

# THE IMPACT OF GOVERNOR DESANTIS'S MASK ORDER ON FLORIDA PRIVATE SCHOOLS: TO MASK OR NOT TO MASK?

Insights  
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In response to several Florida school boards considering mask mandates in advance of school openings, Florida Governor Ron DeSantis just signed an executive order threatening to withhold state funds from any school boards that require mask usage during the upcoming school year. What do Florida private schools need to know about the July 30 [Executive Order 21-175](#), "Ensuring Parents' Freedom to Choose – Masks in Schools"?

## An Overview of the Executive Order

The Order directs the Florida Department of Health and the Florida Department of Education to work together to "immediately execute rules" and "take any additional agency action necessary" to "ensure safety protocols for controlling the spread of COVID-19 in schools" that:

- do not violate Floridians' constitutional freedoms;
- do not violate parents' rights under Florida law to make health care decisions for their minor children; and
- protect children with disabilities or health conditions who would be harmed by certain protocols such as face masking.

The Order further states that the rules must be consistent with the recently enacted [Parents' Bill of Rights](#), and "protect parents' right to make decisions regarding masking of their children in relation to COVID-19."

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The Order is silent as to whether it applies only to public schools or also extends to private schools – but it does direct the Florida Commissioner of Education to use all legal means available to ensure school district compliance, including withholding state funds from noncompliant school boards.

The Order comes on the heels of the U.S. Centers for Disease Control and Prevention (CDC)'s updated guidance issued on July 27, 2021 recommending universal masking for teachers, staff, students, and visitors **in all K-12 schools**, regardless of vaccination status, and which retracted [guidance](#) from earlier in July allowing for vaccinated persons to go mask-free in schools. While CDC guidance is not law, schools can minimize the risks of exposure to potential negligence and student or worker safety claims by following CDC guidance.

Also, as [explained](#) in the non-school context following the CDC's announcement, OSHA may refer to CDC guidance in setting its own expectations for employers – including private schools – like it did in [prior guidance](#). Additionally, with the passage of Florida's COVID-19 related immunity shield law in March 2021, a school must show that it made a "good faith effort" to comply with government issued health standards or guidance to protect against COVID-19 related claims.

### **Will Private Schools Be Required to Comply?**

Maybe. The Florida Department of Education has authority over public schools, and can impose certain requirements on private schools that receive state monies, including those participating in state [scholarship](#) programs.

The Florida Department of Health, however, [has the authority](#) to adopt rules governing the immunization of children against preventable communicable diseases (as well as related testing and control measures) after consultation with the Department of Education. This law, which predates the COVID-19 pandemic, explicitly covers both private and public schools. The Florida Department of Health also determines the immunizations required for both students in private and public schools, and it has the power to exclude students who are not immunized from school on a temporary basis during communicable disease emergencies.

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While the Governor's Executive Order makes direct reference to H.B. 241, the Parents' Bill of Rights, this law primarily limits state-run entities from infringing on certain fundamental parental rights. Some of the obligations under the law, however, apply to both governmental entities and "other institutions" (which arguably includes private schools). This includes the requirement that licensed healthcare providers and practitioners (as defined by statute) may not provide, solicit, or arrange to provide healthcare services to children without first receiving written parental consent. At this time, it does not appear that a policy for or against masking, if contrary to the wishes of a parent, would implicate the consent for health care services provision of the Parents' Bill of Rights that applies to private schools.

With lingering uncertainty only a few weeks before students return to the classroom, schools should prepare for multiple potential scenarios until the Florida Department of Health and Florida Department of Education issue regulations or the Governor or Legislature provide further clarity. This might include masks for all, masks for unvaccinated, or masks optional, depending on factors within the school's campus community (percent of employees and students vaccinated) and the wider community (level of community transmission of COVID-19). You will also need to be prepared to explain to parents the reasoning behind your decisions, and stand ready to change your stance on any particular decision to ensure that you are acting consistently with applicable law.

## **Conclusion**

If you have any questions about how these changes impact your school, please contact your Fisher Phillips lawyer, the authors of this Insight, or any member of [our Education Practice Group](#). Fisher Phillips will continue to monitor further developments and provide updates in the coming months, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information.