

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

NO. 294 MD 2021

v.

ACTING SECRETARY OF THE  
PENNSYLVANIA DEPARTMENT OF  
HEALTH,

Respondent

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**RESPONDENT’S ANSWER TO PETITIONERS’ APPLICATION FOR  
SPECIAL RELIEF IN THE FORM OF AN EMERGENCY  
PRELIMINARY INJUNCTION**

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**INTRODUCTION**

The parties are before this Court because Petitioners, private schools and parents of school-aged children, seek to overturn the disease control measure designed to preserve in-person education and protect students and teachers in the midst of a global pandemic. The *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021, requires the wearing of face coverings by those present within school buildings – a mitigation strategy recommended by the Centers for Disease Control and Prevention and the American Academy of Pediatrics. Such a requirement does not in any way limit education or infringe upon Petitioners’ rights.

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “It has been well stated that upon an application for a preliminary injunction to doubt is to deny.” *Madison Square Garden Corp. v. Braddock*, 90 F.2d 924, 927 (3d Cir. 1937). Petitioners have a very steep hill to climb and they are not even close to the summit. In the end, Petitioners present nothing more than a policy dispute and ask this Court to ignore a real and substantial public health risk so they can continue with instruction in whatever manner they see fit. The Court should decline this invitation.

### **ANSWER TO PETITIONER’S APPLICATION FOR SPECIAL RELIEF**

Respondent, by and through their undersigned counsel, hereby submit this Answer to Petitioners’ Application for Special Relief in the form of an Emergency Preliminary Injunction, as follows.

1. ADMITTED.
2. It is ADMITTED that this paragraph correctly quotes a portion of the Order at issue. By way of further response, the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021 is a written document that speaks for itself.
3. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; the law vests the Department with authority

to prevent and control disease in the general public and in schools. In furtherance of that authority, the Department further promulgated regulations at 28 Pa. Code. Ch. 27. The Disease Prevention and Control Law of 1955, Act of Apr. 23, 1956, P.L. (1955) 1510, 35 P.S. §§ 521.1 *et seq.*; the Administrative Code of 1929, Act of Apr. 9, 1929, P.L. 177, No. 175, 71 P.S. §§ 51 *et seq.*; and Pennsylvania Department of Health regulations at 28 Pa. Code § 27.60 allow the Pennsylvania Department of Health to carry out appropriate control measures, such as the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021. COVID-19 is a contagious disease that has spread rapidly from person to person and there have been 1,329,111 total cases reported as of 9 PM last night (up 4,391) cases and 28,446 (up 38) deaths in this Commonwealth caused by the disease. The Delta variant of SARS-CoV-2, the virus that causes COVID-19, is more infectious and is leading to increased transmissibility. Delta Variant: What we Know about the Science, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (last visited Sept. 9, 2021); Rachel Herlihy, et al., “Rapid Increase in Circulation of SARS-CoV-2 B.1.617.2 (Delta) Variant,” Aug. 6, 2021, CDC, [https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e2.htm?s\\_cid=mm7032e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e2.htm?s_cid=mm7032e2_w) (last visited Sept. 9, 2021); Megan Scudellari, “How the Coronavirus Infects Cells – and Why Delta is so Dangerous,” Nature, [3](https://www.nature.com/articles/d41586-</a></p></div><div data-bbox=)

[021-02039-y](#) (last visited Sept. 9, 2021). Accordingly, the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021, is an appropriate disease control measure under the laws and regulations of the Commonwealth of Pennsylvania. Simply put, to the extent that Petitioners believe a separate rule or regulation is required to implement a control measure, they are incorrect.<sup>1</sup>

4. ADMITTED in part, DENIED in part. It is ADMITTED that the Acting Secretary of Health issued the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021, which took effect at 12:01 a.m. on September 7, 2021. It is DENIED as a conclusion of law to which no answer is required that there is no rule or regulation that exists within the Commonwealth of Pennsylvania that provides for a mask mandate. By way of further response, please see response to Paragraph 3.

5. DENIED as a conclusion of law to which no answer is required. By way of further response, to obtain a preliminary injunction, Petitioners bear the burden of establishing that: (1) the injunction is necessary to prevent immediate and irreparable harm; (2) greater injury would result from refusing an injunction than from granting it and that issuance of the injunction would not substantially harm

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<sup>1</sup> See also, *County of Allegheny v. The Cracked Egg*, 2021 WL 3124248 (Pa. Cmwlth. 2021)(Finding the trial court did not err in concluding that the mandatory rule-making procedures were not applicable to the COVID-19 Control Measure Orders.)

other interested parties; (3) the injunction would restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the right to relief is clear and the wrong is manifest (*i.e.*, Petitioners are likely to prevail on the merits); (5) the injunction is reasonably suited to abate the offending activity; and (6) the injunction would not adversely affect the public. *Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966, 970 (Pa. Cmwlth. 2006). Petitioners omit the last two requirements from their analysis. This is notable because overturning the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities* would adversely affect the public.

6. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary, Petitioners cannot show that a greater injury will result in granting the injunction than denying it. There is no evidence that wearing a mask causes bodily harm. However, there is evidence that COVID-19 is a worldwide pandemic that has cost countless lives. Additionally, there is evidence that masking helps prevent the spread of COVID-19. Moreover, children have not yet had the benefit of the vaccine and are therefore susceptible to getting COVID-19. There can be no more fundamental interest to the public than protecting its children from an unnecessary disease or death.

7. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; the *Order of the Acting Secretary of the*

*Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021 does not cause a threat of immediate and irreparable harm as it protects the ability of commonwealth schools to continue to provide in-person education to children and follows recommendations of masking in schools from the Centers for Disease Control and Prevention (“CDC”) and the American Academy of Pediatrics to, in part, protect students from the spread of COVID-19. Guidance for COVID-19 Prevention in K-12 Schools, CDC, updated Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last visited Sept. 7, 2021); COVID-19 Guidance for Safe Schools, American Academy of Pediatrics, <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/> (last visited Sept. 7, 2021). Additionally, face coverings were required during last school year under the *Updated Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated November 17, 2020 and the *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated July 1, 2020.

8. DENIED as a conclusion of law to which no answer is required.

9. DENIED as a conclusion of law to which no answer is required. It is also DENIED as the *Order of the Acting Secretary of the Pennsylvania Department*

*of Health Directing Face Coverings in School Entities*, dated August 31, 2021 protects children and others from COVID-19, which also protects and maintains in-person education.

10. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; face coverings were required during last school year under the *Updated Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated November 17, 2020 and the *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated July 1, 2020.

11. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; face coverings were required during last school year under the *Updated Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated November 17, 2020 and the *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated July 1, 2020. Accordingly, all schools should already have procedures in place to address the situation of students refusing to comply with the Order.

12. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; SARS-CoV-2 infection is transmitted predominantly by inhalation of respiratory droplets when people cough, sneeze,

sing, talk or breath and masks help reduce the emission of virus-laden droplets and reduce the inhalation of these droplets by the wearer. Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2, CDC, updated May 7, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html> (last visited Sept. 7, 2021). COVID-19 has caused hospitalizations and deaths within the Commonwealth and the United States. As such, the “CDC recommends indoor masking for individuals age 2 years and older, including students, teachers, staff, and visitors, regardless of vaccination status.” Guidance for COVID-19 Prevention in K-12 Schools, CDC, updated Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last visited Sept. 7, 2021).

13. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; the *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities*, dated August 31, 2021, protects and maintains in-person education. Accordingly, all schools should already have procedures in place to address the wearing of face coverings. Moreover, schools were given 7-days to prepare for the Order’s effective date.

14. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; if the injunction is granted then case counts



will continue to rise and the health and safety of all students and teachers will be placed at risk.

15. DENIED as a conclusion of law to which no answer is required. To the extent an additional answer is necessary; face coverings were required during last school year under the *Updated Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated November 17, 2020 and the *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, dated July 1, 2020. Accordingly, all school districts should already have procedures in place to address the use of face coverings.

16. DENIED as a conclusion of law to which no answer is required.

17. DENIED as a conclusion of law to which no answer is required.

18. ADMITTED.

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petitioners' Application for Special Relief in the form of an emergency preliminary injunction.

Respectfully submitted,

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By: /s/ Karen M. Romano  
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Chief Deputy Attorney General  
Chief, Litigation Section  
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DATE: September 8, 2021

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**VERIFICATION**

**VERIFICATION**

I, \_\_Wendy E. Braund, MD, MPH, MSED, FACPM\_\_\_\_\_,  
verify that the statements set forth in the Respondent's Answer to Petitioners'  
Application For Special Relief in the Form of an Emergency Preliminary Injunction,  
filed in this matter on September 8, 2021, are true and correct to the best of my  
knowledge, information, and belief. I understand that false statements made herein  
are made subject to the penalties of 18 Pa. C.S. § 3904 relating to unsworn  
falsification to authorities.

Date: 8 September 2021\_\_\_\_\_



MD MPH MSED FACPM

Wendy E. Braund  
COVID-19 Response Director  
Pennsylvania Department of Health

## CERTIFICATE OF COUNSEL

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*

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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, via PACFile notification, on the following:

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*/s/ Karen M. Romano*

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KAREN M. ROMANO  
Chief Deputy Attorney General

DATE: September 8, 2021