

## **Guidance for Reviewing Regulations Based on Judge Daniel Green's 2021 Decision – Shannon Robinson et al vs. DHSS**

**1) Does the rule allow an individual to exercise arbitrary discretion without a definite standard or rule for his guidance?** Phrases like "...when, in the opinion of the local health authority" from 19 CSR 20-20.050(3) fall in this category. Judge Daniel Green, in his 2021 ruling against DHSS, quoted MO case law cited 19 CSR 20-20.050, "...an ordinance or statute is unconstitutional when it attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance".

**2) Does the rule allow an agency to delegate rulemaking power to another unelected administrative entity, such as a local authority?** Before Judge Green's ruling, DHSS rules 19 CSR 20-20.040(2)(G-I), 19 CSR 20-20.040(6) allowed DHSS to delegate authority to local health directors to issue gathering orders and in 19 CSR 20-20.050(3) to close schools both public and private as well as places of public or private assembly. Judge Green wrote in his Nov. 2021 decision, "This type of double delegation, which results in lawmaking by an administrative entity, if an impermissible combination of legislative and administrative power.

**3) Does the rule use the words like "necessary", "adequate", and "appropriate" to provide standards that agency officials can use in creating and enforcing their own rules and orders?** In his 2021 decision, Judge Green stated, "Delegations of authority that include the phrase 'in accordance with public convenience and necessity' are insufficient due to lack of criterion or standard." He also cited the United State Supreme Court case Panama Refining Co. v. Ryan (1934) which held that "as may deem necessary" is an unconstitutional delegation because it "assumes positive motives with no set standards".

**4) Does the rule use phrases like, "In the opinion of"?** In another quote from Judge Green in his 2021 ruling, he stated, "The Missouri Supreme Court has held that a bureaucrat cannot possess such broad authority, as 19 CSR 20-20.040(3) gave local health directors the authority to "close public and private schools or other places of public or private assembly when, in the opinion of the local health authority, the director of the Department of Health and Senior Services, or the director's designated representative, the closing is necessary to protect the public health". He added, "**A health agency director with the authority to shut down a school or assembly wields incredible power to coerce his subjects into submission.** DHSS' permissive closure regulation effectively converts the recommendations, and even the whims, of a health agency director into enforceable law."

**5) Does the rule allow local authorities to create orders that a) go into effect without public comment and b) are created outside of the legislative process, and c) differ substantially and unfairly between counties?** The county health orders during the Covid lockdowns are an example of these unconstitutional orders.