

# ADMINISTRATIVE REGULATION REVIEW SUBCOMMITTEE

## Minutes of the 2nd August Meeting

August 17, 2021

### Call to Order and Roll Call

The 2nd August meeting of the Administrative Regulation Review Subcommittee was held on Tuesday, August 17, 2021, at 10:00 AM, in Room 149 of the Capitol Annex. Senator Stephen West, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Stephen West, Co-Chair; Representative David Hale, Co-Chair; Senators Ralph Alvarado and David Yates; Representatives Randy Bridges, Deanna Frazier, and Mary Lou Marzian.

Guests: Todd Allen, Jean Glass, Lu Young, Department of Education; Audrey Gilbert, Pragya Upreti, (High School Students) Kentucky Student Voice Team; Shannon Stocker, Parent; Elizabeth Park, FCPS Parent; Karen Worthen, Citizen; Ray Arnold (& kids), Parents in Madison County; Chuck Eddy, Self; Rebecca Blankenship, Parent; Tony Wheatley, Self & Children of Kentucky; Katie Basham, Parent; Jarrod Burgess, Teachers & Students; Sarah Durand, Bluegrass Institute for Public Policy; Rita Yates, Children and Kentucky Prayer Coalition; Chris Henning, District 2 & Self; Dawn Perkins, Founder of Let Them Play Movement; Terri Conen, Self; Marcie Timmerman, Parent, Advocate; Wes Duke, Eric Friedlander, Department for Public Health; and Senator Danny Carroll.

LRC Staff: Sarah Amburgey, Stacy Auterson, Emily Caudill, Ange Darnell, Emily Harkenrider, Karen Howard, Carrie Nichols, and Christy Young.

The Administrative Regulation Review Subcommittee conducted a supplemental meeting on Tuesday, August 17, 2021, and submits this report:

The subcommittee determined that the following effective emergency administrative regulations were deficient pursuant to KRS 13A.030(2)(a):

EDUCATION AND WORKFORCE DEVELOPMENT CABINET: Board of Education: Department of Education

702 KAR 1:195E. Face coverings in school facilities. Todd Allen, general counsel; Dr. Jason Glass, commissioner; and Professor Lu Young, board chair, represented the department. Ray Arnold, parent; Nathan Arnold, student; Lincoln Arnold, student; Katie Basham, parent; Rebecca Blankenship, parent; Chuck Eddy, citizen; Audrey Gilbert, high

school student, Kentucky Student Voice Team; Cassidy Stocker, student; Shannon Stocker, parent; Marcie Timmerman, parent advocate; Pragya Upreti, high school student, Kentucky Student Voice Team; and Kristen Worthen, parent, appeared in support of this administrative regulation. Jarrod Burgess, parent; Terri Conen, parent; Sarah Durand, Bluegrass Institute for Public Policy; Chris Henning, citizen; Elizabeth Park, attorney; Dawn Perkins, founder, Let them Play; Dr. Chuck Thurston, board-certified emergency room physician; Delvin Williams, parent; and Rita Yates, Kentucky Prayer Coalition, appeared in opposition to this administrative regulation.

In response to a question by Co-Chair West, Dr. Glass stated that the policy of universal face coverings in schools had generated significant differences of opinion. The Kentucky Board of Education used data in determining the appropriateness of this policy. Because of the evolving of the virus, rather than begin a new policy, this administrative regulation established a return to universal face coverings in schools, which was the policy during the previous school year. Face covering policies had been effective in order to continue in-person instruction for students, teachers, and staff. This was a difficult decision for the board, and the board considered local control and decision-making and personal health decisions were important values; however, the board was required to balance those values with the need to protect the health and safety of students, especially our most vulnerable students. Universal face coverings in Kentucky schools would help reduce viral transmission rates and protect Kentucky's medical resources.

Professor Young stated that, while face coverings alone were not a singularly effective strategy against coronavirus, a layered mitigation approach led to returning students to a safe, in-person learning environment. Vaccinations of school personnel, social distancing, hand hygiene, sanitation, and universal face coverings in schools formed a comprehensive mitigation strategy. Universal face coverings in schools should reduce the number of students and school personnel who would be required to quarantine after viral exposure. The Kentucky Board of Education was statutorily required to promulgate administrative regulations as necessary or advisable. Based on expert guidance from the Centers for Disease Control and Kentucky public health officials, the Kentucky Board of Education determined unanimously that this administrative regulation was necessary and advisable. The board had no intent to extend the face covering policy longer than was necessary to reduce viral transmission, quarantine days, and sick days that kept students from in-person instruction.

Pragya Upreti stated that she was a senior at Lafayette High School and a co-leader of the Kentucky Student Voice Team. The team strongly supported a universal face covering policy for schools as established in this administrative regulation. The Kentucky Student Voice Team conducted a survey of 10,000 students from 119 Kentucky Counties. The survey demonstrated that students' shared experiences pertaining to virtual instruction included a devolution in academic standards and achievement; increased responsibilities at home and work; social isolation; technological challenges, such as inconsistent Wi-Fi

services; challenges regarding planning for future education; and physical, financial, and emotional instability. Returning to in-person instruction also included challenges, including anxiety pertaining to students without face coverings in various situations.

Audrey Gilbert stated that she was a junior at Frankfort High School and a co-leader of the Kentucky Student Voice Team. Because Frankfort High School eliminated the virtual option for students for this coming academic year, many students had anxiety about becoming infected with or transmitting coronavirus and returning to in-person instruction, and dealing with encounters with students without face coverings. The Kentucky Board of Education's administrative regulation addressed the anxiety of many students. Mandating universal face coverings in schools would keep schools open for in-person instruction, while failure to do so would put schools and communities at risk.

Shannon Stocker stated that her daughter, student Cassidy Stocker, was currently battling brain cancer, was in active chemotherapy treatment, and was immunocompromised. There were many medically fragile students in Kentucky. Cassidy stated that she experienced anxiety about becoming infected with coronavirus if this administrative regulation were lifted. Ms. Stocker stated that this administrative regulation was used by Cassidy's oncology team to decide that Cassidy would be able to return to in-person instruction. Universal face coverings in schools was not a personal choice because refusal to observe these requirements put the community at risk. Medically fragile students deserved the protection of this administrative regulation.

Kristen Worthen stated that her family kept her school-aged children home last school year in order to protect their medically fragile brother from infection by coronavirus. The children's education suffered during virtual instruction. The delta variant was impacting children more than at any other time during the pandemic, and face coverings were an effective mitigation method; therefore, this was not the time to lift this administrative regulation. Without a requirement in place, it stood to reason that COVID-cautious families would wear face coverings and other families would not, which would place all at risk.

Katie Basham, public school parent, stated that her 11 year old son was too young to be vaccinated against coronavirus. Pre-pandemic Kentucky led the nation in schoolchildren being raised by grandparents and great grandparents, who might be at increased risk of negative outcomes from infection by coronavirus. These caregivers deserved the opportunity to raise their charges in a healthy environment. Some school districts were already seeing the beginning of staffing shortages, which could be exacerbated if Kentucky eliminated universal face coverings in schools. For the health and safety of Kentucky's children, please uphold this administrative regulation.

Rebecca Blankenship stated that, as stepmother to seven children, five of whom were school aged, she supported this administrative regulation. Because many children were too young to be vaccinated against coronavirus, it was too early to relax universal

face covering requirements for schools. If we fail to vote to uphold this administrative regulation, we should be prepared to accept the list of Kentuckians who would die as a result, including teachers, parents, grandparents, and children.

Chuck Eddy requested that the subcommittee uphold this administrative regulation. Coronavirus was contagious, transmissible, and deadly, and because of the delta variant, more schoolchildren were becoming infected. Approximately 620,000 Americans and at least 7,451 Kentuckians had died from coronavirus. Face coverings were an important and necessary way to reduce the spread and to allow in-person instruction. Half of the children in schools were under 12 years old and ineligible for vaccination. 2,100 new cases of coronavirus were reported in Kentucky on August 16, 2021. 548 of those cases were persons under 18 years of age. Twenty-five percent of new cases were children.

Chris Henning, Bullitt County resident, stated that universal face coverings for schools was a bad decision. There was extensive data to support not requiring that schoolchildren wear face coverings. The Declaration of Independence listed repeated injuries and usurpations by the British Crown, including two that were synonymous with the actions of Governor Beshear and the Kentucky Department of Education. He has refused his ascent to the laws and combined with others to subject us to a jurisdiction foreign to our Constitution and acknowledged by our laws, giving his ascent to their acts as pretended legislation. Citizens should have the equal choice to wear a face covering or not in order to adhere to the principles of liberty. As a veteran of this nation, Mr. Henning found it shameful that we were not following our founding documents. Our oath stated that we were to follow the Constitution. Have courage and stop being afraid. If face coverings worked, why haven't face coverings worked?

Dr. Chuck Thurston stated that he had worked as a physician for almost half a century in nine (9) states and in many countries. He spent the last year as a COVID ICU hospitalist managing ventilators and pronouncing hundreds of people deceased. He worked at Billie Jean King, 471 FEMA Hospital, in New York City, where hydroxychloroquine was used and, to his knowledge, no one died. He proceeded to work in the Rio Grande area, where hydroxychloroquine was not used and there was a 75 to 95 percent death rate. All the patients who died had been wearing face coverings. Dr. Thurston states that face masks do not work especially since most are not N95 masks or properly worn. All of his patients who died in El Paso were allergic or had a relative who was allergic to Lisinopril. The primary mode of coronavirus spread was not respiratory, but through touch. Face coverings would not help the medically fragile or immunocompromised. Our creator endowed us with the rights and mechanisms to sabotage viruses. Viruses did not mutate; they were sabotaged by the cell. Social distancing and face coverings eliminated that sabotage of the virus by the cell.

Elizabeth Park stated that she approached this matter from a product liability and product safety perspective. If we assumed that face coverings worked and could protect the

medically fragile, was it safe for healthy children to wear face coverings for long periods of time? Face coverings were intended for brief use, not for use for nine hour periods. This might constitute product misuse. Research indicated questions regarding the safety of extended face covering use, but not enough investigation had been conducted. There might be long-term neurological effects that show up later in life from oxygen deprivation and too much carbon dioxide.

Marcie Timmerman stated that she was a public school parent, a PTA member, and a person with a disability and an autoimmune disorder. Her ability to work was directly related to upholding this administrative regulation. She was not equipped to home school. Her son was a second grader who was too young for vaccination against coronavirus but who had no difficulties wearing a face covering. Because her medication for her autoimmune disorder significantly weakened her immune system, she was especially susceptible to death from coronavirus infection, even after vaccination, including boosters. This administrative regulation made it possible to send her son to school for in-person instruction; therefore, she and many parents, teachers, and schoolchildren supported universal face coverings in schools during the pandemic.

Ray Arnold stated that he felt great after being vaccinated and hoped to be able to vaccinate his children before universal face coverings in schools was lifted. Parents in Madison County had been unable to vote for school board members since the pandemic began; therefore, parents had no real choice regarding school mitigation measures to prevent coronavirus. In Mr. Arnold's opinion, most parents believed that coronavirus was a serious threat. Students who lived in poverty had been unable to participate effectively in virtual instruction. There might be potential legal liability related to schools losing insurance coverage. He asked the subcommittee to table this discussion until the court system resolved this dispute or until Kentucky was out of the coronavirus red zone. Nathan Arnold, aged 11, wanted to wear face coverings in school even though he was anxious about going to school amid the pandemic even with face covering requirements in place. Lincoln Arnold, aged eight, presented artwork he had produced that depicted a person with a face covering and a person without a face covering.

Delvin Williams stated that he had three children in the school system. Cloth face coverings had been proven to be insufficient protection against coronavirus. While most schoolchildren wore the cloth face coverings; even, N95 face coverings were insufficient protection against viruses. As was stated in earlier testimony, this country was founded on freedom, and we should have freedom of choice whether our children would wear a face covering in school or not. His children would prefer not to wear the face coverings, but had complied in order to avoid school disciplinary action. He was opposed to this administrative regulation. This should be a personal choice, and he believed that most people agreed.

Terri Conen stated that she was a mother of two students from McClean County. The members of the Kentucky Board of Education were not elected and had been appointed by Governor Beshear. This gave the appearance that the school board might not be acting solely in the interest of the children, but might be a partisan arm of the Governor. Members of Ms. Conen's small rural community rarely wore face coverings throughout the pandemic, but coronavirus outbreaks had been few. According to the Cabinet for Health and Family Services' Web site, McClean County had a total case rate of zero and two-tenths percent, while Jefferson County's rate was listed at seventeen and 17.3 percent. Imposing the same restrictions on rural and urban areas was ill considered. There were costs to this policy, including effects on children from not seeing each other's faces, treating each other like lepers to be avoided, and fearing reactions from adults if they coughed or sneezed. How were children expected to learn to enunciate? These policies could have long-term effects that were not being considered in this debate. Ms. Conen advocated for a class-action lawsuit against policy makers if there were negative long-term effects for children because of these policies.

Jarrod Burgess stated that his wife was a public school teacher and he had two children in the public school system in Western Kentucky. He agreed with Commissioner Glass that there was a wide difference of opinion about this policy. Freedom and the United States Constitution was not open to opinion; these were rights given by God. Mr. Burgess said that officials were taking away his right to determine what was best for his children. He had the liberty to raise his children the way he saw fit.

Rita Yates, Kentucky Prayer Coalition, stated that she was speaking on behalf of the children who did not have a voice in this debate. Ms. Yates was retired critical care nurse for almost 30 years and was trained in the proper use of face coverings. There was a lot of improper use by the public of personal protective equipment, including pulling at a face covering and not being changed frequently. The standards established by the Kentucky Board of Education allowed for almost anything tied to the face to constitute a face covering. Face coverings did not protect against coronavirus. Proper hand hygiene and keeping hands away from the face were more protective than misused face coverings. Coronavirus was a real disease that was best avoided by being conscious of our environment and using protective equipment properly. Sweden was the only western country that did not shut down, mandate face coverings, or close schools and not one child perished. We had the liberty to choose for ourselves and should have the right to choose what was best for our children. She stated that the lawlessness of Kentucky's Governor should not go unchecked, as he was under an injunction by the Boone County Circuit Court.

Dawn Perkins, founder of Let them Play, stated that, beginning August 2020, children's anxiety levels became concerning to her. If we could play sports, we could go to school. Student athletes were students first. No one addressed mental health or overall wellbeing. Children were educated virtually, and all sports were put on hold. Let them Play became involved with House Bills 208 and 563 and Senate Bill 128 from the Regular Session of the General Assembly. Let them Play believed that unproven face coverings

might have mental health effects on children. The Governor had dismissed our children and the leadership in local districts in the name of public health. This administrative regulation was rushed quickly and unexpectedly through the back door and was unnecessary because a 30 day mandate was already in place. Superintendents had been overruled by the Kentucky Board of Education. Children's needs varied by region, and this policy should be a decision for local districts. Where was the end game and where were the children's mental health briefings?

Sarah Durand of the Bluegrass Institute for Public Policy, stated that coronavirus posed a smaller risk to children than influenza. The Kentucky Board of Education had never issued a face covering mandate for influenza. This administrative regulation was filed as an emergency to avoid public comment and to usurp local control. Educators had access to this vaccine before higher-risk groups in order to avoid the current situation. Some school boards and superintendents weighed the minimal health risks to children against the negative psychological and learning consequences and chose to leave face covering decisions to parents. It was not the role of the Kentucky Board of Education, the Governor, or the Centers for Disease Control to make health decisions for her children. Face coverings had negative impacts on children. This administrative regulation should be found deficient because it did not meet the criteria for an emergency. It should go through the proper process required by law, which provided for adequate vetting of this policy.

In response to a question by Co-Chair West, Dr. Glass stated that individual rights ended at the point where the rights of others became affected. Established speed limits and restaurant health and safety precautions, for example, were appropriate. The Kentucky Board of Education was operating pursuant to the authority established by KRS 156.160, which directed the board to promulgate administrative regulations that were "necessary or advisable for the protection and physical welfare of public schoolchildren." This authority was separate from the Governor's authority pursuant to KRS Chapter 39A, which authorized Executive Orders. The Kentucky Board of Education was appropriately appointed, confirmed, and empowered to promulgate this administrative regulation. There was a comment period for this emergency administrative regulation, and appropriate notice was conducted in accordance with state law. Experimental and correlational studies, including a study by researchers at Duke University, demonstrated that face coverings were effective reducing the probability of transmission and should be used in combination with other virus-mitigation strategies. In Sweden, face coverings had been voluntary, rather than mandatory, and Sweden had the worst per-capita coronavirus mortality in Europe. The American Academy of Pediatrics stated that face coverings could be worn safely by children two years and older, including most children with underlying health conditions. This administrative regulation considered short-term and long-term impacts of this policy and weighed those concerns against protecting the health and safety of students and the preservation of their opportunities for in-person instruction, which were the primary values. Mr. Allen stated that the board complied with KRS Chapter 13A, which provided for a public comment process for this administrative regulation.

In response to questions by Co-Chair West, Dr. Glass stated that face coverings could be worn by most young children safely for the school day. Face coverings were used effectively last academic year, and the board was unaware of any claims of negative effects. Professor Young stated that this administrative regulation authorized face covering removal outdoors and at times of social distancing. The Kentucky Board of Education members were not health experts; therefore, the board relied on expert medical advice and data. Dr. Glass stated that face coverings were also authorized for removal for articulation in learning to read. Mr. Allen stated that this administrative regulation was authorized by KRS 156.160, not the Governor's Executive Order.

Co-Chair West stated that, pursuant to Senate Bill 2 from the 2021 Regular Session of the General Assembly, the Governor had a limited amount of time to promulgate an administrative regulation to effectuate an Executive Order. If this administrative regulation was promulgated solely based on the authority established by KRS 156.160 and the Governor's Executive Order did not have an administrative regulation promulgated thereto, the Executive Order would become null and void. Mr. Allen stated that the authority the board relied upon to promulgate this administrative regulation was KRS 156.160, not the Governor's Executive Order issued pursuant to KRS Chapter 39A.

In response to questions by Co-Chair West, Dr. Glass stated that a noncompliant school would be assessed based on the level of noncompliance. Individual student noncompliance would be addressed through the school's code of conduct procedures, the same as in the previous academic year. Noncompliance by staff would be addressed through established human resources procedures and possibly through licensure board disciplinary action. Institutional noncompliance by a board, district, or superintendent would be addressed based on the penalties established in the Executive Order or through licensure disciplinary action. If many students became quarantined or ill due to noncompliance, attendance data, which was tied to funding, would be affected. There might also be repercussions related to maintaining liability insurance. Professor Young stated that this administrative regulation did not establish special enforcement. Noncompliance would be addressed as would be noncompliance with other administrative regulations promulgated by the board. Mr. Allen stated that Section 2 of this administrative regulation required superintendents to develop and implement procedures to ensure compliance. If penalties were implemented, notice and due process procedures would apply. In the interim between academic years, more information was available to develop a layered mitigation method to operate schools safely. Schools did not have adequate space for social distancing; however, the board had learned that social distancing could be relaxed if face coverings were worn. Professor Young stated that in-person instruction in a safe environment was the board's primary priority to return students to school for this academic year.



In response to questions by Co-Chair Hale, Dr. Glass stated that, as requested by the Local Superintendents Advisory Council, the board considered tabling this policy and working with localized models. Based on the board's mandate established in KRS 156.160, the board determined that this was not a local matter because most of Kentucky (all except six (6) counties) was in the coronavirus (COVID-19) red zone. The board was unaware of any response from the Local Superintendents Advisory Council. The board believed that, due to the delta variant and the fast-approaching beginning of the academic year, the situation was too dire to table. Dr. Glass hoped that the face covering policy would not need to be in place for the entire school year, and the board planned to lift the policy once it was safe to do so. This administrative regulation was in place for 270 days as established in KRS Chapter 13A, and the board established in their motion a trigger to lift this policy if appropriate. Mr. Allen stated that this administrative regulation could be withdrawn at any time if it became safe to lift this policy.

Senator Alvarado stated that he was a board-certified pediatrician. Coronavirus would not be ending; this virus would continue, like influenza. The Kentucky Board of Education consisted of unelected individuals, while local school boards were elected.

In response to questions by Senator Alvarado, Dr. Glass stated that he believed the parents of Kentucky, the superintendents, and the local school boards loved their children and that he cared about the wellbeing of all Kentucky children.

Senator Alvarado stated that the board did not seem to trust parents and neither did the Governor. Why was the board not asking for input from experts, such as pediatricians? Many superintendents were not commenting on this policy because they were in fear of retribution against their jobs or their districts' funding. This was a matter of process and policy, not an opposition to face coverings themselves.

In response to questions by Senator Alvarado, Mr. Glass stated that staff of the Kentucky Department of Education were not medical experts; therefore, they relied on expert advice from the Centers for Disease Control, the American Academy of Pediatrics, the American Medical Association, and the Kentucky Department for Public Health.

Senator Alvarado stated that Governor Beshear, in his veto response to House Bill 1 from the 2021 Regular Session of the General Assembly, had indicated that Centers for Disease Control guidelines were not intended to be prescriptive for administrative regulations or law. In response to a question by Senator Alvarado, Dr. Glass agreed that some countries had more experience dealing with the delta variant than the United States. Senator Alvarado stated that The World Health Organization and the United Nations Children's Fund recommended adherence to local standards related to mitigation against coronavirus infection. There was limited research on face coverings for children under six years of age; therefore, the Centers for Disease Control and the United Nations Children's Fund recommended that children under six years of age should not be required to wear face

coverings. They additionally listed factors to consider before requiring face coverings for children six to 11 years of age. Medically fragile children were at risk from influenza, as well as coronavirus. Vaccination, not face coverings, was the solution to increasing population immunity.

In response to questions by Senator Alvarado, Mr. Glass stated that he was unaware of how many teachers had been vaccinated against coronavirus (COVID-19). The board was not currently considering mandatory vaccinations for teachers and school staff. Senator Alvarado stated that this was an issue for local districts.

Representative Marzian stated that House Bill 1 from the 2021 Regular Session of the General Assembly authorized Kentucky to match the Centers for Disease Control guidelines for addressing coronavirus. She worked thirty-eight years in nursing, including being an ICU nurse. Nursing staff were exhausted and frustrated from the current caseload due to coronavirus, much of which was unnecessary and the result of vaccine hesitancy and the refusal to wear face coverings. Concerns about the effect of face coverings on children's mental health should also apply to children's mental health in situations of child abuse and domestic abuse, especially because Kentucky ranked first in national incidents of child abuse and domestic abuse. She thanked the board for this policy on behalf of her district.

Senator Yates thanked Senator Alvarado for raising the issue of using the Centers for Disease Control guidelines. House Bill 1 from the 2021 Regular Session of the General Assembly authorized Kentucky to match the Centers for Disease Control guidelines. In response to questions by Senator Yates, Mr. Glass stated that the board's decision to promulgate this administrative regulation was unanimous. The board consisted of diverse members from both parties. Face coverings were a mitigation method, and Kentucky should be doing whatever was practical to maintain in-person instruction this academic year. Many students experienced difficulties with virtual instruction. The Kentucky Chamber of Commerce was in support of this administrative regulation for economic reasons. Senator Yates thanked the subcommittee for raising this issue for discussion. He noted that this subcommittee could not stop this administrative regulation from remaining in effect.

Senator Alvarado stated that House Bill 1 from the 2021 Regular Session of the General Assembly gave local districts the option whether or not to match Centers for Disease Control guidelines.

Representative Bridges stated that Dr. Glass referenced people in the schools knowing best and the phrase, "in good faith." In response to questions by Representative Bridges, Dr. Glass stated that people in the schools knew what to do in terms of mitigating against coronavirus. He had been appointed by the Kentucky Board of Education, who were in turn appointed by Governor Beshear and confirmed by the Kentucky Local superintendents were

better suited to make these decisions than appointed members of a board, who were not working directly with schools and students. The recommendations of superintendents went unconsidered, and some were fearful of retribution. He questioned whether the actions of the board were sincerely for the health and wellbeing of the children or whether this policy was the directive of a higher governing power.

In response to questions by Co-Chair West, Dr. Glass stated that this administrative regulation was promulgated pursuant to KRS 156.160, not under authorization of the Governor's Executive Order.

Co-Chair West stated that this subcommittee could not strike down an administrative regulation. KRS Chapter 13A authorized three actions the subcommittee could take which are to request deferral, request withdrawal, or find an administrative regulation deficient. An administrative regulation found deficient could remain effective upon decision by the Governor. Deficient administrative regulations could then be found null and void by the legislature. A finding of deficiency indicated the intent of legislators regarding that policy.

In response to a question by Co-Chair West, Dr. Glass stated that the department declined to withdraw this administrative regulation. Professor Young stated that the board also declined to withdraw this administrative regulation.

Senator Alvarado made a motion, seconded by Representative Bridges, to find this administrative regulation deficient. Co-Chair West opened the floor for discussion on the motion.

Senator Alvarado stated that he was not opposed to face coverings and that he supported vaccinations. He believed that this policy should be for the local level. Many experts stated that it was inappropriate for very young children down to the age of (2) years old to wear face coverings. It was in many cases easier to potty train a two (2) year old in a month than to train a two (2) year old to safely wear a face covering.

Co-Chair Hale stated that he was not opposed to face coverings. He encouraged those who wanted to wear face coverings to wear them properly. He was not opposed to vaccinations and believed vaccinations were the solution to public immunity but also believed vaccination to be a personal health choice. Local school boards and superintendents were the appropriate people to direct these policies, not the unelected Kentucky Board of Education appointed by the Governor. Many superintendents and school boards were in disagreement with this policy and feared retribution for their opposition. House Bill 1 from the 2021 Regular Session of the General Assembly was passed by the legislature, vetoed by the Governor, and that veto was overridden by the General Assembly. Because the Governor did not like that legislation, he began litigation. Those bills had been with the courts without a ruling for months. This agency was flouting

the decisions made by the legislature. These decisions represented the voice of the people of Kentucky. The Governor was also an elected representative; however, one (1) person did not have the ability to overrule the legislative process. A finding of deficiency of this administrative regulation would be equally ignored by the Governor and the Kentucky Board of Education. Legislators had a duty, and the Executive Branch was not implementing the decisions made by the General Assembly.

Representative Frazier stated that either we had a representative government with local officials who had the power to act locally or we did not.

Representative Bridges stated that there were no guidelines or metrics. What positivity rate would trigger this policy to be lifted by the board? The board should establish definitions and guidelines for consideration by local districts. Pertaining to transmission rates, students did not mingle among schools as, for example, restaurant patrons. This was a matter for local districts, and counties with a shared border were zoned differently with regard to coronavirus positivity rates. Freedom was not a baseless consideration.

Co-Chair West stated that this subcommittee was about due process and the rule of law. The Constitution and the rule of law applied, especially during time of a pandemic. This administrative regulation was not passed by the General Assembly and received no due diligence. The biggest concern was that this administrative regulation had no penalty provisions for noncompliance and no provisions for due process; therefore, he advocated that this administrative regulation be found deficient. The department was making the rules and penalties up as they went. Previous administrative regulations pertaining to face coverings were found deficient by this subcommittee based on these same concerns. This administrative regulation was arbitrary, and our Constitution and the Kentucky Bill of Rights, Section 2, disallowed arbitrary power.

A roll call vote was conducted and, with five votes to find this administrative regulation deficient and two votes against deficiency, this administrative regulation was found deficient.

Representative Marzian explained her no vote. This was a case of political theatre, not healthcare. Sixty-nine percent of Americans supported face covering mandates. This was a matter of protecting our children's health and ensuring in-person instruction. Coronavirus would not be limited by county boundaries. It would continue to spread, and medical resources would collapse.

**CABINET FOR HEALTH AND FAMILY SERVICES: Department for Public Health: Division of Epidemiology**

902 KAR 2:213E. Childcare standards for covering the face in response to declared national or state public health emergency. Wes Duke, general counsel, and Eric

Friedlander, secretary, represented the division. Chuck Eddy, citizen, appeared in support of this administrative regulation. Melanie Barker, owner of ABC Children's Academy and developer of the Kentucky Association of Childcare Owners; Senator Danny Carroll, daycare operator; and Tony Wheatley, parent and member of Constitutional Kentucky; appeared in opposition to this administrative regulation.

In response to a question by Co-Chair West, Mr. Friedlander stated that the policy of universal face coverings in childcare facilities was recommended by the Centers for Disease Control and the American Academy of Pediatrics and was an important strategy to reduce transmission of coronavirus and keep children present in preschool and childcare settings. Vaccines were the solution to establishing general public immunity. He urged everyone to get vaccinated. Currently, most children were too young for vaccination. Until vaccination was available for younger children, the goal was to use mitigation methods to keep them as safe as possible. Mitigation methods for childcare settings included sanitization, hygiene, face coverings, and social distancing. Kentucky was experiencing spikes in infection, hospitalizations, and ICU. There was a concern that medical resources were quickly being outpaced by patients infected with coronavirus. There were currently seventeen children hospitalized in Kentucky because of coronavirus. That was more hospitalized children in Kentucky than at any other time during the pandemic. This was a matter of our common humanity. He thanked parents of medically fragile children because it was a very difficult task.

Chuck Eddy supported this administrative regulation for childcare facilities, including requiring face coverings for children two years and older. Twenty-five percent of yesterday's newly reported coronavirus patients were for children under the age of 18. Children could transmit the virus to parents and grandparents who are caregivers to children. Coronavirus was easily transmissible, highly contagious, and deadly. Failure to uphold this policy would likely result in the closure of childcare facilities. These closures would have negative impacts on the economy and on the parents who would miss work to care for these children.

Melanie Barker, owner of ABC Children's Academy and developer of the Kentucky Association of Childcare Owners, stated that two and three year olds could not consistently wear face coverings properly. Children older than three were somewhat better at wearing face coverings, but enforcement was still impractical. It was impossible to keep the face coverings sanitary and to enforce the requirements. It was good to encourage face coverings, but not practical to force this mandate. The majority of time in childcare settings was now spent enforcing the face covering requirements, rather than in educating. A cardiologist client stated to her that this mandate was inappropriate for young children aged two to four. This policy should be lifted immediately.

Tony Wheatley, parent to five daughters, two of whom were medically fragile, stated that he was with Constitutional Kentucky and that he and his daughters would never

wear a face covering if they had a choice. Children could not wear face coverings properly for long periods of time. He was trying to develop an alternative school, and 1,100 families had expressed interest in attending an alternative school. Citizens should have the right to wear a face covering or not and should have the right to determine whether or not their children would wear a face covering. He thanked the subcommittee for defending the Constitution.

Senator Danny Carroll, daycare operator, stated that it was counterintuitive to expect a two or three year old to wear a face covering properly. Four and five (5) year olds were somewhat more able to wear the face coverings. He reiterated the earlier testimony of Melanie Barker. This policy was making the situation worse, not better, and would mean the entire day would be spent putting face coverings back on and washing hands. That would be the extent of the development for the children each day. This policy was neither productive nor safe because broken face coverings included parts, such as rubber bands, that were dangerous for young children. He was not opposed to face coverings, but this was a decision for parents. It was unclear whether or not the administration had consulted childcare providers to determine if this policy was practical. This policy was more stringent than Centers for Disease Control guidelines, which stated that only unvaccinated children two years of age and older should wear the face coverings. This situation would have been better addressed with a team approach from both branches of government that included input from childcare providers. This policy was inconsistent and unfair to parents and especially to young children.

In response to a question by Co-Chair West, Mr. Friedlander stated that the department was attempting to implement the recommendations from the Centers for Disease Control and the American Association of Pediatrics.

In response to questions by Senator Alvarado, Mr. Friedlander stated that this administrative regulation required face coverings for children two years of age and older as they were able to wear them. Senator Alvarado stated that he had concerns about hazards, such as choking, related to face coverings worn by very young children.

In response to questions by Senator Alvarado, Mr. Friedlander stated that the Department for Public Health was not responsible for licensing childcare facilities, with the exception of some food establishment components. The Office of Inspector General, in collaboration with the Department for Community Based Services, was responsible for licensing childcare facilities. The department had consulted across the cabinet, including the Division of Childcare, through the general counsel regarding this policy. Mr. Friedlander and Mr. Duke were unaware whether or not childcare operators were consulted regarding this policy. Neither had directly consulted childcare operators. Mr. Duke stated that the cabinet had broad authority pursuant to KRS 214.020, 211.180, and several other statutes, regarding communicable diseases in the Commonwealth, including quarantine and other authority. The Kentucky Board of Education seemed better suited to promulgate

an administrative regulation establishing universal face coverings in schools; however, if necessary, it could be argued that the Department for Public Health also had authority to do so, as would local health departments through local ordinances. Waivers regarding the choking and suffocation risks to young children wearing face coverings were required last year. Because there was an exemption for children who could not wear face coverings safely, the waivers were not being used this year. A good faith effort pertaining to encouraging young children wearing face coverings would be similar to a good faith effort with encouraging them to wear shoes. The department had tried to be reasonable with this administrative regulation.

In response to questions by Co-Chair West, Mr. Duke stated that the cabinet had no intention this year to require waivers regarding the choking and suffocation risks to young children wearing face coverings. Childcare facilities themselves, as a contractual matter, did not seem to be prohibited from requiring the waivers. Mr. Friedlander stated that a willfully noncompliant childcare facility was subject to licensure action in conjunction with due process as established in KRS Chapter 13B. Mr. Duke stated that childcare requirements were enforced pursuant to 922 KAR 2:190, which established a hearing process. The cabinet intended to work closely with childcare facilities to assist with compliance, answer questions, and alleviate fears of overbearing enforcement. The goal was health and safety. This administrative regulation did not cross reference 922 KAR 2:190 or KRS Chapter 13B. The cabinet decided to use the authority already existing in 922 KAR 2:190 and KRS Chapter 13B. Because Senate Bills 1 and 2 and House Joint Resolution 77 from the 2021 Regular Session of the General Assembly were part of pending litigation, with competing injunctions in place, it was difficult to determine the outcome. The cabinet would comply with any Kentucky Supreme Court order. The cabinet did not believe that the preliminary injunction by the Boone Circuit Court made this administrative regulation void for lack of legal authority because there was a competing injunction by the Franklin Circuit Court. Both injunctions were awaiting a decision by the Kentucky Supreme Court.

In response to questions by Senator Alvarado, Mr. Duke stated that “childcare center” and “family home” were defined in another existing administrative regulation. This policy would not include, for example, children in Sunday school. Mr. Friedlander stated that there were developmental and behavioral affects from dealing with coronavirus across all age spectrums.

In response to questions by Co-Chair Hale, Mr. Friedlander stated that this policy was necessary because the delta variant was causing an unprecedented spike in infections, hospitalizations, and ICU use. More children were being affected than at any time during the pandemic. Vaccines were the solution, but they were not yet available for young children.

In response to questions by Co-Chair West, Mr. Friedlander stated that there was ongoing research regarding the effects of face covering mandates. This situation would be studied for many years. So far, the preponderance of the evidence was on the side of wearing face coverings because of their efficacy in reducing the transmission of disease. There had been spread of coronavirus within childcare facilities because the delta variant was far more contagious. Co-Chair West stated that after previous face covering mandates were implemented, there were significantly more coronavirus cases. He stated that he hoped that this would not be the case with these mandates.

Co-Chair Hale made a motion, seconded by Senator Alvarado, to find this administrative regulation deficient. Co-Chair West opened the floor for discussion on the motion.

Co-Chair West stated that this administrative regulation was the same as those face covering mandates previously found deficient by this subcommittee. This administrative regulation was silent regarding penalties and due process. The message that this sent to childcare providers was that failure to comply would result in a lost license. While the cabinet said it would work with providers, this administrative regulation did not include provisions for that. As Attorney General Daniel Cameron stated, the Governor, like everyone else, was bound to the law. The Governor was enjoined and prohibited from issuing this administrative regulation. Because the Constitution and the rule of law still applied, Co-Chair West advocated that this administrative regulation be found deficient.

A roll call vote was conducted and, with five votes to find this administrative regulation deficient and two votes against deficiency, this administrative regulation was found deficient.

Senator Alvarado explained his yes vote. He stated that children aged two to five were too young for requirements for face coverings. This administrative regulation did not include the latitude the cabinet had stated it would employ. This promised latitude was not uncommon in healthcare settings, but was sometimes abandoned in situations of noncompliance.

Representative Bridges explained his yes vote. The word, “preponderance,” which meant “a greater weight,” had been used today; however, the preponderance should rest with the health and safety concerns for children. Senator Alvarado was an expert in this area and, if he believed that this was inappropriate, then Representative Bridges agreed that this age group was too young to require face coverings.

Other Business: Co-Chair West welcomed new subcommittee member, Senator Ralph Alvarado.



The subcommittee adjourned at 1:45 p.m. The next meeting of this subcommittee was tentatively scheduled for September 14, 2021, at 1 p.m.