
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 297 MD 2021

J.W. individually and on behalf of minor children C.W., D.W., and M.W.; S.H. individually and on behalf of minor children C.H. and D.H.; C.H. individually and on behalf of minor child M.J.L; N.J. individually and on behalf of minor children J.J. and J.K.; R.M. individually and on behalf of minor child M.M.; C.A.A individually and on behalf of minor child F.J.A,

Petitioners

v.

Acting Secretary of the Pennsylvania Department of Health, Alison Beam,

Respondent

BRIEF OF PETITIONERS

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I. Statement of jurisdiction

This Court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 761(a)(1).

II. Order or other determination in question

Accordingly, on this day, August 31, 2021, in order to prevent and control the spread of disease, I hereby order:

....

Each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.

....

/s/ Alison V. Beam
Alison V. Beam
Acting Secretary of Health

III. Statement of the Questions Involved

- A. Where face coverings are neither an “appropriate control measure ... provided by rule or regulation” nor an “other disease control measure ... appropriate for the surveillance of disease,” does Respondent lack the legal authority to require individuals with or without a communicable disease to wear face coverings?

Suggested Answer: Yes.

- B. Where the Local Health Administration Law and the Disease Prevention and Control Law of 1955 (“DPCL”) vest county health departments with the responsibility for disease prevention and control for schools in areas where a county health department exists, is the August 31, 2021 Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities (“Order”) inapplicable to counties in which a health department is located where Respondent has not made a finding that the disease control programs carried out by county health departments with respect to COVID-19 are so “inadequate” that they “constitute[] a menace” to the public health?

Suggested Answer: Yes.

- C. Where the Pennsylvania Constitution and the Public School Code require religious exemptions to be considered where medical treatments are otherwise required and masks are being used as a form of medical treatment, does the Order violate the Pennsylvania Constitution and the Public School Code by not allowing for a religious exemption?

Suggested Answer: Yes.

- D. Where the Order requires the masking of all students, regardless of whether they have a communicable disease, does the Order violate the Religious Freedom Protection Act by substantially burdening the free exercise of religion where requiring universal masking is not the least restrictive means of furthering a compelling interest of Respondent?

Suggested Answer: Yes.

E. Where Petitioners enjoy certain inherent and indefeasible rights and other rights guaranteed under the Pennsylvania Constitution, does the Order violate procedural due process where the Order deprives Petitioners of civil rights and was issued without providing for notice or opportunity to respond?

Suggested Answer: Yes.

IV. Statement of the Case

The 2021-2022 school year began for many students across the Commonwealth, including those attending schools in the Central Bucks School District, without a requirement to wear masks, and students attended school without masks and without incident. *See* Complaint at ¶9(f). Other school districts, such as the Mechanicsburg Area School District, planned on allowing students to make their own choices with respect to masks. *See* Mechanicsburg Area School District Safe Return to In-Person Instruction and Continuity of Services Plan, available at https://www.mbgdsd.org/apps/pages/index.jsp?uREC_ID=2218447&type=d&pREC_ID=2197069.

On August 31, 2021, Respondent issued the Order purporting to wrest control from local government and require all students, teachers, staff and visitors – regardless of vaccinated status or serological immunity to the SARS-CoV-2 virus – to wear a “face covering” while working, attending or visiting a “School Entity” as defined in the Order. *See* Order at § 2, attached as Exhibit A.

The Order purports to apply throughout the Commonwealth, regardless of whether a particular School Entity¹ exists in a county with its own health

¹ As used herein, the term “School Entity” is intended to have the meaning ascribed to it in the Order.

department. *See id.*; *see also* Respondent’s Answer to Petitioners’ Application for Emergency Relief Seeking a Preliminary Injunction (“Answer”) at ¶6 (“It is ADMITTED that the Order applies statewide”).

County health departments exist in Allegheny, Bucks, Chester, Erie, Montgomery and Philadelphia Counties, and each county has carried out a disease control programs regarding COVID-19 in schools within those counties. *See* Complaint at ¶¶33-36. The Order does not contain a finding that any county is carrying out a disease control program with respect to COVID-19 that is so “inadequate” that it “constitutes a menace” to the public health, and, by information and belief, Respondent did not make such a finding prior to the August 31, 2021 Order. *See* Complaint at ¶38; *see also* September 28, 2021 Stipulation, attached hereto as Exhibit B (“Acting Secretary of Health Alison Beam did not publish a finding that the disease control program carried out by any county health department ‘is so inadequate that it constitutes a menace to the health of the people’ with respect to COVID-19 prior to issuing the August 31, 2021 ‘Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities’”).

The Order also does not allow for the ability to receive an exemption from the mask requirement based on religious beliefs. *See* Exhibit A; *see also* Answer at ¶7 (“[T]he Order does not expressly include an exemption based upon religious

beliefs”); *but see* Exhibit A at §4(A)(5)(c) (“A School Entity should not: ... c. Violate other laws, including state and federal anti-discrimination laws”).

The Order was a surprise to Petitioners, school districts and others, as it was issued without any public notice or an opportunity to be heard. *See* Application for Emergency Relief Seeking a Preliminary Injunction at ¶8 (“The Order was issued outside the rulemaking procedures under the Commonwealth Documents Law ... and the Regulatory Review Act ... and without allowing for notice or an opportunity to respond”); Answer at ¶8 (“ADMITTED...”).

Petitioners, individually and on behalf of their minor children, have been aggrieved by the Order for the reasons set forth in the Complaint. Petitioners have serological immunity to the SARS-CoV-2 virus, other medical objections, religious objections and/or philosophical objections to the Order’s masking requirements.

V. Summary of Argument

This litigation is not a policy dispute concerning masks – it is purely a legal question as to whether Respondent Acting Secretary of the Pennsylvania Department of Health Alison Beam possesses the power she purports to have. The parties are before this Court because Respondent has taken action far outside the boundaries of existing law by issuing a one-size-fits-all order, without any notice or opportunity to be heard, that purports to impact all students in schools across the Commonwealth, regardless of whether those students attend school within a county with its own health department, whether there is an active report of COVID-19 within an individual school, or whether students have religious objections to wearing a face mask.

The Order was issued without legal authority and substantially impacts the ability of Petitioners and countless students across the Commonwealth to exercise their constitutional rights to receive a public education, breathe clean air and practice their religious beliefs.

Respondent lacks the legal authority to require students to wear masks. As clearly set forth in the DCPL, in counties where a county health department exists, for example, the Order cannot apply in the absence of a finding that the county health department is carrying out a disease control program with respect to COVID-19 that is so “inadequate” that it constitutes a “menace” to the public

health. Since Respondent has not made such a finding, the Order does not apply in any county where a county health department exists, per the unambiguous language of the DCPL

More generally, Respondent lacks the legal authority to require masking *anywhere* in the Commonwealth, because (1) masking is not one of the “control measures” listed in the DPCL or its accompanying regulations; (2) Respondent lacks the legal authority under the DPCL to force individuals *without* a communicable disease to wear masks; and (3) control measures can only be employed in localized areas where there is a “report of a disease,” rather than throughout the Commonwealth, including in areas where there are no reported active cases of COVID-19.

Additionally, by allowing religious objections to be considered, the Order is constitutionally infirm and violates the requirements of 24 P.S. § 14-1419 and Religious Freedom Protection Act.

Finally, as the Order deprives Petitioners and others of rights guaranteed under the Pennsylvania Constitution and was admittedly issued without providing any public notice or opportunity to respond, the Order violates the procedural due process rights of Petitioners.

For the foregoing reasons, Petitioners should be afforded summary relief in this matter.

VI. Argument

In deciding an application for summary relief, this Court may grant summary relief “if a party’s right to judgment is clear ... and no issues of material fact are in dispute.” *McGarry v. Pa. Bd. of Probation and Parole*, 819 A.2d 1211, 1214 n. 7 (Pa. Commw. 2003). Here, there are no issues of material fact in dispute, and Petitioners’ right to judgment is clear.

1. Respondent Lacks the Legal Authority to Require Masking as a Control Measure.

The Order is infirm because requiring individuals to wear masks is not a “control measure ... as is provided by rule or regulation.” As the Department is a creature of statute, it “thus, only [has] the authority to act pursuant to [its] official duties as established by [its] enabling legislation.” *See Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 814 (Pa. Commw. 2010) (citing *Mazza v. Bureau of Driver Licensing*, 692 A.2d 251, 252 (Pa. Commw. 1997)). Respondent, as the Acting Secretary of the Department, similarly only possesses those powers provided by the General Assembly.

Respondent essentially argues that she has the unlimited and unchecked power to do anything she wants – even if not specifically listed in a statute or regulation – as long as Respondent determines, in her sole discretion, that doing so would be “appropriate” for disease control. *See Respondent’s Application for*

Summary Relief at ¶¶17-27. This purported power, as set forth in the Order, includes requiring those *without* a communicable disease to take actions because Respondent has determined that it is “appropriate” to do so. *See* Exhibit A. This alleged power also includes requiring individuals to take actions, even where there is no active report of a communicable disease in individual School Entities. *See id.* Under Respondent’s interpretation, Respondent has the unilateral power, in the name of combating obesity, to force schools to replace cheeseburgers with tofu or, in the interest of preventing the potential spread of communicable diseases, to stop all in-person education in every School Entity within the Commonwealth, without providing anyone notice or an opportunity to respond. This cannot be what the General Assembly intended. *See generally* 1 Pa.C.S. § 1921(a) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly”); 1 Pa.C.S. § 1922(1) (“[T]he General Assembly does not intend a result that is absurd, impossible of execution or unreasonable”).

Respondent cites to three statutory provisions and one regulation within the Order as the basis for its authority: 35 P.S. § 521.5, 71 P.S. § 532(a), 71 P.S. § 1403(a) and 28 Pa. Code § 27.60. *See* Exhibit A. None of these statutes or the regulation vest Respondent with the ability to require the use of face masks.

First, as a threshold issue, the DPCL should be read *in pari materia* with the Administrative Code of 1929 because they both relate to Respondent’s power to address disease prevention issues in the Commonwealth. *See* 1 Pa.C.S. § 1932. As the later-in-time statute with specific provisions setting forth the actual means for the prevention and spread of diseases, the DPCL should be interpreted as limiting the more general powers given to the Department of the Administrative Code of 1929. *See* 1 Pa.C.S. § 1933.

Reading the DPCL and the Administrative Code of 1929 together, it is evident that the intent of these statutes is to impose isolation, quarantine or “control measures ... provided by rule or regulation” of individuals that are reasonably suspected of being infected with a communicable disease, rather than all persons that may *potentially* become infected with a communicable disease. *See, e.g.*, 35 P.S. § 521.7 (requiring Respondent to have “reasonable grounds to suspect any person of being infected with a ... communicable disease” prior to ordering quarantining); 28 Pa. Code §§ 27.60(a)-(b) (discussing the isolation “of a person ... with a communicable disease or infection” and referring to this individual as “the patient”). It would be an absurd reading of these statutes to vest Respondent with the blanket authority to require individuals that are not reasonably suspected of having a disease to take any actions under the guise that such individual merely has the potential to have a disease. *See* 1 Pa.C.S. § 1922(1).

Importantly, 35 P.S. § 521.5 only permits to Respondent to order “appropriate control measures ... **as is provided by rule or regulation.**” (Emphasis added). There are, however, no statutes, rules or regulations that list face masks as an “appropriate control measure[.]” Under the Administrative Code, for example, face masks are absent. *See generally* 71 P.S. §§ 531-56. The DPCL, under the heading “Control measures,”² lists the following three control measures: (1) isolation; (2) quarantine; and (3) “appropriate control measures in such manner in such place as is provided by rule or regulation.” 35 P.S. § 521.5. The terms “isolation” and “quarantine” are defined within 35 P.S. § 521.2 and facially do not include a requirement to wear face masks. In fact, a face mask requirement is not listed anywhere in the DCPL.

As neither the DPCL nor the Administrative Code of 1929 specifically allow for face masks as a “control measure,” the only way Respondent has the power to require face masks is if face masks are a control measure “provided by rule or regulation.” *See* 35 P.S. § 521.5. Although Respondent points to 28 Pa. Code § 27.60 as authority, this regulation does not allow Respondent to impose face masks either.

² *See* 1 Pa.C.S. § 1924 (“The title and preamble of a statute may be considered in the construction thereof”).

This regulation, titled “Disease control measures,” only allows for “isolation;” “surveillance, segregation, quarantine or modified quarantine;” and “any other disease control measure ... **appropriate for the surveillance of disease...**” 28 Pa. Code § 27.60(a) (emphasis added). As set forth above, face masks are definitionally not included within the terms “isolation” and “quarantine.” *See* 35 P.S. § 521.2; *see also* 28 Pa. Code § 27.61 (discussing isolation); 28 Pa. Code § 27.65 (discussing quarantine). Accordingly, Respondent only has the power to require face masks if face masks constitute an “other disease control measure ... appropriate for the surveillance of disease.” *See* 28 Pa. Code § 27.60(a).

The phrase “surveillance of disease” is defined within 28 Pa. Code § 27.1 as “[t]he continuing **scrutiny** of all aspects of occurrence and spread of disease that are pertinent to effective control.” (Emphasis added). In other words, Respondent has the power to implement “other disease control measure[s]” only when they are “appropriate for the” “continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control.” *See* 28 Pa. Code § 27.60(a). “Scrutiny” refers to the monitoring of diseases, rather than mitigation efforts. *See generally* Infectious Disease Surveillance, International Encyclopedia of Public Health (2017) (“Infectious disease surveillance is an important epidemiological tool to monitor the health of a population”), *available at*

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7149515/>; WHO Report on Global Surveillance of Epidemic-prone Infectious Diseases, World Health Organization (“Surveillance has been defined as the continuing scrutiny of all aspects of the occurrence and spread of a disease that are pertinent to effective control”) (citing Last, JM, A Dictionary of Epidemiology, Oxford University Press, 1995), *available at*

<https://www.who.int/csr/resources/publications/surveillance/Introduction.pdf>; Surveillance of Infectious Diseases Is Information for Action, AMA Journal of Ethics, Mark S. Dworkin, MD, MPHTM (“Surveillance is defined as the “ongoing, systematic collection, analysis, and interpretation of outcome-specific data for use in the planning, implementation, and evaluation of public health practice”), *available at* <https://journalofethics.ama-assn.org/article/surveillance-infectious-diseases-information-action/2006-04>. Respondents have not ordered face masks

for the purpose of scrutinizing or monitoring COVID-19; rather, Respondent has ordered face masks “in order to prevent and control the spread of disease.” *See* Exhibit A. As face masks are not being used for the “surveillance of disease,” 28 Pa. Code § 27.60 does not allow Respondent to impose a face mask requirement.

As the Administrative Code, the DPCL and 28 Pa. Code § 27.60 delineate the specific powers that Respondent possesses when it comes to disease prevention and control and a face mask requirement is not listed, Respondent does not have

that power. *See generally Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002) (“under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters”).

While Respondent argues that it should be entitled to deference in interpreting the DPCL, the Administrative Code of 1929 and the Department’s regulation, *see* Respondent’s Application for Summary Relief at ¶15-16, Respondent does not argue that it should be afforded any deference with respect to the Local Health Administration Law. Additionally, deference should not be afforded where, as here, “the intent of the legislature is clear.” *Bethenergy Mines Inc. v. Dep’t of Env’t Prot.*, 676 A.2d 711, 715 (Pa. Commw. 1996). As set forth above, the intent of the General Assembly is clear, as it only allows the use of control measures “provided by rule or regulation,” and no rules or regulations have been promulgated allowing face masks. *See* 35 P.S. 521.5.³

³ Respondent may cite to *dicta* within a footnote to the unreported decision in *County of Allegheny v. Cracked Egg, LLC*, No. 101 C.D. 2021, 2021 WL 3124248 (Pa. Commw. 2021) for the proposition that it may impose face masks as a control measure under the DPCL. That decision lacks precedential value and, in the context of *Cracked Egg*, was merely reiterating what the trial court found. Additionally, it is respectfully submitted that the decision in *Cracked Egg* did not consider the phrase “any other control measure” in the context of the remainder of 35 P.S. 521.5 requiring such control measures to be “provided by rule or regulation.” Further, as the *Cracked Egg* decision involved the use of emergency powers under the Emergency Management Services Code, 35 Pa.C.S. 7101 §§ *et*

The Department has faced respiratory pandemics in the past, such as the 2009 H1N1 (Swine Flu) Pandemic and has had ample opportunity since the beginning of the COVID-19 pandemic to promulgate regulations to add face masks as an “appropriate control measure[.]” The Department should not be granted powers that it did not obtain through the regulatory review process.

2. The Order Does Not Apply to Any School Entity Located in a County in Which a County Health Department Exists.

While the DPCL has been in existence for more than sixty years, there is little case law interpreting it. Nevertheless, both the plain text of the statute and the case law that does exist support a holding that Respondent lacks the legal authority to usurp the power of local county departments of health.

As stated by the Pennsylvania Supreme Court, the General Assembly, through the Local Health Administration Law, 16 P.S. §§ 12001 *et seq.*, “gave to the counties of the State the power to regulate public health within their boundaries.” *Retail Master Bakers Ass’n of Western Pa. v. Allegheny County*, 161 A.2d 36, 37 (Pa. 1960). The Local Health Administration Law provides that “The protection and promotion of the health of the people in the furtherance of human well-being, industrial and agricultural productivity and the national security is one

seq. it was *dicta* to discuss whether face masks can be required under the DPCL. Accordingly, *Cracked Egg* is distinguishable from this matter.

of the highest duties of the Commonwealth” and that these goals “can best be achieved by empowering counties to establish county departments of health...” 16 P.S. § 12002. A county department of health has jurisdiction over “all municipalities or parts of municipalities” previously served “by the State Department of Health for any reason whatsoever...” 16 P.S. § 12013; *see also Pa. Restaurant and Lodging Ass’n v. City of Pittsburgh*, 211 A.3d 810, 828 (Pa. 2019) (“[V]iewed in its entirety, the DPCL embodies the General Assembly’s intention that county boards or departments of health should be treated as serving the municipalities within their respective counties”); *Com. v. Moore*, 584 A.2d 936, 940 (Pa. 1991) (“By reading the [DPCL] in its entirety, however, we may discern that its purposes were to assign primary responsibility for the prevention and control of diseases to local health departments...”).

County health departments are empowered to “execute the powers and duties vested in it or in local health authorities generally by the laws of the Commonwealth,” to “prevent or remove conditions which constitute a menace to public health;” and to “make and enforce such rules and regulations, subject to the approval of the county commissioners ... and institute such programs not inconsistent with law as may be necessary for the promotion and preservation of the public health.” 16 P.S. § 12010. This Court has held that county health departments may issue orders to remedy nuisances and menaces to public health.

See Appeal of Culp, 522 A.2d 1176, 1179 (Pa. Commw. 1987) (holding that the Bucks County Health Department had the legal authority under 16 P.S. § 12010 to issue a cease-and-desist order).

With the Local Health Administration Law’s declared legislative purpose of vesting county health departments with control over local disease prevention matters, Section 3(a) of the DPCL provides that

Local boards and departments of health shall be primarily responsible for the prevention and control of communicable and non-communicable disease, including disease control in public and private schools, in accordance with the regulations of the board and subject to the supervision and guidance of the department.

35 P.S. § 521.3(a). As the Local Health Administration Law and the DPCL both relate to disease prevention, these statutes should be read *in pari materia*. See 1 Pa.C.S. § 1932.

Respondent does not exercise unbridled authority over county health departments; rather, the Local Health Administration Law provides clarity as to what “the supervision ... of the department” means. Under 16 P.S. § 12008, for example, the Pennsylvania Department of Health is responsible for certifying that an individual seeking to become a county health director “meets the qualifications prescribed by the ... Department of Health.” Similarly, under 16 P.S. § 12010(b), the “recruitment, selection, tenure, removal and working conditions of all personnel [of a county health department] shall conform to the standards of

personnel administration prescribed by the State Department of Health,” although the Department has “no authority with respect to the selection, compensation and removal of any individual...” employed by a county health department. 16 P.S. § 12010(b).

The only other relevant context in which Respondent may “supervise” a county health department is limited under both the Local Health Administration Law and the DPCL. Under the DPCL, Respondent may

appoint agents of the [Pennsylvania Department of Health] to supervise or to carry out the disease control program of the particular local board or department of health until he determines that the menace to the health of the people no longer exists and that the local board or department of health is able to carry out an adequate disease control program.

35 P.S. § 521.3(c). This power, however, may **only** be exercised “If the secretary [of the Pennsylvania Department of Health] finds that the disease control program carried out by any local board or department of health is **so inadequate that it constitutes a menace to the health of the people** within or without the municipalities served by the local board or department of health...” *Id.* (emphasis added).

The same supervision concept is present in the Local Health Administration Law, which provides

The State Secretary of Health shall take charge of and direct the operation of a county department of health if he finds:

- (1) that the county department of health is failing to comply with any regulations of the State Department of Health prescribing minimum public health activities, minimum standards of performance of health services, or standards of personnel administration; and
- (2) that as a result, such county department of health is failing to accomplish the purposes described in section 2 of this act; and furthermore
- (3) that conditions exist which constitute a menace to the health of the people

16 P.S. § 12026. “The State Secretary of Health **shall not** take charge of a county department of health under this section until he has given reasonable notice to the county commissioners of the county...” *Id.* (emphasis added).

Petitioners do not dispute that Respondent *could* exercise her power under 35 P.S. § 521.3(c) and 16 P.S. § 12026 to assume disease prevention control powers in counties served by a county health department. However, Respondent must follow the requirements of the DPCL and the Local Health Administration by first (1) giving “reasonable notice to the county commissioners,” 16 P.S. § 12026; and (2) making a finding that “the disease control program carried out by any local board or department of health is so inadequate that it constitutes a menace to the health of the people,” 35 P.S. § 521.3(c). As set forth in the September 28, 2021 Stipulation in this matter, Respondent “did not publish a finding that the disease control program carried out by any county health department ‘is so inadequate that it constitutes a menace to the health of the people’ with respect to COVID-19 prior to issuing the August 31, 2021” Order. *See generally* 51 Pa. Bull. 5181-6384

(demonstrating that the Order was also not published in the Pennsylvania Bulletin). In other words, “reasonable notice” was not given to any county commissioners, and the requisite finding concerning the inadequacy of county health disease prevention programs did not occur. Because Respondent failed to follow the requirements of the Local Health Administration Law and the DPCL, the Order should be vacated, or, in the alternative, held to be inapplicable to any county in which a health department exists.

In its Application for Summary Relief, Respondent suggests that county health departments must “consult with and receive approval from the Department prior to taking any disease control measure.” *See* Respondents’ Application for Summary relief at ¶13 (quoting 28 Pa. Code § 27.60(c)). However, this provision **only** applies where a “local health authority is not” a “local morbidity reporting office,” and, under 28 Pa. Code § 27.1, a “local health department” (defined as a “Each county department of health under the Local Health Administration Law...”) constitutes a “local morbidity reporting office.” 28 Pa. Code § 27.1 (defining “local morbidity reporting office” as “A district office of the Department or a **local health department**”) (emphasis added). If anything, the fact that a local health department is a local morbidity reporting office suggests that, under 28 Pa. Code 27.60(c), a local health department is **not** required to either “consult with or receive approval” from Respondent prior to taking disease control measures.

Respondent appears to argue that the Order constitutes a “rule[] and regulation[] issued by the” Advisory Health Board and that, as a result, county health departments can only require more stringent measures. *See* Respondent’s Application for Summary Relief at ¶11. First, if the Order is a rule or regulation, it must go through the regulatory review process. *See* 71 P.S. § 745.3 (defining “regulation” as “Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency”); *see also* 71 P.S. §§ 745.1-.14 (setting forth the regulatory review process); 71 P.S. § 532(g) (stating that the Department has the “duty ... (g) To promulgate its rules and regulations”). Second, the Order facially was issued by Respondent, rather than the Advisory Health Board. *See* Exhibit A. Third, assuming that the Order is rule or regulation of the Advisory Health Board, Respondent must first “find[] ... (1) that the that the county department of health is **failing to comply with any regulations** ... prescribing minimum public health activities, minimum standards of performance of health services, or standards of personnel administration” and comply with the notice and other requirements of 35 P.S. § 521.3(c) and 16 P.S. § 12026 before wresting control from a county health department. *See* 16 P.S. §

12026(1). Fourth, if the Order is an “order” (as opposed to a “rule[] or regulation[]” of the Advisory Health Board), then 35 P.S. § 521.16(c) does not apply at all because the Order would not be one of the “rules and regulations issued by the” Advisory Health Board.

The General Assembly has spoken clearly in expressing its intent that the “protection and promotion of the health of the people” is “best ... achieved by empowering counties to establish county departments of health...” 16 P.S. § 12002; *see also* 35 P.S. § 521.3(a). Where a county health department exists, Respondent can only supplant a county health department’s power if the procedures set forth under 35 P.S. § 521.3(c) and 16 P.S. § 12026 are followed. As the Order was issued outside of the procedures set forth in the DPCL and the Local Health Administration Law, the Order should be vacated in its entirety, or, in the alternative, be found to not apply in any county with a health department.

3. The Order Substantially Impairs the Free Exercise of Religion and Violates the Religious Freedom Protection Act.

By not allowing religious objections to even be considered, the Order violates the Pennsylvania Constitution, the Public School Code and the Religious Freedom Protection Act. Article I, Section 3 of the Pennsylvania Constitution states:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right

be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

PA. CONST. art I, § 3. This provision provides protection for both religious worship and “the rights of conscience,” separate from religious beliefs. *Id.*

“Under the PA Constitution, public education is a fundamental right, defined also as a civil right...” *Pa. Human Relations Comm’n v. Sch. Dist. of Phila.*, 681 A.2d 1366, 1380 (Pa. Commw. 1996); *see* PA. CONST. art III, 14. The Pennsylvania Constitution provides that “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” PA. CONST. art I, § 26.

a. The Order Violates the Public School Code

With the above constitutional provisions in mind, the Public School Code executes the constitutional protections for religious beliefs and rights of conscience:

[Article XIV. School Health Services] shall not be construed to compel any person to submit to any medical ... treatment ... when the person or the parent or guardian of the person, if a minor, objects to the examination or treatment on religious grounds or to permit any discrimination against any person on account of such objections: Provided, That exemption from medical or dental examinations shall not be granted if the Secretary of Health finds that facts exist under

which the exemption constitutes a present substantial menace to the health of other persons exposed to contact with the unexamined person.

24 P.S. § 14-1419; *see also* 28 Pa.Code § 23.84(b) (stating that children are not required to receive certain medical treatment “if the parent, guardian or emancipated child objects in writing to the immunization on religious grounds or **on the basis of a strong moral or ethical conviction similar to a religious belief**”) (emphasis added).

The Public School Code does not define the term “medical treatment” and there appears to be no case law interpreting 24 P.S. § 14-1419; however, Respondent clearly considers face masks to be a form of medical treatment by ordering their use “in order to prevent and control the spread of disease” in the Order. *See* Exhibit A. Petitioners do not argue that face masks are a “medical examination.” As a result, the last clause within 24 P.S. § 14-1419 (“Provided, That exemption from medical or dental **examinations** shall not be granted if the Secretary of Health finds that facts exist under which the exemption constitutes a present substantial menace to the health of other persons exposed to contact with the **unexamined person**”) does not apply where Petitioners are only asserting that face masks constitute a form of “medical treatment,” rather than a “medical examination.”

The Order compels students with religious beliefs to submit to wearing face masks without any opportunity to object. The lack of opportunity to object violates of 24 P.S. § 14-1419. As the Order requires all School Entities subject to the Public

School Code to enforce the Order, the Order is being implemented under the authority of the Public School Code. Regardless of whether a particular person has religious grounds for objecting to the face mask requirement, the failure of the Order to even allow for the consideration of any religious objections facially violates the procedural due process rights of those with constitutionally-protected religious beliefs.

b. The Order Violates the Religious Freedom Protection Act

The Religious Freedom Protection Act, 71 P.S. §§ 2401 *et seq.*, provides that an agency may not “substantially burden a person’s free exercise of religion, including any burden which results from a rule of general applicability,” except where the burden is both (1) “in furtherance of a compelling interest of the agency;” and (2) “the least restrictive means of furthering the compelling interest.” 71 P.S. § 2404.

Here, the Order’s requirement that Petitioners and others with religious objections to wearing masks substantially burdens their free exercise of religion, both because (1) the Order does not allow even the consideration of religious objections to mask requirements; and (2) the Order violates the religious beliefs of Petitioners by requiring masks.

Requiring individuals that are *not* infected with COVID-19 to wear masks is not in furtherance of any compelling interest of Respondent, as such a requirement is not authorized under the Local Health Administration Law, the DPCL, the Administrative Code of 1929 or 28 Pa. Code § 27.60(a) for the reasons discussed above. Nor is the Order the least restrictive measure of furthering any interest of Respondent, as, to the extent that Respondent has the authority to require masking at all, Respondent could have allowed those with religious objections to be exempt from masking requirements while still otherwise requiring individuals without either a medical condition or a religious objection to wear masks.

Although the Religious Freedom Protection Act ordinarily requires advance notice, no such notice is required under 71 P.S. § 2405(c)(1) and (2) because Respondent’s August 31, 2021 Order was “imminent” at the time of filing and because Petitioners were “not informed and did not otherwise have knowledge of the exercise of governmental authority in time to reasonably provide notice.” *See* Petitioners’ Application for Emergency Relief Seeking a Preliminary Injunction at ¶8 (“The Order was issued outside the rulemaking procedures under the Commonwealth Documents Law ... and the Regulatory Review Act ... and **without allowing for notice** or an opportunity to respond”); Answer at ¶8 (“ADMITTED...”). As the Order impermissibly violates Petitioners’ free exercise

of religion under 71 P.S. § 2404, Petitioners ask that summary relief be granted in their favor.

4. The Order Violates Procedural Due Process by Depriving Individuals of Civil Rights Without Notice or an Opportunity to Respond.

As a matter of procedural due process, government agencies must allow notice and an opportunity to be heard prior to the deprivation of a civil right. “[T]he essential elements of due process are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.” *Soja v. Pa. State Police*, 455 A.2d 613, 615 (Pa. 1982). In the context of a promulgating a rule or regulation, the Regulatory Review Act and the Commonwealth Documents Law satisfy the requirement of due process by allowing for public notice and an opportunity to comment. *See* 71 P.S. § 745.5; 45 P.S. § 1201. Here, however, no public notice occurred prior to the issuance of the Order. *See generally* 51 Pa. Bull. 5181-6384 (demonstrating that the Order was also not published in the Pennsylvania Bulletin); Petitioners’ Application for Emergency Relief Seeking a Preliminary Injunction at ¶8 (“The Order was issued outside the rulemaking procedures under the Commonwealth Documents Law ... and the Regulatory Review Act ... and without allowing for notice or an opportunity to respond”); Answer at ¶8 (“ADMITTED...”).

The Regulatory Review Act defines a “regulation” as

Any rule or regulation, or **order in the nature of a rule or regulation**, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency....

71 P.S. § 745.3. Assuming, *arguendo*, that masking is a power granted to Respondent, the Order is “in the nature of a rule or regulation” in that it purports to set a mandate requiring all School Entities to force students, employees and visitors without a medical exemption to wear face masks. “A regulation must be promulgated in accordance with the Commonwealth Documents Law; otherwise, it is a nullity.” *Shrom v. Pa. Underground Storage Tank Indemnification Bd.*, ___ A.3d ___, 2021 WL 3411473, at *8 (Pa. Commw. Aug. 5, 2021); *see also Pa. Human Relations Commission v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977).

The Commonwealth stated that the Order “establishes a legal mandate” that must be enforced by School Entities “as they do other state laws...” *See* Answers to FAQs, *available at* <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/SchoolReopeningGuidance/ReopeningPreKto12/MaskingOrder/Pages/FAQs.aspx>. The Commonwealth has threatened School Entities with penalties for violating the DPCL, potential personal liability, possible lawsuits and potential cancellation

of liability insurance. *See* September 8, 2021 letter of Department of Education Noe Ortega, available at <https://www.education.pa.gov/Documents/K-12/Safe%20Schools/COVID/SOH%20Order%20Violation%20Letter.pdf>; “Wolf Administration Requires Masking In Schools, Early Learning And Child Care Settings To Keep Students Safely In Classrooms And Delta Variant Out,” (“Failure to implement or follow the Order may subject a person to penalties under the Disease Prevention and Control Law of 1955 and exposure to personal liability.”) available at <https://www.media.pa.gov/pages/education-details.aspx?newsid=1188>. The Order also binds Respondent, the Department and School Entities indefinitely “until [the Order is] otherwise terminated.” *See* Exhibit A at § 6.

Respondent, the Governor of Pennsylvania and the Secretary of Education all regard the Order as binding law; however, this Court should reject the Order as “a nullity” because the Order purports to regulate the conduct of individuals within School Entities without going through the required promulgation process. *See Shrom v. Pa. Underground Storage Tank Indemnification Bd.*, __ A.3d __, 2021 WL 3411473, at *8.

It should also be noted that the Order deprives Petitioners and others of several rights protected under the Pennsylvania Constitution, rights that require the protection of procedural due process. Specifically, the Order deprives Petitioners and others of their “inherent and indefeasible right[.]” to breathe without restriction,

PA. CONST. art. I, § 1. *See Robinson Twp., Washington County v. Com.*, 83 A.3d 901, 954 (Pa. 2013) (citing PA. CONST. art. I, § 25 and stating “‘everything’ in Article I is excepted from government’s general powers and is to remain inviolate”). The Order also violates Petitioners’ “right to clean air,” free of restrictions under PA. CONST. art. I, § 27, *see Robinson Twp.*, 83 A.3d at 951 (“This clause affirms a limitation on the state’s power to act contrary to this right”). Additionally, the Order substantially impairs Petitioners’ free exercise of their religious beliefs protected under Article I, Section 3 of the Pennsylvania Constitution and also impacts their ability to exercise their right to public education. As the Order violates these constitutional rights, the Order should be evaluated from a strict scrutiny standard. *See D.P. v. G.J.P.*, 146 A.3d 204, 210 (Pa. 2016) (noting that a law which “burdens the right of parents to make decisions concerning the care, custody, and control of their children” involves a “fundamental” right that must be evaluated under a strict scrutiny standard). By depriving Petitioners and others of their civil rights without affording anyone notice or an opportunity to respond, the Order violates the constitutional protections of procedural due process.

VII. Conclusion

The Order does not apply in counties where a county health department exists, and Respondent lacks the legal authority to require face masks under the

legal authority cited in the Order. To the extent Respondent has the power to require masking, the Order is constitutionally infirm, both because it substantially impairs Petitioners' free exercise of religion without being the least restrictive means of doing so and in furtherance of a compelling interest and because it was issued without out providing procedural due process – either through the regulatory review process or otherwise – prior to depriving Petitioners and others of their civil rights. Petitioners respectfully ask that the Order be declared void.

LAW OFFICE OF TUCKER R. HULL, LLC

Date: October 8, 2021

By: /s/ J. Chadwick Schnee, Esq.

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Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Tucker R. Hull
Tucker R. Hull (PA306426)

CERTIFICATE OF WORD COUNT

I certify that this brief contains 7,083 words, as calculated by the word count feature on my word processing software, excluding the caption, tables, and certificates.

 /s/ Tucker R. Hull
Tucker R. Hull (PA306426)

EXHIBIT A

Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities

The 2019 novel coronavirus (COVID-19) is a contagious disease that continues spreading rapidly from person to person in the world, the United States, and this Commonwealth. Despite periods of time when the virus seemed to wane, it, like all viruses, has continued to mutate, and spread. As of the date of this Order, there have been 1,300,368 cases and 28,235 deaths in this Commonwealth caused by the still present and ongoing pandemic. At this time, the Centers for Disease Control and Prevention (CDC) estimates that the Delta variant is the predominant strain in the Commonwealth. COVID-19 can be transmitted from any person who is infected, even if they have no symptoms and, with the Delta variant, even if they have been vaccinated.¹ Symptoms of COVID-19 may include fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea. Older adults and people who have serious chronic medical conditions were considered to be at higher risk for serious illness. Now, because of the rise of the Delta variant, increasing disease and hospitalizations, and the inability to obtain vaccines for a large part of that vulnerable group, children are more and more at risk.

There are several reasons for the increasing risk to children from COVID-19. The risk overall to the unvaccinated population is rising. Given the rise in hospitalizations and deaths, and despite COVID-19 vaccines being available, the Delta variant of the SARS-CoV-2 virus is causing the rate of cases of COVID-19 to increase.² The Delta variant is more infectious, and it is leading to increased transmissibility.³ Additionally, data is suggesting that the Delta variant may cause more severe illness than previous strains of SARS-CoV-2.⁴ Vaccination remains the most effective protection against all strains of SARS-CoV-2; however, not all of our population is able to get vaccinated. As of yet, no vaccine has been approved for children under the age of 12. As of August 26, 2021, the total number of cumulative cases reported in children in the Commonwealth was 23,974 in the 0-4 years of age cohort, 56,039 in the 5-12 years of age cohort, and 88,205 in the 12-18 years of age cohort.

¹ Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021, *Weekly* / August 6, 2021 / 70(31);1059-1062 (last visited, August 26, 2021); Key Things to Know About COVID-19 Vaccines, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (Updated August 19, 2021) (last visited August 26, 2021).

² Delta Variant: What we Know about the Science, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (last visited Aug. 9, 2021); Rachel Herlihy, *et al.*, “Rapid Increase in Circulation of SARS-CoV-2 B.1.617.2 (Delta) Variant,” Aug. 6, 2021, CDC, https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e2.htm?s_cid=mm7032e2_w (last visited Aug. 9, 2021); Megan Scudellari, “How the Coronavirus Infects Cells – and Why Delta is so Dangerous,” *Nature*, <https://www.nature.com/articles/d41586-021-02039-y> (last visited Aug. 11, 2021).

³ *Id.*

⁴ *Id.*

In addition to the concern that COVID-19 spreads quickly and dangerously among children, there are concerns that school closures create health issues for children, too. Maintaining in-person instruction at schools is imperative, since it has also been shown that in-person instruction and socialization are necessary for the health and well-being of our children.^{5,7} In view of this serious concern for our nation's children, the CDC has issued a strong recommendation for masking of all persons, teachers, students and staff, within the nation's schools, regardless of vaccination status, to create a multi-layered approach for fighting COVID and to keep our schools open for in-person education. In addition, the American Academy of Pediatrics (AAP) has also strongly recommended masking in schools. Finally, recent studies have shown that mask-wearing in schools has contributed to lower levels of COVID-19 transmission among students and staff and allowed for the continued in-person attendance.⁸ Requiring face coverings in schools, therefore, balances the concerns for the mental health of our children with the need to protect them against a disease that is growing more virulent as we struggle to protect the most vulnerable members of our population. In accordance with the recommendations of the CDC and the AAP and based upon the rising case numbers and hospitalizations in general in the Commonwealth, including the number of cases in our children, as well as the need to protect and maintain in-person education for the health and well-being of those children, I am issuing this Order to protect the ability of our schools to continue to educate our children, and of our children to receive in-person instruction in the safest environment possible.

⁵ Engzell P., Frey A., Verhagen M.D, "Learning loss due to school closures during the COVID-19 pandemic," *Proc Natl Acad Sci* 2021;118(17), <https://www.pnas.org/content/118/17/e2022376118> (last visited August 26, 2021).

⁶ Barnett W.S., Jung, K., "Seven Impacts of the Pandemic on Young Children and their Parents: Initial Findings from NIEER's December 2020 Preschool Learning Activities Survey. 2021," New Brunswick, NJ: National Institute for Early Education Research.

⁷ Verlenden J.V., Pampati S., Rasberry C.N., *et al.*, "Association of Children's Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic — COVID Experiences Survey, United States, October 8–November 13, 2020," *MMWR Morb Mortal Wkly Rep* 2021;70:369–376, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7011a1.htm> (last visited August 26, 2021).

⁸ Zimmerman KO, Akinboyo IC, Brookhart MA, *et al.*, "Incidence and Secondary Transmission of SARS-CoV-2 Infections in Schools," *Pediatrics* 2021;147(4), <https://pubmed.ncbi.nlm.nih.gov/33419869/> (last visited August 26, 2021); Hershov R.B., Wu K., Lewis NM, *et al.*, "Low SARS-CoV-2 Transmission in Elementary Schools – Salt Lake County, Utah, December 3, 2020-January 31, 2021," *MMWR Morb Mortal Wkly Rep* 2021;70(12):442-448, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e3.htm> (last visited August 26, 2021); Falk P., Benda A., Falk P., *et al.*, "COVID-19 Cases and Transmission in 17 K-12 Schools – Wood County, Wisconsin, August 31-November 29, 2020," *MMWR Morb Mortal Wkly Rep* 2021;70(4):136-140, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7004e3.htm> (last visited August 26, 2021); Dawson P., Worrell M.C., Malone S., *et al.*, "Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies – St. Louis County and City of Springfield, Missouri, December 2020," *MMWR Morb Mortal Wkly Rep* 2021;70(12):449-455, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e4.htm> (last visited August 26, 2021).

COVID-19 is a threat to the public's health, for which the Secretary of Health may order general control measures. This authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 35 P.S. § 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures). Particularly, the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. With the opening of the 2021 school year at hand, and case counts and hospitalizations continuing to rise, there is a need for additional action to protect our Commonwealth's children.

Accordingly, on this day, August 31, 2021, in order to prevent and control the spread of disease, I hereby order:

Section 1. Definitions

For purposes of this Order, the listed terms have the following meanings:

"Alternative to a face covering" may include a plastic face shield that covers the nose and mouth, extends below the chin and to the ears, and leaves no exposed gap between the forehead and the shield's headpiece. The Centers for Disease Control and Prevention (CDC) has advised there is currently not enough evidence to determine how much protection a face shield provides to individuals around the person wearing the face shield because of gaps where respiratory droplets may escape. The CDC does state, however, that face shields may still be an option in situations where wearing a cloth face covering is not otherwise feasible.

"Department" means the Department of Health of the Commonwealth.

"Face covering" means covering of the nose and mouth with material that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face. A "face covering" can be made of a variety of synthetic or natural fabrics, including cotton, silk, or linen. A "face covering" may be factory-made, sewn by hand, or be improvised from household items, including, but not limited to, scarfs, bandanas, t-shirts, sweatshirts, or towels. While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, meet those requirements, these specialized masks should be reserved for appropriate occupational and health care personnel.

"School Entity" means any of the following:

- (1) A public PreK-12 school.
- (2) A brick and mortar or cyber charter school.
- (3) A private or parochial school.
- (4) A career and technical center (CTC).

- (5) An intermediate unit (IU).
- (6) A PA Pre-K Counts program, Head Start Program, Preschool Early Intervention program, or Family Center.
- (7) A private academic nursery school and locally-funded prekindergarten activities.
- (8) A child care provider licensed by the Department of Human Services of the Commonwealth.

Section 2: General Masking Requirement

Each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.

Section 3: Exceptions to Covering Requirement

The following are exceptions to the face covering requirements in Section 2. All alternatives to a face covering, including the use of a face shield, should be exhausted before an individual is excepted from this Order.

- A. If wearing a face covering while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state, or federal regulators or workplace safety guidelines.
- B. If wearing a face covering would either cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition or a disability.
- C. When necessary to confirm the individual's identity.
- D. When working alone and isolated from interaction with other people with little or no expectation of in-person interaction.
- E. If an individual is communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication.
- F. When the individual is under two (2) years of age.
- G. When an individual is:
 - (1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing an instrument that would be obstructed by the face covering; or

(2) Participating in high intensity aerobic or anaerobic activities, including during a physical education class in a well-ventilated location and able to maintain a physical distance of six feet from all other individuals.

H. When a child/student is participating in a sports practice activity or event, whether indoors or outdoors.

Section 4. School Entity Obligations

A. A School Entity must:

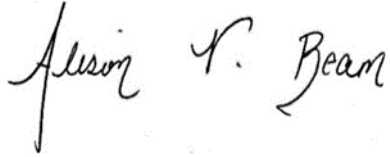
1. Require and enforce the requirement that all teachers, children/students, staff, and visitors (subject to the exceptions in Section 3) wear a face covering indoors, regardless of whether this Order is reflected in a school entity's Health and Safety Plan.
3. Post prominent signs in conspicuous locations for teachers, children/students, staff, and visitors stating that face coverings are required by the Order of the Secretary of Health.
4. Provide reasonable accommodations for individuals who state they have a medical condition, mental health condition, or disability that makes it unreasonable for the person to maintain a face covering.
5. A School Entity should not:
 - a. Enforce face covering requirements when there is an exception under Section 3 or if it is unsafe to do so.
 - b. Restrain, use force, or physically remove, teachers, children/students, staff, or visitors who refuse to comply with this Order when it would not otherwise be legal to do so.
 - c. Violate other laws, including state and federal anti-discrimination laws.

Section 5. Federal Requirements Relating to Transportation

This Order shall not impact the obligation of any School Entity to comply with requirements issued by the CDC, including requirements for masking on public transportation conveyances, such as school district transportation.

Section 6. Effective Date and Duration

This Order shall take effect at 12:01 a.m. on September 7, 2021, and shall remain in effect until otherwise terminated.



Alison V. Beam
Acting Secretary of Health

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.W., individually and on behalf of minor :
children C.W., D.W. and M.W.; S.H., :
individually and on behalf of minor children :
C.H. and D.H; C.H., individually and on :
behalf of minor child M.J.L.; N.J., :
individually and on behalf of minor :
children J.J. and J.K.; R.M., individually :
and on behalf of minor child M.M.; C.A., :
individually and on behalf of minor child :
F.J.A., :
Petitioners, :
v. : No. 297 MD 2021
Acting Secretary of the Pennsylvania :
Department of Health, Alison Beam :
Respondent. :

STIPULATION

AND NOW, come the parties, J.W., individually and on behalf of minor children C.W., D.W. and M.W.; S.H., individually and on behalf of minor children C.H. and D.H; C.H., individually and on behalf of minor child M.J.L.; N.J., individually and on behalf of minor children J.J. and J.K.; R.M., individually and on behalf of minor child M.M.; C.A., individually and on behalf of minor child F.J.A., Petitioners, and Acting Secretary of the Pennsylvania Department of Health, Alison Beam, Respondent, by and through their attorneys, and hereby stipulate and agree as follows:

1. Acting Secretary of Health Alison Beam did not publish a finding that the disease control program carried out by any county health department “is so inadequate that it constitutes a menace to the health of the people” with respect to COVID-19 prior to issuing the August 31, 2021 “Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities.”

Respectfully submitted,

LAW OFFICE OF TUCKER R. HULL, LLC

Date: September 28, 2021

By: /s. Tucker R. Hull, Esq.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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