

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

294 MD 2021

**JACOB DOYLE CORMAN, III, et al.,
Petitioners,**

v.

**ACTING SECRETARY OF THE PENNSYLVANIA HEALTH
DEPARTMENT,
Respondent.**

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION..... 1

II. STATEMENT OF THE QUESTIONS INVOLVED.....2

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT..... 11

 1) The August 31, 2021, “Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities,” constitutes a rule or regulation subject to the provisions of the Regulatory Review Act..... 11

 2) Respondent’s Order dated August 31, 2021, violates the principles contained in the Non-Delegation Doctrine..... 26

V. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652, 692 (1990) (Scalia, J. dissenting).....	10
<i>Blackwell v. Com., State Ethics Com'n</i> , 567 A.2d 630, 636 (Pa. 1989).....	27, 28
<i>Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.</i> , 211 A.2d 487, 492-93 (Pa. 1965).....	27
<i>County of Allegheny v. The Cracked Egg</i> , 2021 WL 3124248 (Pa. Commw. 2021).....	20
<i>Dep't of Transp. v. Ass'n of Am. Railroads</i> , 135 S.Ct. 1225 (2015) (Alito, J. concurring).....	27
<i>Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare</i> , 910 A.2d 134, 144 (Pa. Commw. 2006).....	23
<i>Gilligan v. Pa. Horse Racing Commission</i> , 422 A.2d 487, 489 (Pa. 1980).....	28
<i>Pacific Gas & Electric Co. v. FPC</i> , 506 F.2d 33 (D.C. App. 1974).....	18, 23
<i>Pennsylvania Hum. Rels. Comm'n v. Norristown Area Sch. Dist.</i> , 374 A.2d 671, 679 (Pa. 1977).....	23
<i>Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth</i> , 877 A.2d 383, 418 (Pa. 2005).....	27
<i>PHRC v. Norristown Area School Dist.</i> , 374 A.2d 671, 679 (Pa. 1977).....	18
<i>Protz v. Workers' Compensation Appeal Bd. (Derry Area School District)</i> , 161 A.3d 827 (Pa. 2017).....	27, 28, 30, 32
<i>State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.</i> , 272 A.2d 478, 481 (Pa. 1971).....	27
<i>Tosto v. Pa. Nursing Home Loan Agency</i> , 331 A.2d 198, 203 (Pa. 1975).....	26, 29, 31, 33
<i>Wm. Penn Parking Garage, Inc. v. City of Pittsburgh</i> , 346 A.2d 269, 291 (Pa. 1975).....	26, 30

Statutes

24 P.S. §§ 1–101.....	26
35 P.S. § 521.20.....	24
35 P.S. § 521.5.....	passim
35 P.S. § 532.....	24
35 Pa. C.S. § 7301(c).....	21
42 Pa. C.S.A. § 7531.....	1
42 Pa. C.S.A. § 761(a)(1).....	1
71 P.S. § 1403.....	24

71 P.S. § 1409.....	24
71 P.S. § 745.2.....	4
71 P.S. § 745.3.....	9, 12, 18
71 P.S. § 745.5.....	17
71 P.S. § 745.5a.....	19
71 P.S. § 745.5b.....	20
71 P.S. § 745.7a.....	22

Other Authorities

Chris Ullery, <i>If CDC won't mandate masks in schools, 'neither will I,' Gov. Wolf says</i> , Bucks County Courier Times, Published August 6, 2021.....	6
Gov. Tom Wolf calls on state lawmakers to return to Harrisburg to pass school mask mandate, WGAL 8, Published August 27, 2021, https://www.wgal.com/article/pennsylvania-gov-tom-wolf-asks-lawmakers-to-return-to-harrisburg-to-pass-school-mask-mandate/37397945	6
Jason Thompson, <i>Corman Criticizes Wolf Administration's School Masking Announcement</i> , Posted August 31, 2021, https://www.senatorcorman.com/2021/08/31/corman-criticizes-wolf-administrations-school-masking-announcement/	7
Kathy L. Rapp, Chairperson of the House Health Committee, <i>Letter to Commonwealth Joint Committee on Documents re: Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities</i> , September 14, 2021.....	23
Kathy L. Rapp, Chairperson of the House Health Committee, <i>Letter to Commonwealth Joint Committee on Documents re: Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities</i> , September 14, 2021.....	4
Pennsylvania ARP ESSER State Plan: American Rescue Plan Elementary and Secondary School Emergency Relief Fund, Page 19, Issued July 2021.....	17
Pennsylvania Question 1, <i>Legislative Resolution to Extend or Terminate Emergency Declaration Amendment</i> , approved May 18, 2021.....	5
Pennsylvania Question 2, <i>Emergency Declaration Amendment</i> , Approved May 18, 2021.....	5

Treatises

John Locke, <i>Second Treatise of Government</i> , 87 (R. Cox Ed. 1982).....	27
--	----

Regulations

210 Pa. Code § 65.37.....	20
28 Pa Code § 27.1.....	14

28 Pa. Code § 27.60..... 9, 12, 13, 14, 15
86 FR 21195..... 16
Constitutional Provisions
Pa. Const. Art. II, § 1.....29

I. **STATEMENT OF JURISDICTION**

This Court has original jurisdiction over this action pursuant to 42 Pa. C.S.A. § 761(a)(1). Petitioner's action is in the nature of a Declaratory Judgment action pursuant to 42 Pa. C.S.A. § 7531, et seq.

II. STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the August 31, 2021 "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (Order) constitutes a rule or regulation subject to the provisions of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1 – 745.15?

SUGGESTED ANSWER: Yes.

2. Whether said Order violates the principles governing the delegation of administrative authority?

SUGGESTED ANSWER: Yes.

III. STATEMENT OF THE CASE

This case presents issues of critical importance regarding the power and authority of the Acting Secretary of Health and the Executive Branch to impose an "Order" mandating the wearing of "face masks" in the public schools of Pennsylvania. This case does not center on the efficacy of universal face covering nor the seriousness of the COVID-19 pandemic. Rather, this case sets its focus on the Acting Secretary's obligation to comply with Pennsylvania law and indeed on her actual authority in this case, to do so.

The House of Representatives Health Committee has now spoken regarding the Acting Secretary of Health's issuance of her August 31, 2021, "Order." In reviewing the Respondent's "Order," Pennsylvania's House of Representatives Health Committee approved a letter to the Commonwealth Joint Committee on Documents stating,

Based upon the facts above, acting Secretary Beam violated the law by issuing the August 31 Order because the order is a "rule" or "regulation", and Beam did not follow the rulemaking procedures that are required under the Commonwealth Documents Law and the Regulatory Review Act.

Kathy L. Rapp, Chairperson of the House Health Committee, *Letter to Commonwealth Joint Committee on Documents re: Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face*

Coverings in School Entities, September 14, 2021. A true and correct copy of the Pennsylvania House of Representatives Health Committee letter to the Commonwealth Joint Committee on Documents is attached hereto as, "Exhibit 1."

The Regulatory Review Act was enacted to,

establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence, and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General, and the General Assembly in their supervisory and oversight functions.

See 71 P.S. § 745.2.

In failing to comply with the requirements of Pennsylvania's Regulatory Review Act, Pennsylvania's Acting Secretary of Health has issued an invalid "rule" or "regulation," depriving the citizens of the Commonwealth of Pennsylvania of an opportunity to be heard on the issue.

On May 18, 2021, the citizens of this Commonwealth voted to approve two constitutional amendments that curtailed the Governor's emergency powers under Pennsylvania's Emergency Management Services Act. Pennsylvania Question 1, approved by a majority of Pennsylvania's electors, permits the Pennsylvania General Assembly to pass a resolution, which the governor cannot veto, by a simple majority to extend or terminate the

Governor's Emergency Proclamation under Pennsylvania's Emergency Management Services Act. See Pennsylvania Question 1, *Legislative Resolution to Extend or Terminate Emergency Declaration Amendment*, approved May 18, 2021.

Further, Pennsylvania Question 2, approved by Pennsylvania's electors, limits any emergency proclamation by the Governor to a period of twenty-one (21) days unless the legislature passes a concurrent resolution to extend the order and further provides that the state legislature shall pass laws related to how disaster emergencies must be managed. See Pennsylvania Question 2, *Emergency Declaration Amendment*, Approved May 18, 2021.

Following the amendment of Pennsylvania's Constitution, the Pennsylvania General Assembly approved a Concurrent Resolution terminating Governor Wolf's March 6, 2020, Disaster Proclamation. A true and correct copy of the Pennsylvania General Assembly's Concurrent Resolution terminating Governor Wolf's March 6, 2020 Disaster Proclamation is attached hereto as, "Exhibit 2."

In August 2021, following the restriction of the Governor's unilateral powers to proclaim and extend disaster declarations, the Governor made a public statement, in which he stated in relevant part as follows,

I think the school districts in Pennsylvania have to decide what they're going to do. I think the CDC guideline is they strongly recommend that schools do that. They're not mandating [masks] and neither am I.

Chris Ullery, *If CDC won't mandate masks in schools, 'neither will I,' Gov. Wolf says*, Bucks County Courier Times, Published August 6, 2021.

After repeatedly stating that Pennsylvania's Governor (and Health Secretary) would not mandate universal face coverings and would leave the decision to local school districts, 474 of the 500 districts in Pennsylvania created health and safety plans and only 59 school districts implemented a mandatory masking policy. *Gov. Tom Wolf calls on state lawmakers to return to Harrisburg to pass school mask mandate*, WGAL 8, Published August 27, 2021, <https://www.wgal.com/article/pennsylvania-gov-tom-wolf-asks-lawmakers-to-return-to-harrisburg-to-pass-school-mask-mandate/37397945>.

Shortly thereafter on August 25, 2021, Governor Wolf addressed a letter to the President Pro Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives requesting that they call the General Assembly into session to immediately pass legislation that would require schools to implement masking requirements. The Governor's letter stated,

As we continue to respond to the COVID-19 pandemic, my administration has sought to include the legislature in our efforts and make the process more collaborative. I am asking you to call the General Assembly back to Harrisburg immediately to work with me to pass legislation that will require schools and child care centers to implement masking requirements while in the classroom. My administration will continue to monitor the situation, communicate, and work with the General Assembly and take actions as needed to keep our children safe, and in the classroom. With school having already started in many areas of the state, the time to act is now.

Jason Thompson, *Corman Criticizes Wolf Administration's School Masking Announcement*, Posted August 31, 2021, <https://www.senatorcorman.com/2021/08/31/corman-criticizes-wolf-administrations-school-masking-announcement/>.

In response to this letter, the President Pro Tempore of the Pennsylvania Senate, Jake Corman, stated,

Moreover, the Acting Secretary of Health does not have the authority to even implement or enforce mitigation measures on healthy Pennsylvanians. If Governor Wolf truly believed that he had this authority, then he would not have asked the General Assembly to implement a mask mandate just last week.

Id.

Despite all of the foregoing, on August 31, 2021 Pennsylvania's Acting Secretary of Health, Alison Beam, issued an "Order," effective September 7, 2021, entitled, "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (the

"Order"). See Exhibit A. The Secretary of Health's August 31, 2021, Order contains a "General Masking Requirement." The "Order," provides that,

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

The Order further defines, "School Entity," to mean

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 (UI); 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; and 8) a childcare provider licensed by the Department of Human Services of the Commonwealth.

See Exhibit A, Page 3.

Pursuant to the Secretary of Health's Order dated August 31, 2021, a covered "School Entity" must require that all teachers, children/students, staff, and visitors wear a face covering indoors, post prominent signs throughout the premises stating that face coverings are required by the Order of the Secretary of Health, and provide reasonable accommodations for individuals who state they have a medical condition or disability. See Exhibit A, Pages 3-5.

As authority for the Order, the Acting Secretary of Health claims,

... 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...

Exhibit A, Page 3.

Section 521.5 – “Control Measures” of the Disease Prevent and Control Law of 1955, as cited by Respondent as support for their August 31, 2021, Order, states that,

Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, ***or any other control measures in such manner and in such place as is provided by rule or regulation.***

35 P.S. § 521.5 (emphasis added).

In the absence of any existing rule or regulation granting the Secretary of Health the authority to issue her August 31, 2021, Order, the Secretary of Health must follow the procedures and requirements set forth in Pennsylvania's Regulatory Review Act prior to issuing her Order. See 71 P.S. § 745.3. The procedures and requirements set forth in Pennsylvania's Regulatory Review Act are mandatory and are not impacted by any emergency declaration of the Governor exercising emergency powers, as any and all emergency declarations relative to the COVID-19 Pandemic have

expired through their own terms or have been revoked by the General Assembly. As the Secretary of Health has no authority to issue regulations except through Pennsylvania's Regulatory Review Act; and as the Secretary of Health has failed to comply with the requirements of the Act, the Secretary of Health's Order dated August 31, 2021, is void *ab initio*.

Respondents argue that the very nature of the COVID-19 Pandemic requires the Commonwealth of Pennsylvania to adopt certain measures, including masking of healthy persons in school settings, and to ignore the law on this matter. As Justice Antonin Scalia observed,

[G]overnmental abridgment of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our Bill of Rights, however, is that there are some things - even some seemingly desirable things - that government cannot be trusted to do.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 692 (1990) (Scalia, J. dissenting).

IV. ARGUMENT

Pursuant to the Court's Order dated September 13, 2021, Petitioners' Brief is limited to the following two issues:

- 1) Whether the August 31, 2021 "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (Order) constitutes a rule or regulation subject to the provisions of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1 – 745.15; and
- 2) Whether said Order violates the principles governing the delegation of administrative authority.

For the reasons set forth herein, Petitioners urge this Court to find Respondent's August 31, 2021, Order to be a "rule" or "regulation" subject to the provisions of the Regulatory Review Act and that said Order is in violation of Pennsylvania's Non-Delegation Doctrine.

- 1) The August 31, 2021, "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities," constitutes a rule or regulation subject to the provisions of the Regulatory Review Act.

Respondent's August 31, 2021 Order constitutes a "rule" or "regulation" under the Regulatory Review Act and as such, in failing to comply with the procedures and requirements contained in the Act, Respondent has issued an invalid Order.

Pennsylvania's Regulatory Review Act defines a regulation to be,

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. . . The term shall not include a proclamation, executive order, directive, or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor.

71 P.S. § 745.3.

As authority for her Order, the Acting Secretary of Health cites the following,

... 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. ...

Exhibit A, Page 3.

As an initial matter, the Acting Secretary of Health claims authority to promulgate her August 31, 2021, Order by and through Section 521.5 of Pennsylvania's Disease Prevention and Control Law (35 P.S. § 521.5). Section 521.5 of the Disease Prevention and Control Law simply provides

that the Department of Health, upon the report of a disease which is subject to isolation, quarantine, or any other control measure, shall carry out appropriate control measures in such manner and in such place ***as is provided by rule or regulation***. 35 P.S. § 521.5 (emphasis added). Such a regulation is not currently in existence in the Commonwealth of Pennsylvania.

Respondent's Order next cites to 28 Pa. Code § 27.60(a) – Disease Control Measures, of the Department of Health's regulations. 28 Pa. Code § 27.60(a) states, in relevant part,

(a) The Department or local health authority shall direct *isolation* of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine, or modified quarantine of contacts of a person or animal with a communicable disease or infection; and any other disease control measure the Department or local health authority considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infectious agents.

28 Pa. Code § 27.60(a).

28 Pa. Code § 27.60 permits the Secretary of Health to direct isolation of a person or an animal with a communicable disease or surveillance of contacts of a person or animal with a communicable disease or infection. The term "isolation," as used in Section 27.60, is defined to mean, "[t]he separation for the communicable period of an infected person or animal from

other persons or animals, in such a manner as to prevent the direct or indirect transmission of the infectious agent from infected person or animals to other persons or animals who are susceptible or who may spread the disease to others." 28 Pa Code § 27.1. The term "surveillance," as used in Section 27.60 has been defined as, "[t]he continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control." *Id.*

Applying the authorized powers of the Secretary of Health under Section 27.60 to the present matter makes clear that the Acting Secretary of Health does not possess the regulatory authority to support the issuance of her August 31, 2021, Order. Respondent's Order mandates the wearing of face coverings by teachers, students, children, staff, or visitors working, attending, or visiting a School Entity. Such measures do not constitute the direction of "isolation" by the Department of Health, nor do they constitute "surveillance of disease," as the terms are used in Regulation 27.60. Nor is there any authority to impose restrictions or regulations on healthy Pennsylvanians. Moreover, what's next if this Order is permitted to stand? The repeat of "stay-at-home" orders, or business closure orders?

Section 27.60 also permits the use of "Disease Control Measures" by the Department of Health, stating as follows,

- (b) The Department or local health authority will determine the appropriate disease control measure based upon the disease or

infection, the *patient's* circumstances, the type of facility available, and any other available information relating to the patient and the disease or infection.

28 Pa. Code § 27.60(b) (emphasis added).

Section 27.60 likewise fails to justify Respondent's issuance of her August 31, 2021, Order. The regulation does not simply state that the Department shall, "direct ... any other disease control measure the Department ... considers to be appropriate." Rather, the statute allows the Department to direct disease-control measures that are appropriate for "isolation," or "surveillance of disease." The specific terms used in Section 27.60 such as isolation, segregation, quarantine, and modified quarantine all involve measures that focus on keeping the infected person away from healthy individuals, and *ejusdem generis* therefore counsels against a broad interpretation of the catchall term that would apply differently to allow the Department to mandate measures be taken in regard to those who are not infected. Additionally, the language contained in Section 27.60(b), which twice refers to "the patient," confirms that the Department's actions should be directed to "control" a disease by limiting the behavior of the individual that has contracted the disease – not the entirety of the Commonwealth's population.

Similarly, there is no existing "rule" or "regulation" of the Department of Education that authorizes Respondent to issue her August 31, 2021, Order. On April 22, 2021, the Federal Department of Education promulgated its Interim Final Rule for the receipt and use of ARP ESSER (American Rescue Plan Elementary and Secondary School Emergency Relief). The Interim Final Rule provides,

Interim Final Requirement: Under this requirement, each LEA [local education agency] that receives ARP ESSER funds must develop, submit to the SEA [state education agency] on a reasonable timeline determined by the SEA, and make publicly available on the LEA's website, a plan for the LEA's use of ARP ESSER funds. The plan, and any revisions to the plan submitted consistent with procedures established by the SEA, must include at a minimum a description of –

(1) The extent to which and how the funds will be used to implement prevention and mitigation strategies that are, to the greatest extent practicable, consistent with the most recent CDC guidance on reopening schools, in order to continuously and safely open and operate schools for in-person learning.

86 FR 21195; 34 CFR chapter undefined.

The Federal Department of Education's Interim Final Rule fails to contain any mandates requiring the use of universal face coverings in elementary or secondary schools. Nor does the Interim Final Rule authorize or require the recipients of ARP ESSER funds to mandate the use of universal face coverings in elementary or secondary schools. The

Pennsylvania Department of Education has also adopted an ARP ESSER State Plan, which requires the SEA to provide,

(i) how the SEA will support its LEAs implementing, to the greatest extent practicable, prevention and mitigation policies in line with the most up-to-date guidance from the Centers for Disease Control and Prevention (CDC) for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff.”

The SEA has responded to this requirement by stating,

The Secretary of the DOH lifted the Commonwealth's universal face covering order on June 28, 2021. As such, LEAs have the authority to determine local masking policies. Schools have been advised to follow CDC recommendations in making policy decisions.

Pennsylvania ARP ESSER State Plan: American Rescue Plan Elementary and Secondary School Emergency Relief Fund, Page 19, Issued July 2021.

There is simply no existing statute or regulation that authorizes or requires a local education agency to mandate the use of universal face coverings of students in schools. If such rule or regulation existed, why would the Governor call for a return of the Legislature to enact one?

In the absence of such a regulation, the Acting Secretary of Health must follow the procedures established by the General Assembly in the Regulatory Review Act. Pennsylvania's Regulatory Review Act applies to any regulations promulgated by an agency. 71 P.S. § 745.5. The Act further defines a regulation to be,

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. . . The term shall not include a proclamation, executive order, directive, or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor.

71 P.S. § 745.3.

Respondent's August 31, 2021, Order constitutes a "regulation" as defined by the Regulatory Review Act. The Pennsylvania Supreme Court has explained and clarified the distinction between substantive rules which must be promulgated through rule-making procedures and statements of policy requiring no such procedures. In making such a distinction, the Court noted,

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . The underlying policy embodied in the rule is not generally subject to challenge before the agency. A general statement of policy, on the other hand, does not establish a 'binding norm'. . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

PHRC v. Norristown Area School Dist., 374 A.2d 671, 679 (Pa. 1977); citing *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. App. 1974).

Section 4 – School Entity Obligations, of Respondent’s August 31, 2021, Order states that, “[a] School Entity must: Require and enforce the requirement that all teachers, children/students, staff, and visitors wear a face covering indoors, regardless of whether this Order is reflected in a school entity’s Health and Safety Plan.” Exhibit A, Page 5. Respondent’s Order clearly establishes a mandatory standard of conduct that any included “School Entity” must abide by. As such, the Acting Secretary of the Commonwealth’s August 31, 2021, Order is a “regulation” subject to the procedures and requirements of Pennsylvania’s Regulatory Review Act.

The procedures for review of proposed regulations are codified in Sections 745.5a and 745.5b of the Act. Section 745.5a of the Act requires the regulation to be published and republished, requires public comment on the regulation, requires the agency’s response to the public comments received, mandates extensive review and input by the reviewing Committees and the Independent Regulatory Review Commission, and requires the Commission’s approval or disapproval of the final-form regulation. 71 P.S. § 745.5a.

Pennsylvania's Regulatory Review Act additionally requires the Regulatory Review Commission to determine whether the agency has the statutory authority to promulgate the regulation; determine whether the regulation is consistent with the intent of the General Assembly; and determine whether the regulation is in the public interest. 71 P.S. § 745.5b. Subsequent thereto, appeals are provided for.

In passing the August 31, 2021, Order, Respondent has failed to comply with any of the above cited requirements of the Regulatory Review Act. Indeed, Respondent failed to submit the proposed regulation to the Independent Regulatory Review Commission for any form of review, to conduct adequate notice and public comment, and to provide the Commission with any rationale for the Order. Thus, Respondent's Order dated August 31, 2021, is non-compliant and is therefore an illegal regulation and void *ab initio*.

In additional support of her argument, Respondent cites the case of *County of Allegheny v. The Cracked Egg*, 2021 WL 3124248 (Pa. Commw. 2021), an unreported, non-precedential decision of the Commonwealth Court pursuant to 210 Pa. Code § 65.37. *The Cracked Egg* case concerns the County of Allegheny seeking an injunction to enforce the closure of a restaurant that refused to operate in accordance with the Emergency Powers

of the Pennsylvania Department of Health, Governor Tom Wolf, and the Allegheny County Health Department, which Powers are no longer in effect. *Id.* at 1. While this Court affirmed the lower court's decision in granting the County's preliminary injunction, it must be noted that the regulations at issue in *The Cracked Egg* case were passed pursuant to Governor Wolf's March 6, 2020, Proclamation of Disaster Emergency, pursuant to Section 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. § 7301(c). *Id.* Unlike in the present matter, the orders at issue in *The Cracked Egg* case were issued while Pennsylvania's Governor's emergency powers were still in effect pursuant to 35 Pa. C.S. § 7301(c). Moreover, the Governor's issuance of Orders pursuant to Section 7301 was essential in this Court's decision to affirm the trial court in *The Cracked Egg* case, as the Court stated,

However, our Supreme Court has already interpreted Pennsylvania's Emergency Code and found that the Emergency Code is a valid exercise of the police power, does not violate the separation of powers doctrine, and grants "broad powers" to the Governor. *DeVito*, 227 A.3d at 886-87, 892-93. See also *Scarnati*, 233 A.3d at 705. Section 7301(b) of the Emergency Code grants the Governor the power to issue "executive orders, proclamations and regulations which shall have the force and effect of law." 35 Pa.C.S. § 7301(b).

Id. at 13.

In the present matter, on May 18, 2021, the People of Pennsylvania adopted section 20(c) of Article IV of the Constitution of Pennsylvania which

provides, “[a] disaster emergency declaration under subsection (a) shall be in effect for no more than twenty-one days, unless otherwise extended in whole or part by concurrent resolution of the General Assembly.” Shortly thereafter, on June 10, 2021, Pennsylvania’s General Assembly passed A Concurrent Resolution Terminating the March 6, 2020, proclamation of disaster. As such, Pennsylvania is not under any such Disaster Declaration at the present time and *The Cracked Egg* case is inapplicable to the present case.

Lastly, the Pennsylvania General Assembly has recently had occasion to speak to the validity of Respondent’s Order in a letter from the Pennsylvania House of Representatives Health Committee to the Commonwealth Joint Committee on Documents. Under section 7.1 of Pennsylvania’s Regulatory Review Act, if a committee finds that an issued document should be promulgated as a regulation, the committee may present the matter to the Joint Committee on Documents for a determination. See 71 P.S. § 745.7a. In the Health Committee’s letter pursuant to section 7.1 of the Regulatory Review Act, the Committee concluded that Respondent’s Order was, in fact, a rule or regulation, stating as follows,

Based upon the facts above, acting Secretary Beam violated the law by issuing the August 31 Order because the order is a “rule” or “regulation”, and Beam did not follow the rulemaking procedures that are required under the Commonwealth Documents Law and the Regulatory Review Act.

Kathy L. Rapp, Chairperson of the House Health Committee, *Letter to Commonwealth Joint Committee on Documents re: Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, September 14, 2021.

In reaching such a conclusion, the Pennsylvania House of Representatives Health Committee utilized the three-part “binding norm” test to determine whether an agency document is a regulation. See *Pennsylvania Hum. Rels. Comm’n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977); citing *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. App. 1974).

The test used by the Health Committee, as articulated by the D.C. Court of Appeals (a Court dealing with a myriad of governmental regulations), and adopted by the Pennsylvania Supreme Court is set forth as follows,

In ascertaining whether an agency has established a binding norm, the reviewing court must consider: 1) the plain language of the provision; 2) the manner in which the agency has implemented the provision; and 3) whether the agency’s discretion is restricted by the provision.

Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare, 910 A.2d 134, 144 (Pa. Commw. 2006); see also *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. App. 1974).

The first prong of the test asks whether the plain language of the order shows that it is an order of general application, applies to a class of individuals clearly set forth in general terms, establishes mandatory conduct or affirmatively prohibits conduct for that class of individuals, and subjects those individuals to a penalty at law for violation thereof. Applying the above to Respondent's Order clearly shows that the plain language of the Order evidences its status as a rule or regulation as Respondent's Order mandates that all individuals connected to, or required to enter into, a school entity must wear a mask unless qualifying for any applicable exemptions. Further, noncompliance with the Order subjects the offending individual to potential criminal sanctions under the Disease Prevention and Control Law of 1955, 35 P.S. § 521.20 and Pennsylvania's Administrative Code of 1929, 71 P.S. § 1409.

The next prong analyzes how the agency implemented its Order. Regulations implement and interpret law while prescribing policy and procedure before an agency. Respondent relies on the provisions of the Disease Prevention and Control Law of 1955, 35 P.S. § 532 and

Pennsylvania's Administrative Code of 1929, 71 P.S. § 1403, which grants the Department of Health the power, "to determine and employ the most efficient and practical means for the prevention and suppression of disease." Respondent's Order is not an announcement of the implementation of a face covering policy through future rulemaking. Rather, Respondent's Order sets forth an affirmative mandate of a new rule which interprets the authority allegedly granted to the Department by the General Assembly.

The third and last prong of the test examines the discretion granted to the agency by the Order. As stated by the House of Representatives Health Committee,

[t]he order, when applied, restricts the discretionary power of the Department of health and is, thus, like a regulation. It mandates all individuals connected to a school entity to wear a face covering unless they qualify under one of the state exceptions. [citation omitted] The Department is not free to exercise discretion to follow or not follow the new policy on an individual basis, and the Department is bound by the order until it rescinds it.

See Exhibit 1, P. 5-6.

Respondent's August 31, 2021, Order displays all of the characteristics of a "rule" or "regulation," and as such, Respondent is obligated to comply with the provisions of Pennsylvania's Regulatory Review Act.

- 2) Respondent's Order dated August 31, 2021, violates the principles contained in the Non-Delegation Doctrine.

In the case of *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), Mr. Justice Wecht provided an explanation of the Non-Delegation Doctrine as follows,

Article II, Section 1 of the Pennsylvania Constitution states that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. II, § 1. That is why, when the General Assembly empowers some other branch or body to act, our jurisprudence requires "that the basic policy choices involved in 'legislative power' actually be made by the [l]egislature as constitutionally mandated." *Tosto v. Pa. Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198, 202 (1975). This constraint serves two purposes. First, it ensures that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 291 (1975) (plurality opinion). And second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power. *Id.*

...

This Court's most recent non-delegation decision involved a provision in the Public-School Code, see 24 P.S. §§ 1-101-27-2702, that gave a five-member School Reform Commission (comprised mostly of individuals appointed by the Governor) sweeping powers to improve the finances of distressed school districts. Among other things, the law delegated to the School Reform Commission the authority to suspend regulations of the State Board of Education and to suspend provisions of the Public-School Code. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 959. The General Assembly placed only minor restrictions upon the Commission's authority. First, the General Assembly put a few provisions of the Public-School Code beyond

the reach of the Commission's suspension power, most of which related to local school-board elections. Second, the General Assembly required that the Commission submit annually a report to the Governor and the Education Committees of both the House and the Senate detailing the progress made in fiscal and academic performance. Finally, individual members of the Commission, as public employees, could be removed by the Governor for "malfeasance or misfeasance." *Id.* at 971 (Baer, J., dissenting). This Court held that the law violated the non-delegation doctrine because it did not include concrete measures to channel the Commission's discretion to wield its suspension power, nor did it include safeguards to protect against arbitrary, *ad hoc* decision making, such as a requirement that the Commission hold hearings, allow for public notice, and comment, or explain the grounds for its suspensions in a reasoned opinion subject to judicial review.

Protz v. Workers' Compensation Appeal Bd. (Derry Area School District), 161 A.3d 827, 833-835 (Pa. 2017).

The Pennsylvania Constitution requires the General Assembly to establish, "adequate standards which will guide and restrain the exercise of the delegated administrative functions." *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 418 (Pa. 2005); See also *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 481 (Pa. 1971); quoting *Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 211 A.2d 487, 492-93 (Pa. 1965).

Pursuant to the "Non-Delegation Doctrine," the General Assembly is prohibited from granting, "to any other branch of government or to any other body or authority," the power to make law. *Blackwell v. Com., State Ethics*

Com'n, 567 A.2d 630, 636 (Pa. 1989); see also *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 480 (Pa. 1971). The General Assembly is the sole branch of government vested with the authority, "to make laws, and not to make legislators." John Locke, *Second Treatise of Government*, 87 (R. Cox Ed. 1982); see also *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015) (Alito, J. concurring) ("[t]he principle that Congress cannot delegate away its vested power exists to protect liberty.")

Despite the principle that the General Assembly has the power to make law, and it cannot constitutionally delegate such authority to any other branch of government, the General Assembly may still delegate authority, "in connection with the execution and administration of a law to an independent agency or an executive branch agency where the General Assembly first establishes primary standards and imposes upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation." *Blackwell*, 567 A.2d at 637. In such a circumstance where the General Assembly chooses to delegate authority, two critical limitations apply. The first is that "the basic policy choices must be made by the [l]egislature;" and the second is that "the legislation must contain adequate standards which will guide and restrain the exercise of the

delegated administrative functions." *Blackwell*, 567 A.2d at 637; citing *Gilligan v. Pa. Horse Racing Commission*, 422 A.2d 487, 489 (Pa. 1980).

The Pennsylvania Supreme Court has had occasion to interpret the Non-Delegation Doctrine in the case of *Protz v. Workers' Compensation Appeal Bd. (Derry Area School District)*, 161 A.3d 827 (Pa. 2017). The *Protz* case deals with an individual who sustained a work-related injury during her employment with the Derry Area School District. Pennsylvania's Workers' Compensation Act allows for an employer to demand that a claimant undergo an "impairment-rating evaluation (IRE)" in which a physician determines the degree and extent of impairment that is attributable to the claimant's compensable injury. *Id.* at 830. The Act further required physicians to apply the methodology as set forth in, "the most recent edition" of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The Plaintiff in the *Protz* case challenged the Pennsylvania Workers' Compensation Act's mandate to utilize the AMA's Guide as violative of the constitutional requirement that all legislative power "be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." *Id.* at 831; citing Pa. Const. Art. II, § 1.

In reviewing the Workers' Compensation Act, the Pennsylvania Supreme Court, "stressed the importance of procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power." *Id.* at 834; *See e.g., Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975) ("the statute at issue required that the administrative agency establish neutral operating procedures, develop standardized documents, and give the public notice of proposed agency rules and regulations before promulgating them."); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975) ("a plurality of [the Pennsylvania Supreme Court] found it significant that the General Assembly had assigned the [power to assess whether certain local taxes were excessive or reasonable] to the courts, rather than to an administrative body, because the very structure of the judiciary serves to protect against the arbitrariness of *ad hoc* decision making.")

The *Protz* Court subsequently held that the authority delegated to the American Medical Association by Section 306(a.2) of the Workers' Compensation Act is unduly broad and unbridled as, "[t]he General Assembly did not favor any particular policies relative to the Guides' methodology for grading impairments, nor did it prescribe any standards to guide and restrain the AMA's discretion to create such a methodology."

Protz, 161 A.3d at 835. The Court additionally held, “[e]qually problematic, the General Assembly did not include in Section 306(a.2) any of the procedural mechanisms that this Court has considered essential to protect against ‘administrative arbitrariness and caprice.’ [citation omitted]. The General Assembly did not, for example, require that the AMA hold hearings, accept public comments, or explain the grounds for its methodology in a reasoned opinion, which then could be subject to judicial review.” *Id.* at 836; citing *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975).

As an initial matter, it should be noted that the Petitioners do not concede that provisions cited in the Order actually vest in Respondent the authority to issue her August 31, 2021, Order. Notwithstanding this fact, assuming that the provisions of the Disease Prevention and Control Law of 1955 do grant Respondent the authority to issue her August 31, 2021, Order, such excessive delegation of authority would violate the non-delegation doctrine.

Section 521.5 – Control Measures, of the Disease Prevention and Control Law of 1955, 35 P.S. § 521.5, provides,

Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control

measure, the local board or department of health or the department shall carry out the appropriate control measures in such a manner and in such place as is provided by rule or regulation.

Respondent's interpretation, through the Attorney General, of the above cited statute is breathtakingly bold in that they claim that no additional regulation or rule is necessary to give Respondent the authority to issue her August 31, 2021, Order. See Respondent's Answer to Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction, ¶ 3, Pages 2-4 ("Simply put, to the extent that Petitioners believe a separate rule or regulation is required to implement a control measure, they are incorrect.") However, such an interpretation clearly runs afoul of the non-delegation doctrine as the Respondent's interpretation would allow the Acting Secretary of Health in Pennsylvania to issue any appropriate control measures to prevent and control disease in the general public, "without any parameters cabining its authority." See *Protz*, 161 A.3d at 835.

As has already been discovered by those subjected to Respondent's Order, the Order is deficient in its terms. The Order fails to specify what types of face coverings will be acceptable, fails to specify the duration of the Order, and fails to provide an exception for individuals who have already been infected with COVID-19 and have since recovered, thereby providing the individual with natural immunity. Respondent's Order also fails to contain

any obligations requiring a student subjected to the Order to provide a doctor's note to be exempted from the Order, resulting in many students opting out of the Order by providing an exemption form signed by a parent or guardian (note that pursuant to the Pennsylvania School Code, Parents and Guardians have, for generations, provided "notes" regarding their children's health and excusing them from attending school or other events such as field trips.) Michael Rubinkam, Mark Scolforo, and Marc Levy, *Some Pennsylvania students skirt mask rule with loophole*, Associated Press, Published September 9, 2021. As further evidence of the Order's deficiency, resulting perhaps from the failure to subject it to the regulatory process, is the lack of an exemption for religious reasons. All told, the Order is a perfect example of why such documents need to undergo public and legislative scrutiny prior to subjecting the populace of the Commonwealth to such Orders.

If the Respondent's interpretation of the law is correct, then the Citizens of this Commonwealth can be subjected to Orders, such as the Order at issue in the present action, that have no specific duration, have no limitations on implementation, and fail to otherwise protect the Citizens of this Commonwealth from Constitutional violations.

Similar to the statute at issue in the *Protz* case, Respondent's interpretation of Pennsylvania's Disease Prevention and Control Law of 1955 would fail to include any procedural mechanisms that the Pennsylvania Supreme Court has held to be essential to protect against "administrative arbitrariness and caprice." *Id.* at 836; citing *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975). For example, 35 P.S. § 521.5 fails to require that the Department of Health hold public hearings on the proposed regulation, accept public comments, or otherwise explain the grounds for its Order in a reasoned opinion.

As such, for the reasons set forth herein, Respondent's Order dated August 31, 2021, and Respondent's interpretation of Pennsylvania's Disease Prevention and Control Law of 1955, violate Pennsylvania's constitutional prohibition on the General Assembly's delegation of legislative, law-making authority to an administrative agency.

V. CONCLUSION

Having shown that Respondent's Order dated August 31, 2021, is a regulation or rule subject to the provisions of the Regulatory Review Act, and that said Order violates Pennsylvania's principles governing the delegation of administrative authority, Petitioners respectfully request that this Court

enter judgment declaring the Acting Secretary of Health's Order dated August 31, 2021 void ab initio, invalid, and unenforceable.

Respectfully submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, L.L.P.**

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House of Representatives
Commonwealth of Pennsylvania
Harrisburg

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September 14, 2021

HAND DELIVERED

Vincent C. DeLiberato, Jr.
Chairperson
Commonwealth Joint Committee on Documents
641 Main Capitol Building
Harrisburg, PA 17120-0033

Dear Chairman DeLiberato:

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

On behalf of the Pennsylvania House of Representatives Health Committee, I am writing to request a determination, pursuant to section 7.1 of the Regulatory Review Act¹, that the Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities, effective beginning on September 7, 2021, should be promulgated as a regulation.

Under section 7.1 of the Regulatory Review Act, if a committee² finds that a published or unpublished document should be promulgated as a regulation, the committee may present the matter to the Joint Committee on Documents for a determination.³

On August 31, 2021, Alison Beam, the Acting Secretary of Health, issued an order for a general masking requirement to prevent and control the spread of disease in public and private PreK-12 schools and child care facilities.⁴ Specifically, the order mandates "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity [to] wear a face covering indoors,

¹ 71 P.S. § 745.7a.

² "Committee." A standing committee of the Senate or the House of Representatives designated by the President pro tempore of the Senate for the Senate or by the Speaker of the House of Representatives for the House...." 71 P.S. § 745.3.

³ 71 P.S. § 745.7a.

⁴ Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities, Dept. of Health,

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Order%20of%20the%20Acting%20Secretary%20Directing%20Face%20Coverings%20in%20Schools.pdf> (last visited Sept. 7, 2021).

Vincent C. DeLiberato, Jr.
Page 2
September 14, 2021

regardless of vaccination status.”⁵ The order provides for various exceptions to the mask mandate for certain individuals including:

- Children under the age of two.
- Individuals who are working alone and isolated from interaction with other people and have little or no expectation of in-person interaction.
- Individuals communicating or seeking to communicate with someone who is hearing-impaired.
- Individuals engaged in an activity that cannot be performed, or would be dangerous to perform, while wearing a mask.
- Individuals who are participating in high intensity physical activities.⁶

Failure to implement and follow the control measures under the order subjects a person to the penalty provisions of the Disease Prevention and Control Law of 1955 (“DPCL”)⁷ and purportedly may also result in the loss of sovereign immunity exposing individuals to personal liability under 42 Pa.C.S. § 8550 (relating to willful misconduct), as well as other remedies as provided by law.⁸

Noncompliance with the order by childcare providers licensed by the Department of Human Services will be cited under specified department regulations requiring providers to comply with pertinent laws and regulations and general health and safety requirements.⁹

The threat of imposing penalties for noncompliance with the Order is bolstered by a recent frequently asked questions (“FAQ”) document issued by the Pennsylvania Department of Education on August 31, 2021, in conjunction with the acting Secretary’s Order.¹⁰

Finally, the order is in effect until rescinded by the acting Secretary.

This Order was not issued by the Governor of Pennsylvania, nor does it rely on an emergency declaration issued by the Governor. Rather, it is based solely on the authority granted to the

⁵ *Id.* at § 2.

⁶ *Id.* at § 3.

⁷ 35 P.S. § 521.20 (subjects any person who violates the provisions of this act or any regulation to a summary offense and a fine between \$25.00 and \$300.000 upon conviction), *see also* 71 P.S. § 1409.

⁸ 42 Pa.C.S. § 8550 (In any action against a local agency or employee for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted willful misconduct, the provisions relating to official liability do not apply).

⁹ *See* 55 Pa. Code §§ 3270.14, 3270.21, 3280.14, 3280.20 and 3290.18.

¹⁰ Answers to FAQs, Dept. of Education,

<http://www.education.pa.gov/Schools/safe-schools/emergencyplanning/COVID-19/SchoolReopeningGuidance/ReopeningPreKto12/MaskingOrder/Pages/FAQs.aspx> (last updated Sept. 3, 2021).

Secretary of Health to impose general control measures under section 5 of the DPCL,¹¹ 28 Pa. Code § 27.60¹² and section 2101 (a) of the Administrative Code of 1929.¹³

Based upon the facts above, acting Secretary Beam violated the law by issuing the August 31 Order because the order is a “rule” or “regulation” and Beam did not follow the rulemaking procedures that are required under the Commonwealth Documents Law and the Regulatory Review Act.

The General Assembly enacted the Regulatory Review Act to establish a structured procedure for oversight and review of regulations adopted pursuant to its delegation of legislative power to the numerous Commonwealth departments, agencies, boards, and commissions within the executive branch of government to adopt rules and regulations to implement statutes.¹⁴ The Regulatory Review Act fosters executive branch accountability and provides ultimate review of regulations by the General Assembly.¹⁵

Only when an agency’s substantive regulations are properly enacted under the Commonwealth Documents Law, do they have the force and effect of law.¹⁶ Under the Commonwealth Documents Law and the Regulatory Review Act, a “regulation” is defined 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 prescribing the practice or procedure before such agency.”¹⁷

In determining whether an agency pronouncement was a regulation or not, the Pennsylvania Supreme Court in Pa. Hum. Rels. Comm’n v. Norristown Area Sch. Dist., was influenced by the three-part binding norm test used by the Court of Appeals for the District of Columbia, a court that

¹¹ 35 P.S. § 521.5 (authorizing the Dept. of Health to carry out appropriate control measures). NOTE: This section of the DPCL only provides the Dept. of Health with authority to “carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.” (emphasis added), see footnote below.

¹² Pursuant to the DPCL, authorizing the Department of Health to direct “any other disease control measure the Department... considers to be appropriate for the surveillance of disease...” 28 Pa. Code § 27.60(a) (emphasis added). Surveillance, in turn, is defined as “[t]he continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control.” 28 Pa. Code § 27.1 (emphasis added). The logical connection between control measures providing for “continuing scrutiny” and imposition of a mask requirement is inscrutable.

¹³ 71 P.S. § 532(a) (entrusting the Department of Health with the duty to protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease). See also 71 P.S. § 1403 (a) and 28 Pa. Code § 27.60.

¹⁴ 71 P.S. § 745.3.

¹⁵ 71 P.S. § 745.2.

¹⁶ Justwood Nursing & Rehab. Ctr. v. Dep’t of Pub. Welfare, 910 A.2d 134, 141–42 (Pa. Commw. Ct. 2006) (citing Burstein v. Prudential Prop. and Cas. Ins. Co., 570 Pa. 177, 809 A.3d 204 (2002)).

¹⁷ 45 P.S. § 1102 (12) and 71 P.S. § 745.3 (emphasis added).

has extensive experience in reviewing administrative determinations, to determine if an agency pronouncement is a regulation.¹⁸

The D.C. Court of Appeals expressed the following principle regarding an administrative agency's legislative power:

An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents... A properly adopted regulation is a governmental agency's exercise of delegated legislative power to create a mandatory standard of behavior which has the force of law.¹⁹

The binding norm test articulated by the D.C. Court of Appeals and adopted by the Pennsylvania Supreme Court is simple:

In ascertaining whether an agency has established a binding norm, the reviewing court must consider: (1) the plain language of the provision; (2) the manner in which the agency has implemented the provision; and, (3) whether the agency's discretion is restricted by the provision.²⁰

To determine whether the Pennsylvania Department of Health has issued an order in the form of a regulation, the Department's Order must be analyzed to see if it satisfies the binding norm test.

1. Plain Language

The Department's Order is straight-forward: "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 [of the order]."²¹

The plain language of the order commands all individuals connected to a school entity to wear a face covering unless they qualify under one of the exceptions.²²

¹⁸ Pennsylvania Hum. Rel. Comm'n v. Norristown Area Sch. Dist., 473 Pa. 334, 349, 374 A.2d 671, 679 (1977) (citing Pacific Gas & Electric Co. v. IPC, 164 U.S. App. D.C. 371, 506 F.2d 33 (1974)).

¹⁹ See *id.* at 349-350.

²⁰ Eastwood Nursing, 910 A.2d at 144.

²¹ Order of the Acting Secretary, *supra* note 4, § 2.

²² *Id.*

Furthermore, an individual must exhaust all alternatives to a face covering, including the use of a face shield, before he or she is excepted from the order.²³ In addition, noncompliance with the order subjects an offender to possible criminal penalties under the DPCL and the Administrative Code of 1929.²⁴

Therefore, the plain language of the order clearly shows that it is an order of general application as it applies to a class of people described in general terms, establishes a mandatory standard of conduct for that class of people, and subjects those individuals to the penalty of law for noncompliance. An order that has general application and the force of law and creates a binding norm.

2. Implementation

Regulations implement and interpret law and prescribe policy as well as practice and procedure before an agency. In issuing the order, the acting Secretary relies on the Administrative Code of 1929 and the DPCL, which give her broad authority to impose disease control measures.²⁵

Specifically, the Administrative Code gives the Department of Health the power “to determine and employ the most efficient and practical means for the prevention and suppression of disease.”²⁶ The use of face coverings as a disease control measure is an interpretation of the power delegated by the General Assembly to the Department of Health to impose disease control measures.

The order is not an announcement of future intent to implement a face covering policy through future rulemaking; instead it is an immediate imposition of new rule interpreting the authority granted to the Department by the General Assembly through the DPCL and the Administrative Code of 1929, which likens it to a binding norm.

3. Department’s Discretion

The order, when applied, restricts the discretionary power of the Department of Health and is, thus, like a regulation. It mandates all individuals connected to a school entity to wear a face covering unless they qualify under one of the state exceptions.²⁷ The Department is not free to exercise discretion to follow or not follow the new policy on an individual basis, and the Department is bound by the order until it rescinds it.

²³ *Id.* at § 3.

²⁴ 35 P.S. § 521.20 and 71 P.S. § 1409.

²⁵ Order of the Acting Secretary, *supra* note 4.

²⁶ 71 P.S. § 532 and § 1403.

²⁷ Order of the Acting Secretary, *supra* note 4, § 2.

Vincent C. DeLiberato, Jr.
Page 6
September 14, 2021

In conclusion, the application and effect of the language in the Order shows the pronouncement to be restrictive, directive and substantive—all of the characteristics of a regulation.

Accordingly, the House Health Committee requests a determination by the Joint Committee on Documents that the order issued by the acting Secretary of Health on August 31, 2021, is an order in the nature of a regulation and is subject to the regulatory process. Given that the Order is currently "effective," the Committee also respectfully asks that this determination be expedited.

Respectfully,

Kathy L. Rapp, Chair
House Health Committee

cc: The Honorable Bryan Cutler, Speaker of the House
The Honorable Kerry Benninghoff, House Majority Leader
The Honorable Joanna McClinton, House Democratic Leader
The Honorable Jake Corman, Senate President Pro Tempore
The Honorable Kim Ward, Senate Majority Leader
The Honorable Jay Costa, Senate Democratic Leader
The Honorable Josh Shapiro, Pennsylvania Attorney General
Curtis M. Topper, Secretary, Department of General Services
Gregory Schwab, General Counsel, Governor's Office of General Counsel
Amy J. Mendelsohn, Attorney, Legislative Reference Bureau
Lauren Orazi, Esq., Senior Advisor, Buchanan Ingersoll & Rooney P.C.
Ronald Tomasko, Esq., Tomasko & Koranda, P.C.

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 106 Session of
2021

INTRODUCED BY BENNINGHOFF AND DAVANZO, MAY 24, 2021

AS AMENDED, IN SENATE, JUNE 10, 2021

A CONCURRENT RESOLUTION

1 ~~Terminating~~ ~~EXTENDING IN PART AND TERMINATING IN PART~~ <--
2 TERMINATING the March 6, 2020, proclamation of disaster <--
3 emergency, as amended and renewed, issued under the hand and
4 seal of the Governor, Thomas Westerman Wolf.
5 WHEREAS, On March 6, 2020, the Governor issued a proclamation
6 declaring a disaster emergency in response to the existence of
7 COVID-19 cases in Pennsylvania; and
8 WHEREAS, On June 3, 2020, the Governor issued an amendment to
9 the proclamation of disaster emergency renewing the March 6,
10 2020, declaration for an additional 90 days; and
11 WHEREAS, On August 31, 2020, the Governor issued an amendment
12 to the proclamation of disaster emergency renewing the
13 declaration for an additional 90 days; and
14 WHEREAS, On November 24, 2020, the Governor issued an
15 amendment to the proclamation of disaster emergency renewing the
16 declaration for an additional 90 days; and
17 WHEREAS, On February 19, 2021, the Governor issued an
18 amendment to the proclamation of disaster emergency renewing the

1 declaration for an additional 90 days; and

2 WHEREAS, On May 20, 2021, the Governor issued an amendment to
3 the proclamation of disaster emergency renewing the declaration;
4 and

5 WHEREAS, On May 18, 2021, the People of Pennsylvania adopted
6 an amendment to section 9 of Article III of the Constitution of
7 Pennsylvania which provides, AS AMENDED, that orders, <--

8 resolutions or votes "to which the concurrence of both Houses
9 may be necessary, except on the questions of ... termination or
10 extension of a disaster emergency declaration as declared by an
11 executive order or proclamation, or portion of a disaster
12 emergency declaration as declared by an executive order or
13 proclamation, shall be presented to the Governor" for his
14 approval or veto; and

15 WHEREAS, On May 18, 2021, the People of Pennsylvania adopted
16 section 20(c) of Article IV of the Constitution of Pennsylvania
17 which provides, in relevant part, "A disaster emergency
18 declaration under subsection (a) shall be in effect for no more
19 than twenty-one (21) days, unless otherwise extended in whole or
20 part by concurrent resolution of the General Assembly";
21 therefore be it

22 RESOLVED (The Senate concurring), That the General Assembly,
23 in accordance with ~~section 20 of Article IV of the Constitution~~ <--
24 ~~of Pennsylvania~~ ITS AUTHORITY, hereby terminates the disaster <--
25 emergency declared on March 6, 2020, as amended and renewed, in
26 response to COVID-19; and be it further

27 RESOLVED, That upon adoption of this concurrent resolution by
28 both chambers of the General Assembly, the Chief Clerk of the
29 House of Representatives shall notify the Governor of the
30 General Assembly's action; and be it further

1 RESOLVED, That the Chief Clerk of the House of
2 Representatives shall transmit this concurrent resolution to the
3 Legislative Reference Bureau for publication in the Pennsylvania
4 Bulletin under 45 Pa.C.S. § 725(a)(4)-; AND BE IT FURTHER <--

5 RESOLVED, THAT THIS CONCURRENT RESOLUTION SHALL TAKE EFFECT
6 IMMEDIATELY.