



Jeff Landry
Attorney General

State of Louisiana

DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. BOX 94005
BATON ROUGE
70804-9005

August 6, 2021
OPINION 21-0103

The Honorable Patrick McMath
Louisiana State Senate
District 11
409 East Boston Street
Covington, LA 70433

22-A EDUCATION

La. Const. art. VIII, § 3
La. R.S. 17:6

Pursuant to La. Const. art. VIII, § 3(A), and in the absence of any specific legislation to the contrary, the State Board of Elementary and Secondary Education may, if it chooses, adopt rules governing COVID-19 safety protocols, such as mask requirements and exceptions thereto, in the schools of this State.

Dear Senator McMath:

This office received your request for an opinion regarding whether the State Board of Elementary and Secondary Education ("BESE") may adopt rules governing COVID-19 safety protocols, such as mask requirements and exceptions thereto, in the schools of this State. For the reasons that follow, we answer your question in the affirmative.

Background

Louisiana has been under a perpetual state of emergency due to COVID-19 since March 11, 2020. See, e.g., 25 JBE 2020 (original gubernatorial proclamation declaring a public health emergency for COVID-19). Recently, on August 4, 2021, Governor Edwards reinstated a statewide mask mandate, which purportedly applies to Louisiana's schools although the mandate contains no specific language regarding masks in schools. See 137 JBE 2021, § 3(A). The current version of the mask mandate provides, in part, "All individuals in the State of Louisiana shall be required to wear a face covering over the nose and mouth when indoors in any place outside of a private residence except in the circumstances provided for in Subsection (C) below." *Id.*¹ 137 JBE 2021 does not identify any specific provision of the Louisiana Constitution from which the Governor derives his authority to impose the measures provided for therein. Instead, the proclamation relies upon delegated authority from the legislature, as provided for in La. R.S. 29:721, *et seq.*, and La. R.S. 29:760, *et seq.*

The Legislature in Act 9 the 2020 First Extraordinary Session called on BESE to "[n]o later than July 15, 2020, . . . adopt emergency rules informed by the Centers for Disease Control and Prevention guidelines to provide minimum standards, policies, medical exceptions, and regulations to govern the reopening of schools for the 2020-2021 school year." Act 9 of the 2020 Louisiana Legislative First Extraordinary Session, § 2. Pursuant

¹ This office previously opined that a prior version of the Governor's mask mandate was "likely unconstitutional and unenforceable." La. Atty. Gen. Op. No. 20-0068. The language of the earlier mask mandate was similar, providing, in part, "Every individual in Louisiana shall wear a face covering over the nose and mouth when inside a commercial establishment or any other building or space open to the public, whether indoor or outdoor."

to this legislative charge, BESE on July 14, 2020, adopted certain revisions to BESE Bulletin 741 (Nonpublic)—Louisiana Handbook for Nonpublic School Administrators, BESE Bulletin 741—Louisiana Handbook for School Administrators, and BESE Bulletin 126—Charter Schools, providing the “minimum health and safety standards regarding the reopening of school facilities for the 2020-2021 school year” for Louisiana’s non-public, public, and charter schools, respectively. See Louisiana Register Vol. 46, No. 8 (August 20, 2020), at pp. 1060–66, available at <https://www.doa.la.gov/media/351pamu1/2008.pdf>. The minimum health and safety standards adopted by BESE included provisions regarding face coverings in schools. See, e.g., *Id.* at 1061. However, the minimum standards expired on June 30, 2021, pursuant to revisions adopted by BESE on May 12, 2021. See Louisiana Register Vol. 47, No. 6 (June 20, 2021), at pp. 705–07, available at <https://www.doa.la.gov/media/ldehawni/2106.pdf> (“These minimum standards regarding the reopening of schools for the 2020-2021 school year expire on June 30, 2021.”). You want to know if BESE has the authority to adopt rules providing for minimum health and safety standards that would be effective for this upcoming school year.

Analysis

BESE is a constitutionally created body consisting of eleven members, eight of whom are elected by the people, and three of whom are appointed by the governor. La. Const. art. VIII, § 3(A) and (B)(1). The constitution vests BESE with wide-ranging authority over elementary and secondary education in this State:

The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public elementary and secondary schools and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution or by law, but shall have no control over the business affairs of a city, parish, or other local public school board or the selection or removal of its officers and employees

La. Const. art. VIII, § 3(A). Thus, the Louisiana Constitution requires BESE to “supervise and control [Louisiana’s] public elementary and secondary schools . . . as provided by law.” *Id.*

Considering this constitutional provision, BESE “has general supervisory authority over the educational programs of parish school boards As authorized by the Constitution, this general authority of BESE has been further enabled and specified by legislative act.” La. Atty. Gen. Op. No. 90-120. See also La. Atty. Gen. Op. No. 93-694 (“BESE is mandated by the Constitution to supervise and control the public elementary and secondary schools located within the State of Louisiana”). The Louisiana Supreme Court “describe[s] the constitutional relationship between BESE and the legislature as ‘a symbiotic relationship in which neither the Legislature nor BESE has exclusive authority over public elementary and secondary education.’” *Louisiana Fed’n of Teachers v. State*,

13-0120 (La. 5/7/13), 118 So.3d 1033, 1044 n.12 (quoting *Aguillard v. Treen*, 440 So.2d 704, 709 (La. 1983)).

Article VIII, § 1 of the Louisiana Constitution provides that “[t]he legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.” Article VIII, § 3(A) creates BESE. The second sentence of this section provides BESE “shall supervise and control the public elementary and secondary schools ... as provided by law.” In *Aguillard v. Treen*, 440 So.2d 704, 708 (La.1983), and *Board of Elementary and Secondary Education v. Nix*, 347 So.2d 147 (La.1977), we explained the phrase “as provided by law” indicated BESE’s powers of supervision and control were not unfettered nor self-executing, but arose from, and were subject to, laws passed by the legislature. Article VIII, § 10 recognizes the existence of parish and city school boards “subject to control and supervision by the State Board of Elementary and Secondary Education and the power of the legislature to enact laws affecting them.” Taken as a whole, these sections make the local school boards subject to BESE’s powers to exercise supervision and control over the public schools, which in turn are pursuant to laws passed by the legislature.

Eiche v. Louisiana Bd. of Elementary & Secondary Educ., 582 So.2d 186, 189 (La. 1991).

The First Circuit Court of Appeal in *Rankins v. Louisiana State Bd. of Elementary & Secondary Educ.*, 93-1879 (La.App. 1 Cir. 3/17/94), 637 So.2d 548, *writ denied*, 635 So.2d 250 (La. 1994), examined whether BESE possessed the authority to establish a policy providing for graduation exit examinations, despite the absence of any specific legislative authorization for such an exam. The court recognized the previous jurisprudence of the Louisiana Supreme Court establishing that BESE’s broad grant of authority under La. Const. art. VIII, § 3(A) “is not self-executing” and “is not unfettered, but is subject to the laws passed by the legislature.” *Id.* at 551 (citing *Aguillard*, 440 So.2d at 708). Accordingly, the court of appeal “look[ed] to legislative enactments in search of BESE’s authority” and found that the Legislature provided BESE with general, far-reaching authority over education matters:

A. In the exercise of its supervision and control over the public elementary and secondary schools and special schools under its jurisdiction, and in the exercise of its budgetary responsibility for all funds appropriated or allocated by the state for public elementary and secondary schools and special schools placed under its jurisdiction, the board shall have authority to:

.....

(15) Perform such other functions as are necessary to the supervision and control of those phases of education under its supervision and control.

La. R.S. 17:6(A)(15). The court observed that “[t]his statute provides BESE broad powers to perform such functions as are necessary for the supervision and control of public

education." *Rankins*, 637 So.2d at 552. Considering the lack of any expressed contrary intent on the part of the Legislature, the First Circuit held that BESE retained the power under La. R.S. 17:6(A)(15) to implement the exam as a high school graduation requirement. *Id.*

More recently, the First Circuit in *Hill v. Jindal*, 14-1757 (La.App. 1 Cir. 6/17/15), 175 So.3d 988, *writ denied*, 15-1394 (La. 10/23/15), 179 So.3d 600, held that, in light of the Louisiana Constitution's provisions regarding elementary and secondary education, the gubernatorial executive orders at issue "constituted an unconstitutional interference" with BESE's fulfillment of its mandates from the Legislature. *Id.* at 1007.

This office is of the opinion that directives as to the safety protocols to be observed by teachers and students present at school facilities during the school day are themselves a vital aspect of education over which BESE holds constitutional and statutory authority to oversee, pursuant to La. Const. art. VIII, § 3(A) and La. R.S. 17:6(A)(15). Although BESE adopted safety measures for the 2020–2021 school year only after the passage of Act 9, nothing in that or any other legislative act expressly establishes a legislative intent to prohibit BESE from adopting safety measures in the absence of targeted legislation similar to Act 9. The Legislature specifically delegated authority to BESE in La. R.S. 17:6.1 to adopt rules for any program, statement, guideline, or requirement for conduct or action prescribed by the board. Thus, BESE may adopt such rules providing for COVID-19 safety protocols, such as mask requirements and exceptions thereto. Additionally, BESE may adopt rules providing guidelines for local school boards to adopt such policies considering factors specific to the school district such as the percent positivity rate of the district, event settings, group composition, physical distance between students in classrooms, activity engaged in, and other relevant criteria. We note that these rules must be promulgated in accordance with the Administrative Procedure Act. The Administrative Procedure Act provides mechanisms for oversight by both the Legislature and the Governor.²

BESE finds within the state constitution its authority to supervise and control education in this State, and the Legislature is the only other entity with constitutional authority to regulate education in Louisiana on a statewide basis. Thus, pursuant to La. Const. art. VIII, § 3(A), no entity other than the Legislature may supersede any action of BESE undertaken to supervise and control education in this State.

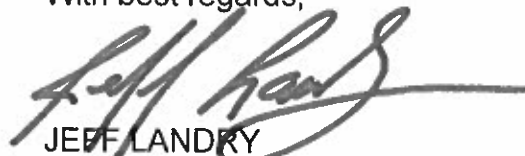
Conclusion

For the reasons provided herein, it is the opinion of this office that, pursuant to La. Const. art. VIII, § 3(A), and in the absence of any specific legislative intent to the contrary, BESE may, if it chooses, adopt rules governing COVID-19 safety protocols, such as temperature checks, the option of mask mandates or exceptions to mask mandates, and other protocols that schools may seem fit. We also recommend that BESE take into consideration constitutional rights of students that parents may raise.

² La. R.S. 49:953 and La. R.S. 49:968.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

With best regards,

A handwritten signature in black ink, appearing to read "Jeff Landry", with a long horizontal flourish extending to the right.

JEFF LANDRY
ATTORNEY GENERAL