



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

August 5, 2021

The Honorable Commissioner Richard Corcoran
Florida Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399

Commissioner Corcoran,

In a follow-up to Governor DeSantis's July 30 Executive Order Number 21-175 you have noticed a purported "emergency meeting" to consider "emergency rules" under Florida Administrative Code sections 6AER21-01 and 6AER21-02 and under Florida Statute 1002.40 Hope Scholarship Program. In his Order, the Governor made baseless and dangerous claims about nonexistent dangers associated with children wearing protective facemasks in school. Using these falsehoods as justification, the Order instructed both your Department of Education and the Department of Health to engage in rulemaking with the presumed purpose of limiting the ability of District School Boards to impose universal masking mandates for students participating in in-person learning. The Department of Education has responded with its announced "emergency" rulemaking notice in which it now uses the Hope Scholarship Program as a basis for said rulemaking. I am writing to you today to object to these announced proceedings for several reasons, and to remind you of the constitutional and statutory requirements that must be adhered to.

It should be noted first and foremost that the Governor does not have the statutory authority to instruct your Department to engage in rulemaking, nor does your Department have the authority to do so on this particular issue. Florida's Administrative Procedure Act (Chapter 120) is clear that agencies only have the authority to develop and adopt rules that have been explicitly approved by the Legislature. As no statute grants your Department specific authority to engage in rulemaking concerning mask behaviors in schools, any such action would be in violation of the law.

The summary of proposed Emergency Rule 6AER21-02 is an instance of rulemaking that was not approved by the Legislature as required by law. The rulemaking authority delegated to the Department of Education through *Fla. Stat.* 1002.40(3) is related strictly to incidents of "battery; harassment; hazing; bullying; kidnapping; physical attack; robbery; sexual offenses, harassment, assault, or battery; threat or intimidation; or fighting at school." This statute solely addresses

REPLY TO:

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behavioral issues among students and is unrelated to the health and safety policies of public schools or the Districts with exclusive authority to run them. It is therefore entirely outside of the scope of the Department of Education's authority to utilize this statute as a means to address school masking policies.

In addition to the legal infirmities listed above, it is clear in the text of the Order and in related statements made by Governor DeSantis that his intention is for the requested rulemaking to be developed and adopted prior to the opening of Florida's public schools this month, which is why you are attempting to circumvent the standard rulemaking process by improperly invoking an emergency rulemaking process. However, section 120.54, Florida Statutes, controls and provides that the emergency process is reserved for incidents where there is an immediate danger to the public health, safety, or welfare that requires emergency action. Only under these extraordinary circumstances can a rule be temporarily adopted. In order for an emergency rule to be established, the agency must publish the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare. 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 Governor DeSantis' 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. It should also be patently clear that expanding Hope Scholarship eligibility does not constitute an emergency under Florida law.

Since this is not an emergency and must proceed via the standard rulemaking process, under Florida law it is not possible to adhere to this apparent timeline while also meeting the legal requirements for rulemaking as laid out in section 120.54, Florida Statutes. 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 your 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. As the representative of a community that has embraced the well-established medical data that supports universal mask wearing as an effective and necessary mitigation measure, I can assure you that any rule based on information contradicting this fact will garner a flood of justified requests for public hearings. I hereby request, as an affected individual, that you conduct public hearings. Again I remind you that such hearings are legally necessary for your Department to implement the rulemaking requested by Governor DeSantis in Executive Order Number 21-175.

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Should your Department comply with the statutory requirements listed above, and ultimately issue new notice of rulemaking regarding masks in public schools, I would also remind you of your inability to apply any penalties for school districts that rightfully refuse to comply. Florida's rulemaking statute (*Fla. Stat.* 120.54(1)(e)) specifically states that, "[n]o agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules." As such, the Department of Education has no authority to withhold state funds from noncomplying school districts, as Governor DeSantis requests in his Order.

Finally it should be noted that your ability to develop and adopt the rules requested by Governor DeSantis is not only restricted by our statutes, but also by the Florida Constitution. Article IX Section 4 of the Florida Constitution specifically designated the authority to operate, control, and supervise free public schools to their respective school boards. As neither the State Constitution nor statutes contemplate state level authority on whether or not students, teachers, and staff wear masks, this is an operational issue which is the explicit responsibility of district school boards. As such, you should be aware that the rulemaking requested by Governor DeSantis would violate our State Constitution.

In closing I would remind you that as public officials we swore an oath when we set out to serve the people of Florida. This was not an oath of allegiance to the Governor, but to the Constitution of the United States and the State of Florida, and by virtue of that to the people that these documents were designed to protect. It is abundantly clear that the task set before you by Governor DeSantis is nothing more than an attempt to take advantage of our current public health crisis by siphoning even more money away from our public schools, in direct violation of Florida's Statutes and its Constitution. Perhaps more importantly this is a request that, if fulfilled, would put Florida's children directly and unnecessarily into harm's way. I implore you to search your conscience, remember your civic responsibilities, and to do the right thing and suspend the announced rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary M. Farmer Jr.", with a stylized, cursive script.

State Senator Gary M. Farmer Jr.