

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.	:	
	:	
Acting Secretary of the Pennsylvania	:	
Department of Health,	:	No. 294 M.D. 2021
Respondent	:	

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON

FILED: November 16, 2021

Before the Court is the “Application to Terminate (Eliminate) Automatic Stay” (Application) filed by Jacob Doyle Corman, III, Jesse Wills Topper, Calvary Academy, Hillcrest Christian Academy, James and Michelle Reich, Adam and Chelsea McClure, Victoria T. Baptiste, Jennifer D. Baldacci, Klint Neiman and Amanda Palmer, Penncrest School District, Chestnut Ridge School District, and West York Area School District (collectively, Petitioners) seeking to vacate the automatic stay occasioned by the appeal of Alison M. Beam, the Acting Secretary of Health (Acting Secretary), of this Court’s November 10, 2021 Opinion (November 10, 2021 Opinion) that declared the Acting Secretary’s August 31, 2021 “Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities” (Masking Order) void *ab initio*. For the reasons that follow, we grant the Application.

Preliminarily, as stated in the Court’s November 10, 2021 opinion, this Court expresses herein “no opinion regarding the science or efficacy of mask-wearing or the politics underlying the considerable controversy the subject continues to engender.” November 10, 2021 Opinion at 3 (citing *Wolf v. Scarnati*, 233 A.3d 679, 684 (Pa. 2020)). The November 10, 2021 Opinion decided the narrow legal question of whether the Acting Secretary acted properly in issuing the Masking Order in the absence of either legislative oversight or a declaration of disaster emergency by the Governor. *See generally* November 10, 2021 Opinion. This Court concluded the Masking Order was void *ab initio* because it was a regulation not duly

promulgated in accordance with the Commonwealth Documents Law¹ and the Regulatory Review Act.² See November 10, 2021 Opinion at 30-31 & Order.

The Acting Secretary appealed the November 10, 2021 Order to the Supreme Court of Pennsylvania on the afternoon of November 10, 2021, thereby triggering an automatic stay ancillary to appeal. See Notice of Appeal dated November 10, 2021; see also Pa. R.A.P. 1702; Pa. R.A.P. 1736(b) & Note (noting

¹ Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1102-1602, and 45 Pa.C.S. §§ 501-907, which, collectively, are known as the “Commonwealth Documents Law.” As this Court explained in the November 10, 2021 Opinion:

In general, the purpose of the Commonwealth Documents Law is to promote public participation in the promulgation of a regulation. To that end, an agency must invite, accept, review and consider written comments from the public regarding the proposed regulation; it may hold public hearings if appropriate. Section 202 of the Commonwealth Documents Law, 45 P.S. § 1202. After an agency obtains the Attorney General’s approval of the form and legality of the proposed regulation, the agency must deposit the text of the regulation with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. Section 205, 207 of the Commonwealth Documents Law, 45 P.S. §§ 1205, 1207.

November 10, 2021 Opinion at 13 (citing *Germantown Cab Co. v. Phila. Parking Auth.*, 993 A.2d 933, 937-38 (Pa. Cmwlth. 2010), *aff’d*, 36 A.3d 105 (Pa. 2012)) (internal brackets omitted).

² Act of June 25, 1982, P.L. 633, as amended, 71 P.S. §§ 745.1-745.15. As we further noted in the November 10, 2021 Opinion:

In promulgating regulations, the Regulatory Review Act requires that Commonwealth agencies submit proposed regulations to the Independent Regulatory Review Commission (IRRC) for public comment, recommendation from the IRRC, and, ultimately, the IRRC’s approval or denial of a final-form regulation. Section 5 of the Regulatory Review Act, 71 P.S. § 745.5.

November 10, 2021 Opinion at 14 n.18 (quoting *Naylor v. Dep’t of Pub. Welfare*, 54 A.3d 429, 434 (Pa. Cmwlth. 2012), *aff’d*, 76 A.3d 536 (Pa. 2013)) (internal quotation marks and brackets omitted).

that self-executing automatic supersedeas attaches upon the taking of an appeal and continues through the pendency of the appeal process). On November 11, 2021, Petitioners filed the Application seeking the termination of the automatic stay. The Court directed the Acting Secretary to answer the Application, if at all, by Monday, November 15, 2021, and the Acting Secretary complied. *See* November 12, 2021 Order; *see also* Response to Petitioners’ Application to Terminate the Automatic Supersedeas, filed November 15, 2021 (Answer).

As this Court has explained:

It is well-established that in order to prevail on a motion to vacate an automatic supersedeas, the petitioner must establish: 1) that he is likely to prevail on the merits; 2) that without the requested relief he will suffer irreparable injury; and 3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest.

Solano v. Pa. Bd. of Prob. & Parole, 884 A.2d 943, 944 (Pa. Cmwlth. 2005) (citing *Elizabeth Forward Sch. Dist. v. Pa. Labor Relations Bd.*, 613 A.2d 68 (Pa. Cmwlth. 1992)); *see also Pa. Pub. Util. Comm’.* *v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).³ These criteria weigh in favor of Petitioners.

³ It is Petitioners’ burden to establish the conditions required under *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983), for vacatur of the automatic supersedeas. *See Rickert v. Latimore Twp.*, 960 A.2d 912, 923 (Pa. Cmwlth. 2008). However, we reject the Acting Secretary’s suggestion that the *Process Gas* factors do not apply to an application to lift an automatic supersedeas. This Court has expressly stated that “to set aside the automatic supersedeas, the litigant must make a showing that is the obverse of what is required under . . . *Process Gas* . . . where a litigant seeks to stay an order being appealed.” *Rickert*, 960 A.2d at 923.

Department of Environmental Resources v. Jubelirer, 614 A.2d 199 (Pa. 1989), on which the Acting Secretary relies, is not to the contrary. Our Supreme Court in that case applied the same

Regarding the first criterion, the Court finds that Petitioners are likely to prevail on the merits. In the November 10, 2021 Opinion, this Court, sitting *en banc*, determined the Masking Order to be void *ab initio* because the Acting Secretary did not comply with the requirements of the Commonwealth Documents Law and the Regulatory Review Act in issuing the Masking Order. *See* November 10, 2021 Opinion at 30-31. It is beyond dispute that (1) the Governor did not issue a new declaration of disaster emergency following the termination of the Disaster Proclamation by the General Assembly’s June 10, 2021 Concurrent Resolution, and (2) the Acting Secretary did not comply with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act for promulgating a regulation. *See id.* at 29-30. Further, the Masking Order represents a rule or regulation subject to the formal requirements for regulatory rulemaking and the Acting Secretary was not authorized by statute or regulation to promulgate the Masking Order without complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act.⁴ *See id.* at 18-30. Therefore, Petitioners are likely to prevail on the merits on appeal. *See id.* at 30-31.

test applied here, *i.e.*, to support vacatur of an automatic supersedeas, “petitioner must make a substantive case on the merits, demonstrating the stay will prevent petitioner from suffering irreparable injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest.” *Id.* at 203.

⁴ The Acting Secretary insists authority for the Masking Order can be found by reading various statutes and regulations *in pari materia*. It is true that statutes *in pari materia* must be construed together, if possible. *See* Section 1932 of the Statutory Construction Act, 1 Pa.C.S. § 1932 (requiring that statutes *in pari materia* be construed together as one statute, when possible). However, the principle of *in pari materia* does not allow the Department of Health to add language to the applicable statute to streamline the process of carrying out its duty to protect the people of the Commonwealth. This Court may not insert terms into a statute that are not present. *See Mohamed v. Dep’t of Transp., Bureau of Motor Vehicles*, 40 A.3d 1186, 1194-95 (Pa. 2012) (“[W]here the language of a statute is clear and unambiguous, a court may not add matters the

Second, the irreparable harm involved in this matter is self-evident. The November 10, 2021 Opinion declared the Masking Order void *ab initio* based on a failure to comply with the requirements of Pennsylvania rulemaking requirements. *See* November 10, 2021 Opinion at 30-31. “In Pennsylvania, the violation of an express statutory provision *per se* constitutes irreparable harm[.]” *Council 13, Am. Fed’n of State, Cty. & Mun. Emps., AFL-CIO by Keller v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991) (Commonwealth’s failure to comply with clear statutory requirements constituted irreparable harm); *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 498 (Pa. 2014) (violation by Executive Branch of statute and constitution constitutes irreparable harm). As the Pennsylvania Supreme Court has explained,

legislature saw fit not to include under the guise of construction Any legislative oversight is for the General Assembly to fill, not the courts.”).

In the same vein, the exercise of reading statutory provisions *in pari materia* does not allow the Department of Health to omit express text that the Acting Secretary views as troublesome or otherwise inconvenient. For example, in asserting that the Department of Health had authority to issue the Mask Order, the Acting Secretary ignored the language in the Disease prevention and Control Law of 1955 (Disease Control Law), Act of April 23, 1956, P.L. (1955) 1510, *as amended*, Section 5 of which states, in relevant part: “Upon the receipt by . . . the Department of Health . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure, . . . the Department of Health 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 (emphasis added); *see* November 10, 2021 Opinion at 22-23. Further, the Acting Secretary ignores the limitations in existing Department of Health regulations, which authorize measures for the “*isolation of a person . . . with a communicable disease . . . and any other disease control measure . . . appropriate for the surveillance of disease . . .*” 28 Pa. Code § 27.60(a) (emphasis added); *see* November 10, 2021 Opinion at 25-27.

Therefore, to the extent the statutes and regulations cited by the Masking Order as authority for the mask mandate contained therein are to be read *in pari materia*, they cannot be read as though the limitations within the text of the purported authorities, as discussed *supra*, do not exist. *See* 1 Pa.C.S. § 1921 (“Every statute shall be construed, if possible, to give effect to all its provisions.”).

[t]he argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.

Pa. Pub. Util. Comm'n v. Israel, 52 A.2d 317, 321 (Pa. 1947). Allowing an order to remain in force indefinitely during the pendency of an appeal, where that order was issued without proper authority or adherence to statutory requirements, was declared to be void by this Court, and affects the lives and behavior of all those entering School Entities⁵, would constitute an irreparable harm to the citizenry of the Commonwealth. *See* November 10, 2021 Opinion at 30-31.

Third, vacating the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest. The Acting Secretary is concerned that the public health will be harmed if the November 10, 2021 Order is not stayed pending appeal. *See* Answer at 4-11. However, as noted in this Court's November 10, 2021 Opinion, the Regulatory Review Act provides a mechanism for emergency rulemaking, even in the absence of a declared disaster emergency. *See* November 20, 2021 Opinion at 15 n.20. The Acting Secretary, on behalf of the

⁵ The Masking Order defines a "School Entity" as any of the following:

- (1) A public PreK-12 school.
- (2) A brick and mortar or cyber charter school.
- (3) A private or parochial school.
- (4) A career and technical center (CTC).
- (5) An Intermediate unit (IU).
- (6) A PA Pre-K Counts program, Head Start Program, Preschool Early Intervention program, or Family Center.
- (7) A private academic nursery school and locally-funded prekindergarten activities.
- (8) A childcare provider licensed by the Department of Human Services of the Commonwealth.

Masking Order at 3-4; *see* November 10, 2021 Opinion at 8 n.12.

Department of Health, had and has the ability to request certification by the Governor that a regulation is required to meet an emergency. This allows for the immediate adoption of a regulation to meet an emergency, which includes conditions which the Governor finds “may threaten the public health, safety or welfare[.]” 71 P.S. § 745.6(d).⁶ The emergency regulation can “take effect on the date of publication,” and remain in effect while its review by the Independent Regulatory Review Commission and the House and Senate Committees takes place. *See id.* This Court notes that the next publication date of the Pennsylvania Bulletin is December 4, 2021 with a closing date (subject to change) of November 22, 2021.⁷

Considering the Petitioners’ likelihood of success on the merits on appeal, the *per se* harm inherent in allowing an order issued in violation of statutory authority to remain in force, and the lack of substantial harm to other interested parties or the public interest given the existence of expedited, rule-making procedures under the Regulatory Review Act, the Application to lift the automatic

⁶ Although the Regulatory Review Act has been amended numerous times since its enactment in 1982, the mechanism for the emergency certification of agency regulations has remained intact. Under this mechanism, a regulation can be promulgated expeditiously. For example, on March 17, 1986, in the wake of “substantial increase in the number of mid-term cancellations and nonrenewal of commercial property and casualty insurance policies,” Governor Dick Thornburgh certified that emergency rulemaking was required to address that “emergency situation.” 16 PA. B. 953 (Mar. 22, 1986) (citations omitted). On March 22, 1986, the Insurance Department published its “emergency amendments” to its regulations “to provide commercial property and casualty insurance policyholders within 60 days’ advance notice of nonrenewal or midterm cancellation of their coverage and to limit the reasons for which an insurer may cancel commercial property and casualty insurance policies in midterm.” 16 PA. B. 951-52 (Mar. 22, 1986). The regulation was deemed approved by the IRRC on April 16, 1986. *See* 16 PA. B. 4167 (Oct. 25, 1986). From the certification of the emergency to the promulgation of the emergency regulation, a total of five days elapsed. In the instant matter, the Acting Secretary did not employ such measures in the implementation of the Masking Order, but still has this mechanism at her disposal.

⁷ *See* <https://www.pacodeandbulletin.gov/downloads/2021BulletinSchedule.pdf> (last visited Nov. 16, 2021).

stay is granted. The automatic stay will be lifted upon the next publication of the Pennsylvania Bulletin on Saturday, December 4, 2021. 71 P.S. § 745.6(d).

s/Christine Fizzano Cannon

CHRISTINE FIZZANO CANNON, Judge