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294 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III, *et al.*,	:	
	:	
Petitioners	:	
	:	**No. 294 M.D. 2021**
v.	:	
	:	
ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH	:	
	:	
Respondent	:	
	:	

RESPONSE TO PETITIONERS' APPLICATION TO TERMINATE THE AUTOMATIC SUPERSEDEAS

Respondent, Acting Secretary of Health (Department of Health), hereby opposes Petitioners' application to terminate the automatic supersedeas and, in support thereof, sets forth the following:

I. BRIEF STATEMENT OF THE CASE

On August 31, 2021, the Department of Health issued an order directing that face coverings be worn by each teacher, student, staff, or visitor working, attending, or visiting a school while indoors (Masking Order). Opinion at 2.[1] Petitioners challenged the order, arguing that it constituted a new regulation that was

[1] The Department of Health will cite to this Court's opinion as "Opinion" using the original pagination. A copy of the opinion is attached to Petitioners' application as Exhibit A.

promulgated without complying with Pennsylvania law. *Id.* at 2-3. Petitioners also argued that the Masking Order violated the Non-Delegation Doctrine. *Id.*

In September, the Pennsylvania House of Representatives Health Committee voted to submit the question of whether the Masking Order violates the Regulatory Review Act to the Joint Committee on Documents. Opinion at 20, fn. 23. On October 21, 2021, "the Joint Committee on Documents reviewed the Masking Order and arrived, by a vote of 7 to 4, at the opposite conclusion—that the Masking Order was not a regulation requiring compliance with formal rulemaking procedures." *Id.*

On November 10, 2021, this Court declared the Masking Order void *ab initio* and unenforceable. Opinion at 31. The Court decided the "narrow legal question" of whether the Department of Health acted properly in issuing the Masking Order without going through the process of promulgating a new regulation. Opinion at 3. This Court concluded that the Department did not act properly, and therefore did not reach the Non-Delegation Doctrine issue.

Judge Wojcik dissented, concluding that the Masking Order was within the Department of Health's authority under current statutory and regulatory authority, and that the order did not violate the Non-Delegation Doctrine. *See* Dissent, attached as Attachment A.

To prevent confusion among school districts, parents, and students, the Department of Health filed an immediate appeal, triggering the automatic

supersedeas of Pennsylvania Rule of Appellate Procedure 1736. Petitioners then filed an application to terminate that supersedeas.

II. ARGUMENT

A. Petitioners Did Not Establish the Elements Necessary to Vacate an Automatic Supersedeas Under Pa.R.A.P. 1736.

The appeal of a court order by a Commonwealth official acts as an automatic supersedeas, which stays the court's order pending appeal. Pa.R.A.P. 1736 (an appeal by the "Commonwealth or any officer thereof" shall "operate as a *supersedeas* . . . , which . . . shall continue through any proceedings in the United States Supreme Court"). Vacating a statute, regulation, or order can have significant disruptive effects for the public and the operations of the Commonwealth. The purpose of the automatic supersedeas is to maintain the status quo pending appeal in order to reduce confusion and afford the Commonwealth time to adjust, should the trial court's judgment be affirmed. *Accord. City of Philadelphia v. Commonwealth*, 838 A.2d 566, 594 (Pa. 2003). Therefore, the automatic supersedeas can be vacated *only* if the moving party makes a strong showing on *each* of the following elements:

(1) "a substantive case on the merits[;]"

(2) vacating the supersedeas will prevent "irreparable injury[;]"

(3) "other parties will not be harmed[;]" and

(4) vacating the supersedeas "is not against the public interest."

Department of Environmental Resources v. Jubelirer, 614 A.2d 199, 203 (Pa. 1989); *see also Germantown Cab Co. v. Philadelphia Parking Authority*, 15 A.3d 44 (Pa. 2011) (requiring moving party to proffer "adequate evidence"). "Because Rule 1736(b) affords the [Department of Health] an automatic, self-executing supersedeas, the [Department] bears no burden. It is the appellee's burden to convince the court that under the particular facts and circumstances of the case, the maintenance of an automatic supersedeas is inappropriate." 20A West's Pa. Practice, Appellate Practice § 1736:6. Petitioners present no evidence and fail to meet their high burden.

1. Vacating the supersedeas will result in more children being hospitalized for COVID-19.

Petitioners do not, because they cannot, dispute the efficacy of universal mask wearing for combatting the spread of COVID-19. At this point in the pandemic, it cannot be reasonably disputed that COVID-19 "is transmitted predominately by inhalation of respiratory droplets generated when people cough, sneeze, sing, talk, or breathe," and that masking inhibits the spread of this disease.[2] "The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can

[2] CDC, "Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2," https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html (May 7, 2021).

live on surfaces for up to four days." *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889–90 (Pa. 2020). For this reason, this Court—like many courts—requires "that all members of the public, including counsel, wear a facemask in the public areas of the PJC and the courtrooms *regardless of vaccination status*." Notice, Commonwealth Court October 18-22, 2021 oral argument session to be conducted in person in Harrisburg, Sept. 17, 2021 (emphasis added). This requirement rests firmly upon the medical reality that universal masking within buildings arrests the spread of COVID-19.

Petitioners also do not, because they cannot, dispute the efficacy of universal masking in schools. In an analysis of 520 United States counties, the Centers for Disease Control and Prevention (CDC) found that pediatric cases rose more sharply in places without school mask requirements.[3] That study revealed that "[c]ounties without school mask requirements experienced larger increases in pediatric COVID-19 case rates after the start of school compared with counties that had school mask requirements . . . ."[4] These findings prove that "[s]chool mask requirements, in combination with other prevention strategies, including COVID-19 vaccination, are

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[3] Budzyn, Samantha *et al*. "Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements—United States, July 1-September 4, 2021," *Morbidity and Mortality Weekly Report* 2021, 70(39):1377-1378, https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e3.htm?s_cid=mm7039e3.

[4] *Id.*

critical to reduce the spread of COVID-19 in schools . . . ."[5] Similarly, in a recent report that looked at Arizona's two most populous counties, the CDC found that schools without mask requirements were 3.5 times more likely to experience a virus outbreak than schools with mask requirements.[6] Masking in schools undisputedly reduces the risk that a child will contract COVID-19.

Finally, it cannot be reasonably disputed that the spread of COVID-19 within schools has serious consequences for the health of children. "Weekly COVID-19–associated hospitalization rates rose rapidly during late June to mid-August 2021 among U.S. children and adolescents aged 0–17 years; by mid-August, the rate among children aged 0–4 years was nearly **10 times** the rate 7 weeks earlier."[7] And since March 2020, approximately one in four hospitalized children with COVID-19 has required intensive care.[8] As of early November, over 6.5 million children have

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5 *Id.*

6 Jehn, Megan, *et al*. "Association Between K–12 School Mask Policies and School-Associated COVID-19 Outbreaks — Maricopa and Pima Counties, Arizona, July–August 2021," *Morbidity and Mortality Weekly Report* 2021, 70:1372–1373, http://dx.doi.org/10.15585/mmwr.mm7039e1.

7 Delahoy, Miranda J., *et al*. "Hospitalizations Associated with COVID-19 Among Children and Adolescents — COVID-NET, 14 States, March 1, 2020–August 14, 2021," *Morbidity and Mortality Weekly Report* 2021;70:1255–1260, https://www.cdc.gov/mmwr/volumes/70/wr/mm7036e2.htm (emphasis added).

8 *Id.*

tested positive for COVID-19, making up over 16% of all COVID cases.[9] Because of these medical realities, the CDC recommends "universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status."[10]

In an attempt to avoid the overwhelming evidence that school masking prevents the hospitalization of children, Petitioners point to the Governor's statements about the importance of vaccinations for students. App. at 33-36. Petitioners argue that these statements somehow show that the immediate elimination of a Masking Order would not result in harm to children. *Id.* This theory is dangerous and risks the health and safety of our school-aged children.

The majority of school children were not able to be vaccinated until only two weeks ago. The United States Food and Drug Administration authorized the emergency use of the Pfizer-BioNTech COVID-19 vaccine for children 5 through 11 years of age on October 29, 2021.[11] And this vaccine regiment requires two doses,

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[9] American Academy of Pediatrics, "Children and COVID-19: State-Level Data Report," https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/ (as of Nov. 4, 2021).

[10] CDC, "Guidance for COVID-19 Prevention in K-12 Schools," https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html (updated Nov. 5, 2021).

[11] "FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5 through 11 Years of Age," FDA, https://www.fda.gov/news-

administered three weeks apart. *Id.* Thus, no children under 11 are currently fully vaccinated for COVID-19. And it will take time to administer this two-dose vaccine to the Commonwealth's approximately 1.7 million students. Terminating the supersedeas would eliminate the time needed to vaccinate children, putting them at unnecessary risk.

At bottom, the termination of the automatic supersedeas will have grave effects on our most vulnerable—young school children. No one wants to put a child into the hospital with a deadly respiratory disease. But the effect of an immediate termination of the Masking Order, before the majority of students have the opportunity to be fully vaccinated, *will* result in the hospitalization of more children. It will also increase the number of children infected with this highly contagious disease right before the Thanksgiving holiday, when families traditionally come together. Although break-through cases are rare, they do occur.[12] Universal masking in schools is presently necessary to protect both children and their family members.

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events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age (Oct. 29, 2021).

[12] Petitioner Senate president pro tempore Jacob Corman recently contracted COVID-19 despite being vaccinated. *See* Wise, Jenna, "Pa. Sen. Jake Corman tests positive for COVID-19," PennLive, https://www.pennlive.com/politics/2021/11/pa-sen-jake-corman-tests-positive-for-covid-19.html (Nov. 10, 2021).

Innocent parties will be seriously and irreparably harmed by the termination of the automatic supersedeas. On this reason alone, Petitioners' application must be denied.

2. Vacating the supersedeas is against the public interest.

"There is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest." *Friends of Danny DeVito*, 227 A.3d at 902–03. As discussed above, no one challenges the efficacy of masking to arrest the spread of COVID-19 among school children and their families, which is all the more crucial as we approach the Thanksgiving holiday. There can be no more fundamental interest to the public than protecting its individual members from unnecessary illness and death. Given this, Petitioners cannot establish that their application is in the public interest.

Instead of facing this insurmountable hurdle, Petitioners argue, without citation to any support, that the general interest will not be negatively affected with the tautological assertion that the Masking Order is invalid. App. at 32. This argument, however, makes no sense in the context of Rule 1736. The very reason an automatic supersedeas is triggered when a court invalidates a Commonwealth statute or order is to maintain the status quo during appeal and avoid "risking circumstances of ongoing flux[.]" *Accord. City of Philadelphia*, 838 A.2d at 594. The public

interest, therefore, is in maintaining the supersedeas in the present situation, not terminating it.

Respectfully, reasonable jurists disagree on whether the Acting Secretary followed the proper procedures to issue the Masking Order, as demonstrated by Judge Wojcik's dissent in this case and the conclusion of the Joint Committee on Documents. The Department of Health filed an immediate appeal of this Court's decision precisely to prevent the confusion among school districts and parents that would be caused by ever changing rules. Maintaining the status quo prevents confusion and, as discussed above, reduces the number of children who will be hospitalized. The public interest during this pandemic weighs overwhelmingly in favor of maintaining the mask requirement during the pendency of this appeal, or until facts on the ground make the order no longer necessary.

Finally, this Court decided the narrow legal question of whether the Masking Order constituted a rule or regulation subject to the provisions of the Regulatory Review Act, 71 P.S. §§ 745.1-745.15. Opinion at 3 fn.3. This Court did not conclude that the order violated any constitutional rights or was beyond the powers of the Commonwealth, only that this specific order was issued without following certain formal administrative procedures. [13] Respectfully, the Acting Secretary maintains,

[13] Representative Kathy Rapp, chair of the House Health Committee, filed an amicus brief in support of Petitioners' application raising separation of powers

as Judge Wojcik determined in dissent, that these procedures are not applicable in this instance. Moreover, a universal school mask mandate clearly falls within the Commonwealth's broad police powers, *see Friends of Danny DeVito*, 227 A.3d at 886–87, and this Court noted that the Department of Health could have issued such an order through an expedited administrative rulemaking process, Opinion at 15, fn. 20. This case, therefore, does not represent a situation where the substance of the order is in question, only the procedure by which it was issued. That interest cannot outweigh the health and safety of school children and their families.

Given the serious impact an immediate termination of the supersedeas will have on the health of school children, Petitioners failed to meet their burden that their application is in the public interest. For this reason alone, their application must be denied.

3. Reinstating the supersedeas will not irreparably harm Petitioners.

Petitioners cite to two cases in support of their argument that the Masking Order constitutes "irreparable harm *per se*[:]" *SEIU Healthcare Pennsylvania v. Commonwealth,* 104 A.3d 495(Pa. 2014) and *Council 13, Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO by Keller v. Casey,* 595 A.2d 670, 674 (Pa. Cmwlth. 1991). Both of these cases, however, involved a request for preliminary injunctions,

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arguments. This Court did not, however, rest its decision upon the Non-Delegation Doctrine.

not termination of the automatic supersedeas. These two standards are not coterminous.

In *Jubelirer*, an action also concerning the Regulatory Review Act, the petitioners convinced this Court to terminate the automatic supersedeas by balancing the preliminary injunction standards articulated in *Process Gas Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (1983). *Jubelirer*, 614 A.2d at 202. In vacating this Court's order and reinstating the supersedeas, the Pennsylvania Supreme Court admonished courts not to improperly conflate the two distinct tests:

> We must *not* blur the distinction between the standard required for the entry of a preliminary injunction . . . and the requirements necessary for the entry of a stay [of the automatic supersedeas] . . . .

Jubelirer, 614 A.2d at 203 (internal citations omitted) (emphasis added). "The Commonwealth Court, on this issue, retreated from the requirements established for a stay, and by holding 'this Court perceives a greater harm in not lifting the automatic supersedeas' . . . , improperly applied one of the five tests applicable when issuing a preliminary injunction: will greater injury result by refusing the preliminary injunction than by granting it." *Id.* Petitioners ask this Court to make that error again.

Petitioners are not at risk of losing any rights during the pendency of the appeal process. This Court decided a narrow legal issue; it did not find that any constitutional rights are being violated. Even with the supersedeas in place, should

the Pennsylvania Supreme Court ultimately affirm this Court's ruling, the decision will remain the law and the Masking Order will be voided *ab initio*. In contrast, if the supersedeas is removed and the Supreme Court ultimately reverse this Court's ruling, children will have been hospitalized and many more will have been infected unnecessarily. One child being hospitalized unnecessarily is one too many. The Court must deny Petitioner's application.

4. The Department of Health's appeal is based on legitimate grounds.

To vacate a supersedeas, an appellee must demonstrate a substantive case on the merits. *Jubelirer*, 614 A.2d at 203. In attempting to establish this element, Petitioners simply point to this Court's ruling in its favor.[14] But an application to vacate an automatic supersedeas only arises after the moving party has already prevailed. For this element to have meaning, the moving party cannot simply point to the decision below.

Respectfully, the Department of Health has a good basis to seek review of this Court's decision. This Court's ruling depends upon the interpretation of complex statutory and regulatory language that, again respectfully, this Court read independently of each other instead of *in pari materia*, as required by our rules of

[14] Petitioner's statement that "it was largely uncontested that the Acting Secretary did not properly administer the Masking Order" is false. The Department of Health has consistently argued that it possess the authority to issue the Masking Order. See Opinion at 21.

statutory interpretation. *See e.g.*, 1 Pa.C.S. § 1932(a) ("Statutes or parts of statutes are *in pari materia* when they relate to the same persons or things or to the same class of persons or things"). This has led to an absurd result where the Department has the authority to quarantine those potentially exposed to COVID-19—which given the asymptomatic nature of this pandemic, could be anyone—but may not require, in certain circumstances, the much less onerous wearing of masks.

Further, the Joint Committee on Documents—the entity specifically empowered to determine whether an administrative agency rule is required to be promulgated as a rule or regulation, *see* 71 P.S. § 745.7a; 45 Pa. C.S. §§ 503, 701, 1206—determined that the Masking Order did not violate the Regulatory Review Act or the Commonwealth Documents Law. While this Court was not bound by that ruling, the Joint Committee on Documents' decision and Judge Wojcik's dissent demonstrate that reasonable minds can disagree about whether the Acting Secretary followed proper procedures.

5. Petitioners cannot meet their high burden to terminate the automatic supersedeas.

It is undisputed that masks arrest the spread of COVID-19 within our schools and prevent the hospitalization of young children. Thus, whether the Masking Order was properly promulgated or not, it is undisputed that the order is protecting the health of children and their families. The public interest in protecting the health of innocent children is enormous. And terminating the supersedeas right before the

Thanksgiving holiday will spread the disease to family members and other vulnerable individuals. As we said before, but must be emphasized, there can be no more fundamental interest to the public than protecting its individual members from unnecessary illness or death.

The Pennsylvania Supreme Court has already expedited a preliminary deadline in this appeal. While that court examines the instant narrow legal issues, this Court must not disturb the status quo, creating confusion through an ever-changing regulatory landscape. Petitioners have failed to demonstrate each of the elements necessary to terminate the automatic supersedes. *See Jubelirer*, 614 A.2d at 203. Accordingly, their application must be denied.

CONCLUSION

Petitioners' application to terminate the automatic supersedeas should be denied.

Respectfully submitted,

Josh Shapiro
Attorney General

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Date: November 15, 2021

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System 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/ Karen M. Romano
KAREN M. ROMANO
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Karen M. Romano, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Answer to Application to Terminate the Automatic Supersedeas to the following parties and in the manner indicated below:

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/s/ Karen M. Romano
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Date: November 15, 2021

ATTACHMENT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, individually and as a parent of two minor school children; Jesse Wills Topper, individually and as a parent of two minor school children; Calvary Academy; Hillcrest Christian Academy; James Reich and Michelle Reich, individually and as parents of three minor school children; Adam McClure and Chelsea McClure, individually and as parents of one minor special needs school child; Victoria T. Baptiste, individually and as a parent of two special needs school children; Jennifer D. Baldacci, individually and as a parent of one school child; Klint Neiman and Amanda Palmer, individually and as parents of two minor school children; Penncrest School District; Chestnut Ridge School District and West York Area School District,	:	
Petitioners	:	
v.	:	No. 294 M.D. 2021
	:	Argued: October 20, 2021
Acting Secretary of the Pennsylvania Department of Health,	:	
Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

DISSENTING OPINION
BY JUDGE WOJCIK FILED: November 10, 2021

I dissent.

On August 31, 2021, the Acting Secretary (Secretary) of the Pennsylvania Department of Health (DOH) issued an Order directing that face coverings must be worn by each teacher, child/student, staff, or visitor working, attending, or visiting a school while indoors regardless of his or her 2019 novel coronavirus (COVID-19) vaccination status. *See* Petitioners' Amended Petition for Review (PFR), Exhibit A at 1-6. The Secretary states her reasoning for issuing the Order, in relevant part, as follows:

> [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 [sic] have no symptoms and, with the Delta variant, even if they [sic] have been vaccinated. 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. The Delta variant

is more infectious, and it is leading to increased transmissibility. Additionally, data [are] suggesting that the Delta variant may cause more severe illness than previous 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.

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 and socialization are necessary for the health and well-being of our children. 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-19 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. 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 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.

> COVID-19 is a threat to the public's health for which the [Secretary] may order general control measures. This authority is granted to the [Secretary] pursuant to Pennsylvania law. *See* [Section 5 of the Disease Prevention and Control Law of 1955 (Disease Control Law)];[1] [Section 2102(a) of The Administrative Code of

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[1] Act of April 23, 1956, P.L. (1955) 1510, *as amended*, 35 P.S. §521.5. Section 5 states, in relevant part: "Upon the receipt by . . . [DOH] . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure, . . . [DOH] shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation." In addition, Section 3 of the Disease Control Law states, in relevant part:

> (a) 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 [State Advisory Health Board (Board)] and subject to the supervision and guidance of [DOH].
>
> (b) [DOH] shall be responsible for the prevention and control of communicable and non-communicable disease in any municipality which is not served by a local board or department of health, including disease control in public and private schools.
>
> (c) If the [S]ecretary 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, he may appoint agents of [DOH] 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. As the Pennsylvania Supreme Court has explained:

> We find in the [Disease Control Law] a holistic scheme that, for purposes of disease prevention and control, favors local regulation as informed by the expertise of a dedicated local board or department of health over state-level regulation, and correspondingly allows local lawmakers to impose more stringent

(Footnote continued on next page…)

1929 (Administrative Code)];[2] and [the DOH] regulation at 28 Pa. Code §27.60 (relating to disease control

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> regulations than state law provides. Thus, in priority order, a municipality with a board or department of health may enact ordinances or promulgate rules and regulations in service of disease prevention and control. Where a municipality lacks its own board or department of health, but lies within the jurisdiction of a county department of health, the municipality may enact such ordinances, while the county board or department of health may issue rules and regulations. Absent a municipal or county board or department of health, a municipality falls within the jurisdiction of the [Board].
>
> With this account in mind, viewing [Section 16 of the Disease Control Law, 35 P.S.] §521.16, in its entirety, certain principles are clear. First, state-level regulations must be devised and promulgated by [the Board] with the Secretary['s] oversight. Second, at the local level, municipalities with the benefit of access to similar expertise, whether in the form of a municipal board or department of health or a department or board administered by the county, enjoy the prerogative of enacting additional laws or regulations, provided they are no *less* strict than state law and regulations on the same subject. *See* [Section 16(c) of the Disease Control Law,] 35 P.S. §521.16(c) (allowing such ordinances that "are not less strict than the provisions of this act or the rules and regulations issued thereunder" by the [B]oard).

Pennsylvania Restaurant and Lodging Association v. City of Pittsburgh, 211 A.3d 810, 828 (Pa. 2019) (emphasis in original).

[2] Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §532(a). Section 2102(a) states: "[DOH] shall have the power, and its duty shall be . . . [t]o 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* Section 2111(a) and (b) of the Administrative Code, 71 P.S. §541(a) and (b) ("The [Board] shall have the power, and its duty shall be . . . [t]o advise the [Secretary] on such matters as he may bring before it . . . [and t]o make such reasonable rules and regulations, not contrary to law, as may be deemed by the [B]oard necessary for the prevention of disease, and for the protection of the lives and health of the people of the Commonwealth, and for the proper performance of the work of [DOH], and such rules and regulations, when made by the [B]oard, shall become the rules and regulations of [DOH].").

> measures).[3] Particularly, [DOH] has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. *See* [Section 5 of the Disease Control Law]; [Section 2102(a) of the Administrative Code and Section 8(a) of the Act of April 27, 1905, P.L. 312, *as amended*, 71 P.S. §1403(a) (DOH Act)];[4] [and Section 27.60 of DOH's regulations]. 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.

PFR, Exhibit A at 1-2 (footnotes omitted).

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[3] 28 Pa. Code §27.60. Section 27.60(a) of DOH's regulations states, in pertinent part:

> (a) [DOH] . . . shall direct isolation of a person . . . with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person . . . with a communicable disease or infection; and any other disease control measure [DOH] . . . 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).

In turn, Section 27.1 of DOH's regulations defines "isolation," in relevant part, as

> [t]he separation for the communicable period of an infected person . . . from other persons . . . in such a manner as to prevent the direct or indirect transmission of the infectious agent from infected persons . . . to other persons . . . who are susceptible or who may spread the disease to others.

28 Pa. Code §27.1. Additionally, Section 27.1 defines "segregation," in pertinent part, as "[t]he separation for special control and observation of one or more persons . . . from other persons . . . to facilitate the control of a communicable disease." *Id.*

[4] Section 8(a) of the DOH Act states: "It shall be the duty of [DOH] to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease."

In Section 2 of the Order, the Secretary imposes a "General Masking Requirement" requiring that "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity[5] shall wear a face covering indoors, regardless of vaccination status, except as set forth in Section 3.[6]" PFR, Exhibit A at 4. The Secretary also stated she issued the Order "in order to prevent and control the spread of disease," and that "[t]his Order shall take effect at 12:01 a.m. on September 7, 2021, and shall remain in effect until otherwise terminated." *Id.* at 3, 6. Petitioners

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[5] Section 2 of the Order defines "School Entity," in relevant part, as follows:

> (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 local-funded prekindergarten activities.
> (8) A childcare provider licensed by the Department of Human Services of the Commonwealth.

PFR, Exhibit A at 3-4.

[6] Section 3 of the Order lists the following exceptions to its application: (1) if wearing a mask while working would create an unsafe condition in which to operate equipment or execute a task under local, state, or federal regulations or workplace safety guidelines; (2) if wearing a mask would either cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition, or a disability; (3) when necessary to confirm an individual's identity; (4) while working alone and isolated from others with little or no expectation of in-person contact; (5) while communicating with someone who is hearing impaired or has another disability requiring sight of the mouth in order to communicate; (6) when the individual is under two years old; (7) when the individual is engaged in an activity that cannot be performed while wearing a mask, such as eating or drinking, or playing an instrument, or participating in a high intensity aerobic or anaerobic activity, including during physical education class, in a well-ventilated area; and (8) while participating in a sports activity or event either indoors or outdoors. PFR, Exhibit A at 4-5.

subsequently filed the PFR seeking declaratory and injunctive relief based on the Order's purported invalidity, and Petitioners and the Secretary filed cross-Applications for Summary Relief (ASR).[7]

On September 13, 2021, this Court filed an order framing the issues to be considered in this matter:

> [W]hether the August 31, 2021 [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 whether said [Order] violates the principles governing the delegation of administrative authority.

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[7] As this Court has recently observed:

> Applications for summary relief filed in this Court's original jurisdiction are governed by Pennsylvania Rule of Appellate Procedure 1532(b), Pa. R.A.P. 1532(b), which provides that "[a]t any time after the filing of a petition for review . . . , the court may enter judgment if the right of the applicant thereto is clear." An application for summary relief under Rule 1532(b) is evaluated according to standard for a motion for summary judgment. A motion for summary relief may only be granted when "**the dispute is legal rather than factual**," there is **no genuine issue of material fact**, and the moving party is entitled to judgment as a matter of law. The evidence is to be reviewed in a light most favorable to the non-moving party. "Even if the facts are undisputed, the moving party has the burden of proving that its right to relief is so clear as a matter of law that summary relief is warranted." "Bold unsupported assertions of conclusory accusations cannot create genuine issues of material fact." "Summary [relief] may be entered only in cases that are clear and free from doubt."

Delaware Riverkeeper Network v. Department of Environmental Protection (Pa. Cmwlth., No. 525 M.D. 2017, filed August 3, 2021), slip op. at 13 (citations and footnote omitted); *see also* Pa. R.A.P. 126(b) ("As used in this rule, 'non-precedential decision' refers to . . . an unreported memorandum opinion of the Commonwealth Court filed after January 15, 2008. [] Non-precedential decisions . . . may be cited for their persuasive value.").

I.

With regard to the first issue presented herein, the Pennsylvania Supreme Court has explained:

> Commonwealth agencies have no inherent power to make law or otherwise bind the public or regulated entities. Rather, an administrative agency may do so only in the fashion authorized by the General Assembly, which is, as a general rule, by way of recourse to procedures prescribed in the Commonwealth Documents Law,[8] the Regulatory Review Act, and the Commonwealth Attorneys Act.[9] When an agency acts under the general rule and promulgates published regulations through the formal notice, comment, and review procedures prescribed in those enactments, its resulting pronouncements are accorded the force of law and are thus denominated "legislative rules." *See Borough of Pottstown* [*v. Pennsylvania Municipal Retirement Board*, 712 A.2d 741, 743 (Pa. 1998)]. *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L.REV. 331, 335 (2011) ("The canonical mode by which agencies define the meaning of statutes and regulations or establish policy is legislative rulemaking.") (footnote omitted).
>
> Non-legislative rules—more recently couched (in decisions and in the literature) as "guidance documents"—comprise a second category of agency pronouncements recognized in administrative law practice. These "come in an abundance of formats with a diversity of names, including guidances, manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, press releases and others." Robert A. Anthony, Commentary, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L.REV. 1045, 1046 (2000). When such documents fairly may be said to merely explain or offer specific and

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[8] Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§1102-1602, and 45 Pa. C.S. §§501-907.

[9] Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§732-101–732-506.

> conforming content to existing statutes or regulations within the agency's purview, they are regarded as "interpretive rules," which generally are exempt from notice-and-comment rulemaking and regulatory-review requirements. *See Borough of Pottstown*, [712 A.2d at 743]; Seidenfeld, *Substituting Substantive for Procedural Review*, 90 TEX. L.REV. at 346 (explaining that an interpretive rule "is meant to explain preexisting legal obligations and relations that are embodied in the agency's authorizing statutes and regulations") (footnote omitted). Additionally, "statements of policy"—or agency pronouncements which are not intended to bind the public and agency personnel, but rather, merely express an agency's tentative, future intentions—also are not regulations subject to notice-and-comment rulemaking and regulatory-review requirements. *See Borough of Pottstown*, [712 A.2d at 743 n.8].

Northwestern Youth Services, Inc. v. Department of Public Welfare, 66 A.3d 301, 310-11 (Pa. 2013) (citation and footnote omitted).[10]

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[10] With respect to the various species of non-legislative rules, such as the Secretary's Order issued herein, Professor Anthony has further explained:

> Documents that are not legislative rules, but that nevertheless fit [Section 551 of Administrative Procedures Act's, 5 U.S.C. §551,] definition of "rule," are called "non[-]legislative rules." They come in an abundance of formats with a diversity of names, including guidances, manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, press releases and others. Non[-]legislative rules do not carry the force of law. They are potentially exempt from notice[]and[]comment requirements under the "interpretative rules" exemption (for documents that interpret) or under the "general statements of policy" exemption (for some documents that do not interpret). Whether a document will be exempt in a given case depends upon further analysis.
>
> That analysis is a simple one for non[-]legislative rules that interpret existing legislation. All such documents (more precisely, those portions of the documents that genuinely interpret) fall

(Footnote continued on next page…)

To my mind, the Secretary's Order is a valid interpretive rule that tracks the statutory and regulatory authority conferred upon her, and it is not a rule or regulation that must be promulgated under the Regulatory Review Act. As outlined above, Section 2102(a) of the Administrative Code states: "[DOH] shall have the power, and its duty shall be . . . [t]o protect the health of the people . . . and to determine and employ the most efficient and practical means for the prevention and suppression of disease[.]" 71 P.S. §532(a). Likewise, Section 8(a) of the DOH Act states: "It shall be the duty of [DOH] to protect the health of the people . . . and to determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. §1403(a). Additionally, Section 5 of the Disease

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> squarely within the exemption for "interpretative rules," and need not undergo notice[]and[]comment. The theory is that the agency is not making new law, but is merely spelling out or explaining positive legal substance that was already inherent in the statute or legislative rule or line of decisional law being interpreted. Thus, the public-participation procedures required by [S]ection 553[, 5 U.S.C. §553,] for making new law are not needed.
>
> In practice, the courts often have quite an uneasy time deciding whether a document does or does not interpret. It is in the application of the interpretative rule exemption, not in its conception, that perplexity intrudes. It is notoriously difficult to say with confidence that a given non[-]legislative document actually interprets a given legislative document, such that the meaning of the former flows fairly from and is justified by the latter. But when the court ultimately concludes that a document does so interpret, the law is utterly clear that notice[]and[]comment need not have been used in its promulgation. (Good practice may counsel agencies voluntarily to observe notice[]and[]comment before issuing an interpretation in many situations, such as where the interpretation would extend the practical scope of the agency's jurisdiction, would alter the obligations of private parties or would modify eligibility for entitlements.)

A Taxonomy of Federal Agency Rules, 52 ADMIN. L.REV. at 1046-47.

Control Law states, in relevant part: "Upon the receipt by . . . [DOH] . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure, . . . [DOH] shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5. In turn, as stated above, Section 27.60(a) of DOH's regulations provides, in relevant part, that "[DOH] . . . shall direct isolation of a person . . . with a communicable disease or infection . . . [or] segregation, quarantine or modified quarantine of contacts of a person . . . with a communicable disease or infection . . . ." 28 Pa. Code §27.60(a).

As extensively outlined in the Secretary's Order, the increase in COVID-19 cases caused by the Delta variant of the SARS-CoV-2 virus at the time of its issuance, in combination with the concern of the quick and dangerous spread among unvaccinated children, while considering the mental health needs of students to return to in-person instruction in schools, compelled the Secretary to follow the advice of the CDC and AAP to temporarily impose the least restrictive and "most efficient and practical means" of ensuring the safety of the vulnerable student population.[11] In the absence of universal testing of all individuals who may come

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[11] In this regard, the Secretary's rulemaking authority under the Administrative Code, the DOH Act, and the Disease Control Law must be distinguished from the Board's authority to promulgate regulations with respect to DOH operations as outlined above in the Disease Control Law. The Pennsylvania Supreme Court has explained this important distinction as follows:

> There is a well-recognized distinction in the law of administrative agencies between the authority of a rule adopted by an agency pursuant to what is denominated by the text writers as *legislative* rule-making power and the authority of a rule adopted pursuant to *interpretative* rule-making power. The former type of rule 'is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the Legislative body,' and 'is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to

(Footnote continued on next page…)

into contact with a student while in a "School Entity," the use of masks by all individuals in this setting during the life of the COVID-19 pandemic is an appropriate and limited "isolation" or "segregation" measure to prevent the spread of an airborne virus causing, in some cases, an asymptomatic disease. This temporary measure is "the most efficient and practical means for the prevention and suppression of [this] disease," as mandated by Section 2102(a) of the Administrative Code and Section 8(a) of the DOH Act,[12] and is a specifically authorized mode of

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> proper procedure, and (c) reasonable.' A court, in reviewing such a regulation, 'is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action . . . involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.'
>
> An interpretative rule on the other hand depends for its validity not upon a law-making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets. While courts traditionally accord the interpretation of the agency charged with administration of the act some deference, the meaning of a statute is essentially a question of law for the court, and, when convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation.

Uniontown Area School District v. Pennsylvania Human Relations Commission, 313 A.2d 156, 169 (Pa. 1973) (emphasis in original and citations omitted). As outlined above, because the Secretary's Order tracks the statutory and regulatory powers conferred thereunder, it is a valid interpretive rule issued pursuant to her rulemaking authority.

[12] Where, as here, the Secretary has extensively outlined the basis upon which she issued the Order, the Pennsylvania Supreme Court has cautioned:

(Footnote continued on next page…)

> By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.

Blumenschein v. Pittsburgh Housing Authority, 109 A.2d 331, 334-35 (Pa. 1954) (footnotes omitted and emphasis in original).

As provided within the text of the Order, the Secretary stated the reasoning underlying the exercise of her statutory and regulatory discretion in formulating the appropriate means for protecting the vulnerable statewide student population in the School Entity setting during the ongoing COVID-19 pandemic. The pleadings in this case simply do not demonstrate the requisite "manifest and flagrant abuse of discretion or a purely arbitrary execution of the [Secretary's] duties or functions" to enable this Court to inquire into the wisdom or details of her actions in this regard. Further, as extensively explained throughout this Dissenting Opinion, the Secretary's Order does not constitute a rule or regulation subject to the notice and comment requirements of either the Regulatory Review Act or the Commonwealth Documents Law, so no extra-agency input was required prior to the Secretary's issuance of the Order pursuant to her statutory and regulatory authority. In sum, although this Court may have reached a different conclusion based on the available information that was relied upon by the Secretary in issuing the Order, it is inappropriate to substitute our judicial discretion for the Secretary's administrative discretion conferred by Section 2102(a) of the Administrative Code and Section 8(a) of the DOH Act to employ "the most efficient and practical means for the prevention and suppression of" COVID-19 in the School Entity setting during the life of this pandemic.

prevention provided by Section 5 of the Disease Control Law and Section 27.60(a) of DOH's regulations.[13]

Moreover, on October 21, 2021, while this matter was pending, the Joint Committee on Documents (Joint Committee) issued the following Order:

> Pursuant to [S]ection 7.1 of the Regulatory Review Act[,[14]] the [Joint Committee] finds the following:
>
> 1. Findings.
>
> The Health Committee of the House of Representatives [(House Committee)] petitioned the [Joint Committee] to determine whether the order of the [Secretary], issued August 31, 2021, should be

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[13] Likewise, Section 2106(b) of the Administrative Code states:

> The [DOH] shall have the power, and its duty shall be:
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> * * *
>
> (b) to establish and enforce quarantines, in such manner, for such period, and with such powers, as may now or hereafter be provided by law, to prevent the spread of diseases declared by law or by the [DOH] to be communicable diseases.

71 P.S. §536(b) (emphasis added).

[14] Added by the Act of June 30, 1989, P.L. 633, *as amended*, 71 P.S. §745.7a. Section 7.1 of the Regulatory Review Act states:

> If the [Independent Regulatory Review Commission (Commission)] or [a standing committee of the Senate or House of Representatives (committee)] finds that a published or unpublished document should be promulgated as a regulation, the [C]ommission or committee may present the matter to the [Joint Committee]. The [Joint Committee] shall determine whether the document should be promulgated as a regulation and may order an agency either to promulgate the document as a regulation within 180 days or to desist from the use of the document in the business of the agency.

promulgated as a regulation. A legislative standing committee may challenge an agency's unpromulgated order under [S]ection 7.1 of the Regulatory Review Act[.]

The [O]rder is an instrument issued by [DOH] under the authority of the Commonwealth and is, therefore, a document for purposes of Pennsylvania's laws governing Commonwealth documents. Def[inition] of "document," [S]ection 102 of the Commonwealth Documents Law[, Act of July 9, 1970, P.L. 477, *as amended*,] 45 P.S. §1102;[15] *see also* [Section 1.4 of the Pennsylvania Code,] 1 Pa. Code §1.4.[16] A regulation is "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 . . . ." Def[inition] of "regulation," [S]ection 3 of the Regulatory Review Act[,] 71 P.S. §745.3[;] 1 Pa. Code §1.4.[17] As a substantive rule issued under an agency's statutory authority, a regulation must be promulgated in accordance with the Commonwealth Documents Law. Def[inition] of "regulation," [S]ection 3 of the Regulatory Review Act[,] 71 P.S. §745.3[;] *see also* Article II of the Commonwealth Documents Law, [45 P.S. §§1201-1208].

2. Determination.

Based on the record, the [Joint Committee], by a vote of seven to four, finds that the [House Committee]

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[15] Section 102 of the Commonwealth Documents Law defines "Document," in pertinent part, as "any . . . order, regulation, rule, statement of policy, adjudication, certificate, license, permit, notice or similar instrument issued, prescribed or promulgated by or under the authority of this Commonwealth."

[16] Section 1.4 of the Pennsylvania Code defines "Document," in relevant part, as "an order, regulation, rule, statement of policy, adjudication, certificate, license, permit, notice or similar instrument issued, prescribed or promulgated by or under the authority of the Commonwealth."

[17] Section 1.4 of the Pennsylvania Code defines "Regulation" as "[a] rule or regulation or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of a statute administered by or relating to the agency, or prescribing the practice or procedure before the agency."

> has failed to show that the [Secretary's Order], issued August 31, 2021, should be promulgated as a regulation.
>
> While the [Secretary's Order] imposes a legal requirement to wear face coverings in schools and other locations identified in the [O]rder, [the Secretary] issued the [O]rder under existing statutory and regulatory authority. [DOH's] regulatory authority to bypass the rulemaking process is authorized by [Section 27.60 of its regulations,] 28 Pa. Code §27.60[;] [S]ection 2101(a) of the [Administrative Code], 71 P.S. §532(a)[;] [S]ection 8(a) of the [DOH Act], 71 P.S. §1403(a)[;] and [S]ection 2106[(b)] of the [Administrative Code], 71 P.S. §536[(b)]. (Footnote Omitted).[18]

As the Commonwealth entity empowered to determine whether an administrative agency rule is required to be promulgated as a rule or regulation subject to the provisions of the Regulatory Review Act[19] and the Commonwealth Documents Law,[20] this Court should defer to the Joint Committee's expertise and

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[18] By an October 29, 2021 order, this Court granted the Secretary's Application for Relief in the Nature of a Motion for Leave to Supplement the Record, treating the application as a post-submission communication under Pa. R.A.P. 2501(a), and docketed the Joint Committee's October 21, 2021 Order in this matter as an addendum to the Secretary's ASR. Additionally, the House Committee has petitioned this Court to review the Joint Committee's October 21, 2021 Order. *See The Honorable Kathy L. Rapp v. Department of Health* (Pa. Cmwlth., No. 1184 C.D. 2021).

[19] *See* Section 7.1 of the Regulatory Review Act, 71 P.S. §745.7a ("The [Joint Committee] shall determine whether the document should be promulgated as a regulation and may order an agency either to promulgate the document as a regulation within 180 days or to desist from the use of the document in the business of the agency."); *see also* Section 11(a) of the Regulatory Review Act, 71 P.S. §745.11(a) ("For the purposes of reviewing the regulations of the [C]ommission and otherwise satisfying the requirements of this act, the [Joint Committee] shall exercise the rights and perform the functions of the [C]ommission; and the [C]ommission shall exercise the rights and perform the functions of an agency under this act.").

[20] Section 502(d) of the Commonwealth Documents Law states that "[t]he [Joint Committee] shall exercise the powers and perform the duties vested in and imposed upon it by this part and any other powers or duties vested in and imposed upon the [Joint Committee] by law." 45 Pa. C.S. §502(d). In turn, Section 503 of the Commonwealth Documents Law states:

(Footnote continued on next page…)

determination that the Secretary's Order does not constitute a rule or regulation within the requirements of either of these statutes, as well as the Secretary's determination that her Order was properly issued according to her statutory and regulatory authority. As the Pennsylvania Supreme Court has explained:

> Subject to the provisions of [S]ection 732 (relating to required contractual arrangements), the manner in which the [Pennsylvania Code], the permanent supplements thereto, and the [Pennsylvania Bulletin], shall be published, and all other matters with respect thereto not otherwise provided for in this part shall be prescribed by regulations promulgated or orders adopted by the [Joint Committee]. The [Joint Committee] shall administer this part and Subchapter A of Chapter 3 of Title 2 (relating to regulations of Commonwealth agencies) with a view toward encouraging the widest possible dissemination of documents among the persons affected thereby which is consistent with the due administration of public affairs.

45 Pa. C.S. §503. *See also* Section 206 of the Commonwealth Documents Law, 45 P.S. §1206 ("The agency text of all regulations and other documents, required or authorized to be deposited with the Legislative Reference Bureau [(Bureau)] by this act shall be prepared in such form and format as may be prescribed by regulations promulgated by the [Joint Committee]."); Section 701 of the Commonwealth Documents Law, 45 Pa. C.S. §701 ("It shall be the duty of the [Bureau], subject to the policy supervision and direction of the [Joint Committee], to compile, edit and supplement . . . an official legal codification, to be divided into titles of convenient size and scope, and to be known as the 'Pennsylvania Code.'"); Section 722(d) of the Commonwealth Documents Law, 45 Pa. C.S. §722(d) ("If an agency and the [B]ureau disagree concerning the form or format of a document required or authorized to be deposited with the [B]ureau, the agency may refer the matter to the [Joint Committee], which shall resolve the conflict pursuant to the standards and procedures provided by [S]ection 723(a) (relating to processing of deposited documents)."); 1 Pa. Code §3.1(a)(2) and (9) ("The following documents shall be codified in the [Pennsylvania] Code: . . . [a]dministrative and gubernatorial regulations [and d]ocuments or classes of documents which the Governor, the Joint Committee or the Bureau finds to be general and permanent in nature."); 1 Pa. Code §17.94 ("Section 502(d) of [the Commonwealth Documents Law] (relating to [the Joint Committee]) provides that the Joint Committee shall exercise the powers and perform the duties vested in and imposed upon it by the act and any powers and duties subsequently vested in and imposed upon the Joint Committee by statute.").

> It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation. . . . Thus, our courts will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

Winslow-Quattlebaum v. Maryland Insurance Group, 752 A.2d 878, 881 (Pa. 2000) (citations omitted).

Based on the allegations raised in the PFR, it is clear that neither the Secretary nor the Joint Committee acted with fraud or bad faith, or that either committed an abuse of discretion or clearly arbitrary action. As a result, unlike the Majority, I do not conclude that the Secretary's Order is void *ab initio* as an improperly promulgated rule or regulation subject to the requirements of the Regulatory Review Act, the Commonwealth Documents Law, or in the absence of a gubernatorially-declared disaster emergency issued pursuant to Section 7301(c) of Pennsylvania's Emergency Management Services Code, 35 Pa. C.S. §7301(c). This conclusion is amply supported by the Joint Committee's October 21, 2021 Order. Accordingly, unlike the Majority, I would grant the Secretary's ASR, and deny Petitioners' ASR, with respect to the first issue in this case.

II.

Regarding the second issue presented in this matter, the Pennsylvania Supreme Court has stated:

> [T]he separation of powers doctrine divides the functions of government equally between the executive, legislative, and judicial branches. As we recently explained,

> Article II, [s]ection 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." 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. And second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.
>
> Although the legislature may not delegate legislative power, it may, in some instances, assign the authority and discretion to execute or administer a law, subject to two fundamental limitations: First, the General Assembly must make "the basic policy choices." Once it does so, the General Assembly may "impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions" of the legislation. Second, the legislation must include "adequate standards which will guide and restrain the exercise of the delegated administrative functions." In determining whether the legislature has established adequate standards, "we are not limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect." Further, the General Assembly does not delegate legislative powers by delegating mere details of administration.

Germantown Cab Company v. Philadelphia Parking Authority, 206 A.3d 1030, 1047 (Pa. 2019) (citations omitted).

The provisions of the Administrative Code and the Disease Control Law provide DOH broad authority "[t]o protect the health of the people of [Pennsylvania], and to determine and employ the most efficient and practical means

for the prevention and suppression of disease." 71 P.S. §§532(a), 1403(a).[21] However, the Disease Control Law and the associated regulations outline the parameters within which the Secretary and the Board, as well as local boards and departments, may operate with respect to the containment of communicable diseases within public and private schools. *See* Sections 4 and 5 of the Disease Control Law; Section 27.60 of DOH's regulations. Specifically, the Secretary may only "carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation," upon the receipt of "a report of a disease which is subject to isolation, quarantine, or any other control measure." 35 P.S. §521.5. *See also Wolf v. Scarnati*, 233 A.3d 679, 705 (Pa. 2020) ("Broad discretion and standardless discretion are not the same thing."); *Gilligan v. Pennsylvania Horse Racing Commission*, 422 A.2d 487, 490 (Pa. 1980) ("The latitude of the standards controlling exercise of the rulemaking powers expressly conferred on the Commission must be viewed in light of the broad supervisory task necessary to accomplish the express legislative purpose.").

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[21] In this regard, the Pennsylvania Supreme Court has observed:

> In *Archbishop O'Hara's Appeal*, [131 A.2d 587, 594 (Pa. 1957)], the standard of "the promotion of the health, safety, morals and general welfare * * *" was deemed sufficient to limit the administrative exercise of the zoning power to grant or refuse a special exception. The similarly general standard of "detrimental to welfare, health, peace and morals of the inhabitants of the neighborhood" was held to provide adequate guidance for the administrative refusal of a liquor license in *Tate Liquor License Case*, [173 A.2d 657 (Pa. Super. 1961)]. *See also Dauphin Deposit Trust Co. v. Myers*, [130 A.2d 686, 689 (Pa. 1957)] (statement that "adequacy or inadequacy of banking facilities" a proper criterion).

DePaul v. Kauffman, 272 A.2d 500, 503 (Pa. 1971).

In this case, the Secretary has acted according to the statutory and regulatory authority conferred upon her to protect the vulnerable student population in "School Entities" by the least restrictive and "the most efficient and practical means" available while the lethal COVID-19 pandemic continues to infect and kill the residents of this Commonwealth. The authority conferred upon her in this regard in no way encroaches upon the legislative power provided in article II, section 1 of the Pennsylvania Constitution.

Accordingly, unlike the Majority, I would grant the Secretary's ASR and deny Petitioners' ASR, with respect to the second issue as well, and dismiss Petitioners' PFR.

MICHAEL H. WOJCIK, Judge