



Center *for* Public Policy Priorities

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Governor's HPV Order is Unconstitutional

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Conservatives are complaining about the Governor's executive order that parents must vaccinate all female children for the Human Papillomavirus (HPV) before the sixth grade. They instinctively feel that the Governor has exceeded his authority.

The conservatives are right. He has. This is not the first time, though. Just a little more than a year ago, the Governor issued an executive order requiring elected school boards to spend 65 percent of their budgets in the classroom. Then, conservatives applauded.

Both the vaccination order and the 65 percent order, however, violate the law in the same way. Under our constitution, the Governor administers the law; the Governor doesn't make the law. This principle is textbook civics. Making law is for the Legislature.

With this principle so clear, how can the Governor possibly claim the authority to require vaccinations? Well, when the Legislature passes a law, it cannot think of every detail, particularly in our increasingly complex world. To deal with the details, the Legislature often authorizes a state agency to adopt rules. So, in his executive order, the Governor hasn't actually required vaccinations; rather, he has ordered a state agency to write a rule requiring vaccinations.

Rules, however, must be consistent with state law and must implement, not expand, the law.

To ensure that rules comply with the law, the Legislature requires a state agency to go through a careful process of evaluating its legal authority before adopting a rule. In addition, to ensure that a rule is wise, the Legislature requires a state agency to give the public notice of any proposed rule, give the public a chance to comment, consider the public's comments, and provide a written justification for the final rule.

Having heard no cry of outrage from the Legislature over his 65 percent order, the Governor has grown bolder, leading to his latest order to a state agency to adopt a rule regardless of legal review, public comments, or agency judgment. We have no idea what he may decree next.

We don't want the Governor to create new laws by unlawfully ordering a state agency to adopt a particular rule. If the Governor thinks we should have a new law, he should ask the Legislature to adopt it. If the Governor thinks we should have a new rule, he should ask the appropriate state agency to consider it, but he should not use his muscle to mandate it.

Asking instead of telling is not merely a matter of form. When the Governor asks a state agency to consider a rule, he allows the rulemaking process to work. When the Governor orders a state agency to adopt a rule, he short-circuits the process.

Any state agency subjected to one of these executive orders will of course go through the charade of complying with the law, but it will only be a charade. When the governor issues an order, agency heads will comply, or agency heads will roll. That is why it is so important for a governor to restrain himself and follow the law.

The HPV executive order should serve as a cautionary tale for conservatives and progressives alike. Conservatives should have objected to the 65 percent order, just as progressives should object to the HPV vaccination order. Texans are governed by laws, not by executive whims.

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