilizing a statute which grants no rulemaking authority, the rule constitutes an "invalid exercise of delegated legislative authority" as defined by Fla. Stat. 120.52 (8)**
    - *Fla. Stat. 120.52 (8)* reads in part, "A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute"
  - **The DOH, DOE, and Executive Office of the Governor has no legal mechanism through which they can enforce the mask opt-out provision of DOH Rule No. 64DER21-12, as**

REPLY TO:

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**WILTON SIMPSON**  
President of the Senate

**AARON BEAN**  
President Pro Tempore

Florida Law forbids an agency from establishing a penalty that is not specifically authorized by the Legislature.

- *Fla. Stat. 120.54 (1) (e)* reads, “No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for a violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.”
- If rulemaking authority on the issue of masks in schools did exist, the manner in which the rules have been put in place would still constitute an invalid exercise of delegated legislative authority, as **the Department of Health and the Department of Education failed to follow the applicable rulemaking procedures and requirements as laid out in *Fla. Stat. 120.54*.**
  - Florida’s rulemaking statutes require that prior to an agency adopting or amending a rule, the agency must provide notice of its intended action, including an explanation of its purpose, effects, and estimated regulatory costs. This notice must be published in the Florida Administrative Register not less than 28 days prior to the intended action. Other requirements also mandate that the Department provide a detailed written statement of the facts and circumstances justifying the proposed rule. Additionally, Florida’s rulemaking statutes require public hearings on rulemaking proposals if a request is made by any affected individual within 21 days after the date of publication of the notice.
  - Chapter 120 specifically disallows any rule that is arbitrary or capricious. *Fla. Stat. 120.52(8)* defines these terms as follows, “[a] rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.” As the DOH “emergency rule” mandates a no questions asked opt-out from school mask requirements despite all reputable medical advice advocating for universal mask wearing, this rule is clearly not supported by facts or logic, and is entirely irrational.
    - **As the Departments failed to meet the statutory requirements for new rules under Chapter 120, these rules put forward by the DOH and DOE would constitute “invalid exercises of delegated legislative authority” as defined by *Fla. Stat. 120.52 (8)*.**
- In an effort to circumvent the protections afforded to the people through the regular rulemaking process, the Department of Health and the Department of Education have attempted to develop and adopt their mask related rules through Florida’s emergency rulemaking process. However, even in doing so **the Departments failed to comply with the requirements established for emergency rulemakings in *Fla. Stat. 120.54 (4)*.**
  - *Fla. Stat. 120.54 (4)* provides for the use of emergency rulemaking only in instances where there is an immediate danger to the public health, safety, or welfare that requires immediate action.
    - Florida’s courts have made it clear that, “[i]n order to utilize emergency rulemaking procedures, rather than employing standard rulemaking, an agency must express reasons at the time of promulgation of the rule for finding a genuine emergency. Those reasons must be **factually explicit and persuasive**” (See *Florida Health Care Association v. Agency for Health Care Administration*, 734 So.2d 1052, 1053).
      - As claims about mask related dangers are not only baseless but are also contradictory to the widely accepted and proven fact that masks are a

necessary measure for the effective mitigation of COVID-19, it would be impossible for any department to provide the legally required justification for an emergency rule preventing mask mandates in schools. Therefore, **the “emergency rules” established by the DOH and DOE are clearly invalid, and should not be considered binding by any school board.**

- The “emergency rules” established by the Department of Education and the Department of Health clearly violate two key provisions in Florida’s State Constitution.
  - **The decision by Governor DeSantis, the Department of Education, and the Department of Health’s to engage in unauthorized rulemaking is a direct violation of the right of Florida’s district school boards to “operate, control and supervise all free public schools within the school district” as established by *Article IX Section 4 of Florida’s State Constitution*.**
  - *Article IX Section 1 of Florida’s State Constitution* guarantees that, “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools...”
    - Currently there are 175 children hospitalized for COVID-19 in the State of Florida.
    - Last week the Florida Department of Health reported 27,454 new COVID-19 cases among children and adolescents.
    - According to the Florida Department of Health last week’s COVID-19 positivity rate for children aged 12 and under was 20.5%, meaning that one in every 5 child tested for COVID-19 showed a positive test result.
      - COVID-19 is a clear danger to students, teachers, school staff, and their families. As the world’s leading medical experts including the American Academy of Pediatrics cite universal mask wearing as a necessity for mitigating the spread of COVID-19 **it is the constitutional duty to maintain safe school environments through the adoption of a universal mask mandate in our schools.**