



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

May 28, 2021

### ***Sent via Electronic Mail***

The Honorable Melissa Wintrow  
Idaho State Senate  
STATEHOUSE  
[MWintrow@senate.idaho.gov](mailto:MWintrow@senate.idaho.gov)

Re: Acting Governor's Authority

Dear Senator Wintrow:

This letter is in response to your recent inquiry regarding the executive order issued on May 27, 2021 by then-acting Governor Janice McGeachin. This analysis identifies and addresses three issues associated with the order.

### **Issue 1: Does the acting Governor's EO exceed the constitutional or statutory powers entrusted to the Governor?**

The Governor's executive order authority is outlined in Idaho Code section 67-802 which states:

The supreme executive power of the state is vested by section 5, article IV, of the constitution of the state of Idaho, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing executive orders from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.

This statute makes clear that an executive order can only be issued to ensure "that the laws are faithfully executed."

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The executive order at hand has been issued to prohibit the state and its political subdivisions from having a mask mandate. As there is no law prohibiting such mandates, acting Governor McGeachin has exceeded the executive order authority granted her under Idaho Code section 67-802. This executive order does not seek to ensure laws are faithfully executed. Oddly, it seems to have been issued in an effort to undermine the existing authorities of the state and its political subdivisions to issue mask mandates. This executive order appears to run counter to both the Idaho Constitution and the Governor's statutory executive order authority.

There are other provisions of Code that grant the Governor executive order authority in specific circumstances. One such provision, and the only one that may be applicable to this situation, is found in Idaho Code section 46-1008, which grants the Governor authority to issue executive orders to proclaim a disaster emergency. Executive orders issued under this authority, however, must "indicate the nature of the disaster, the area or areas threatened, the area subject to the proclamation, and the conditions which are causing the disaster." This has not been done with this executive order. Furthermore, there is no mention of an emergency other than to reference the proclamation that was issued in March or 2020. Thus, it seems clear this emergency order was not intended to be issued as an emergency proclamation.

**Issue 2: Does the acting Governor's EO impermissibly interfere or encroach upon the Legislature's powers to legislate and make policy for the state of Idaho?**

While the Constitution vests the Governor with supreme executive power within the state, Article III, section 1 of the Idaho Constitution vests the legislative power of the State to the senate and a house of representatives. As noted above, there is no existing law prohibiting mask mandates. Thus, rather than ensuring that an existing law is faithfully executed, the acting Governor's EO prohibiting mask mandates has the effect of creating a law through executive order. This likely encroaches on the lawmaking power of the legislature and violates the separation of powers between the executive and legislative branch. See Article II, § 1, Idaho Constitution.

**Issue 3: Does the acting Governor's EO violate or conflict with any statutory or constitutional provisions entrusting public health decisions to cities, counties, public health districts, school districts or other local governmental entities?**

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The public health districts have the power to "do all things required" to protect the public health. Specifically:

The district board of health shall have and may exercise the following powers and duties:

(1) To administer and enforce all state and district health laws, regulations, and standards.

(2) To do all things required for the preservation and protection of the public health and preventive health, and such other things delegated by the director of the state department of health and welfare or the director of the department of environmental quality and this shall be authority for the director(s) to so delegate.

Idaho Code § 39-414. Under this authority, the public health districts have issued mask mandates. Similarly, school districts have the express statutory authority to protect the morals and health of their pupils. Idaho Code § 33-512(5) &(7). And cities are specifically authorized to preserve public health and prevent the introduction of contagious diseases into the city. Idaho Code §§ 50-304 & 50-606. In sum, the Idaho Legislature has specifically legislated authority for these local governmental entities to take the necessary precautions to protect the public health of their respective constituencies. Under the executive order, it does not appear that any circumstances or authority has been cited for the substitution of an executive order to displace these specifically legislated allocations of local authority.

As stated above, the Governor has the power to issue executive orders to exercise a portion of his constitutional authority to see "that the laws [of Idaho] are faithfully executed." Idaho Code § 67-802. The acting Governor's action to prohibit mask mandates, potentially contrary to existing orders of local government entities encroaches upon the express statutory authority of local government entities and likely exceeds the Governor's authority in statute and Idaho's constitution.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,



BRIAN KANE  
Chief Deputy Attorney General

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