



School Administrators Association of New York State

**SAANYS**  
LEGAL DEPARTMENT

8 Airport Park Boulevard | Latham, New York 12110

Phone: (518) 782-0600 | [www.saanys.org](http://www.saanys.org)

## Updates Regarding Mask Mandate Regulations

### February 2022 News & Notes

On January 24, 2022, Supreme Court, Nassau County Judge, Thomas Rademaker, handed down a decision that held as unconstitutional the state mask mandate, 10 NYCRR § 2.60 and its corresponding Commissioner of Health's December 10, 2021 Determination (updated after commencement of the action on January 13, 2022), promulgated through emergency rule-making by the New York Department of Health (DOH).

The January 24 decision, *Demetriou et al. v. New York Department of Health*, provides two rationales: (1) the at-issue regulation, 10 NYCRR §2.60 was promulgated without a legislative grant of power (i.e., a statutory source); and (2) the emergency rulemaking failed to follow the State Administrative Procedure Act, which details the legal process by which state agencies may promulgate rules. Importantly, in March 2021, the New York State Legislature extinguished the Executive's authority to issue executive orders during a state disaster emergency by passing Executive Law § 29-A. Judge Rademaker's decision goes on to say that Governor Kathy Hochul impermissibly circumvented Executive Law § 29-A by using the New York State Department of Health to issue the emergency rule 10 NYCRR §2.60.

The governor's office appealed the January 24 decision to the Appellate Division, Second Department and, at about 2:00pm on January 25, 2022, the Second Department heard oral arguments. Shortly thereafter, Justice Robert J. Miller issued a stay, meaning the mask mandate is *still in effect* pending a Second Department decision on whether to overturn, uphold, or modify the Judge Rademaker's decision.

Complicating things further is that there is disagreement among jurisdictions. The Supreme Court, Albany County in a November 23, 2021 decision in *Massapequa Union Free School District et al. v. Kathy Hochul et al.* In Massapequa, the Supreme Court denied the legal challenge on procedural grounds; specifically, the court noted that the petitioners did not have capacity to sue and having failed to establish standing to sue for want of injury. Notwithstanding the procedural grounds for dismissal, the Court opined that had the petitioners had capacity and standing to sue, their petition would still have failed because the DOH had the power to promulgate emergency regulations under Public Health Law §206—which is directly opposite of Judge Rademaker's January 24 decision.

### The Bottom Line

While the Second Department moved quickly, the stay they issued means that the mask mandate is *still in effect* pending the Second Department's ultimate decision on the matter. SAANYS members with questions regarding CoVID-19 laws, rules, and regulations should contact SAANYS Legal Department at 518-782-0600 for assistance.

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