



ALAN WILSON  
ATTORNEY GENERAL

August 2, 2021

The Honorable Harris Pastides  
Interim President  
University of South Carolina  
Osborne Administration Building  
Columbia, SC 29208

Dear President Pastides:

We have received several inquiries regarding the validity of USC's Fall COVID-19 Testing and Masking Guidelines. The concern is whether these Guidelines violate Provisos 117.163 and 117.190 of the Appropriations Act. Proviso 117.163 prohibits institutions of higher learning receiving directly or indirectly appropriated funds to require proof of a COVID-19 vaccination as a condition of enrollment or attendance. Proviso 117.190 similarly provides that appropriated funds may not be used to require a vaccination to be present at the institution's facilities "without being required to wear a facemask." Our understanding is that the Legislature intended these Provisos to bar use of State-appropriated funds to mandate COVID-19 vaccinations or the wearing of facemasks.

As you are aware, on July 6, 2021, in a letter to the College of Charleston, we interpreted Proviso 117.163 broadly as prohibiting a university from requiring a vaccination for admission or attendance. Thus, we concluded that the school may not use coercive means or measures indirectly to mandate vaccinations.

As our universities and colleges transition to a new year, it is essential that the letter and spirit of the rule of law, as mandated by the Legislature, be followed. We note as background that the Supreme Court has recognized that a person possesses a general liberty interest in refusing medical treatment, Vitek v. Jones, 445 U.S. 480, 494 (1980) or in avoiding unwanted drugs or medication. Washington v. Harper, 494 U.S. 210, 221-22 (1990). But Due Process liberty interests must be balanced against the State's interest in health and safety in preventing contagious diseases, thereby resulting in the Court's upholding a mandatory smallpox vaccination in Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905). See Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 279 (1990). See also Op. S.C. Att'y Gen., 1963 WL 8340 (Nov. 29, 1963) [Clemson could mandate polio vaccine as condition for admission].

Here, in contrast to the foregoing authorities, the Legislature possesses the ultimate authority over health policy and has prohibited mandatory vaccinations and masking at schools and colleges, siding with a student's liberty interests. Possessing plenary power, it may do so. The University must thus adhere to the Legislature's policy, or otherwise it would have "the

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unbridled power to . . . make its own appropriations decisions.” Hampton v. Haley, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013). Thus, the Provisos are mandatory.

With respect to masks, Proviso 117.190 is ambiguous, to be sure. One reasonable interpretation is to prohibit discrimination by requiring masks for the unvaccinated. Under this interpretation, a uniform mask requirement does not violate the Proviso. Based upon this reading, we understand the University has now imposed a mask requirement “inside all campus buildings” with certain exceptions.

Such a policy, however, is likely not consistent with the intent of the Legislature. It is our understanding that Proviso 117.190, while inartfully worded, was intended to prohibit the mandatory wearing of masks, as reflected in its use of the language “without being required to wear a facemask.” Our state Supreme Court has advised that “courts are not confined to the literal meaning of a statute where the literal import contradicts the real purpose and intent of the lawmakers.” Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002). Given the legislative intent, we are constrained to construe Proviso 117.190 as prohibiting a mask mandate, such as the University has imposed.

Accordingly, it is important that the University not only abide by the Provisos but that it protect the constitutional liberty of students, faculty and staff. However, we further note the General Assembly did not impose a testing prohibition, indeed rejecting such. Thus, as we read the University's testing Guidelines, it is simply requiring a one-time testing requirement prior to return to campus, but has exempted those who choose to show they are vaccinated, or have tested positive for COVID within the past 90 days. We do not read this Policy as either requiring vaccinations or in coercing them. Thus, we do not believe the Provisos are violated by the testing Policy. Please confirm that the University is not imposing a Policy requiring vaccinations. Please confirm also that the University will now not require campus-wide wearing of masks, consistent with the intent of Proviso 117.190.

Of course, the rule of law is paramount. We urge the University to remain vigilant in adhering to the Provisos, as I am sure it will. Again, the University is free to encourage or promote voluntary vaccinations and masking as part of one's personal choice in order to protect the health and safety of all. We commend you for doing so and for your steadfast devotion to higher education and public health.

Sincerely,



Alan Wilson  
Attorney General

cc: Terry Parham, General Counsel