

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 83 MAP 2021

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

Appellees

v.

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

Appellant

**REPRODUCED RECORD
VOLUME II (Pages 64a-297a)**

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON NOVEMBER 10, 2021 AT NO. 294 MD 2021

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Chief, Appellate Litigation Section

DATE: November 23, 2021

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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 294 MD 2021**Page 1 of 39****November 10, 2021****CAPTION**

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,
Respondent

CASE INFORMATION

Initiating Document:	Petition for Review		
Case Status:	Closed		
Case Processing Status:	November 10, 2021	Completed	
Journal Number:	46-10-2021		
Case Category:	Civil	Case Type(s):	Declaratory Judgment

CONSOLIDATED CASES**RELATED CASES****COUNSEL INFORMATION**

Petitioner	West York Area School District		
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Miscellaneous Docket Sheet

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November 10, 2021



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Petitioner West York Area School District

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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

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November 10, 2021



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Miscellaneous Docket Sheet

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Miscellaneous Docket Sheet**Commonwealth Court of Pennsylvania****Docket Number: 294 MD 2021****Page 6 of 39****November 10, 2021****COUNSEL INFORMATION****Petitioner Penncrest School District**

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Miscellaneous Docket Sheet**Commonwealth Court of Pennsylvania****Docket Number: 294 MD 2021****Page 7 of 39****November 10, 2021****COUNSEL INFORMATION****Petitioner Palmer, Amanda**

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Miscellaneous Docket Sheet**Commonwealth Court of Pennsylvania****Docket Number: 294 MD 2021****Page 12 of 39****November 10, 2021****COUNSEL INFORMATION****Petitioner Corman, Jacob Doyle**

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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

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COUNSEL INFORMATION

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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

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November 10, 2021



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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

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FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
09/03/2021	Miscellaneous Docket Filing Fee	70.25	09/03/2021	2021-CMW-H-001561	70.25
09/07/2021	Copy Work (Per Page)	33.00	09/07/2021	2021-CMW-H-001570	33.00
09/09/2021	Subpoena	28.00	09/09/2021	2021-CMW-H-001583	28.00
09/10/2021	Copy Work (Per Page)	54.50	09/10/2021	2021-CMW-H-001589	54.50
09/13/2021	Copy Work (Per Page)	41.00	09/13/2021	2021-CMW-H-001590	41.00

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**AGENCY/TRIAL COURT INFORMATION**

Order Appealed From: Notice of Appeal Filed:
 Order Type:
 Documents Received: September 3, 2021

Court Below:
 County: Division:
 Judge: OTN:
 Docket Number: Judicial District:

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content Description
----------------------	------------	---------------------

Date of Remand of Record:**BRIEFING SCHEDULE****Amicus Curiae**

Penn-Trafford School District
Brief

Due: Filed: October 7, 2021
 Due: Filed: October 5, 2021

Respondent

Beam, Alison
Brief

Due: September 23, 2021 Filed: September 23, 2021

Spring Grove Area School District**Brief**

Due: Filed: October 5, 2021

Petitioner**Baldacci, Jennifer D.****Brief**

Due: September 16, 2021 Filed: October 7, 2021

Reply Brief

Due: September 29, 2021 Filed: September 29, 2021

Baptiste, Victoria T.**Brief**

Due: September 16, 2021 Filed: October 7, 2021

Reply Brief

Due: September 29, 2021 Filed: September 29, 2021

Calvary Academy**Brief**

Due: September 16, 2021 Filed: October 7, 2021

Reply Brief

Due: September 29, 2021 Filed: September 29, 2021

Chestnut Ridge School District**Reply Brief**

Due: September 29, 2021 Filed: September 29, 2021

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BRIEFING SCHEDULE

Petitioner

Chestnut Ridge School District

Corman, Jacob Doyle

Brief

Due: September 16, 2021

Filed: October 7, 2021

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

Hillcrest Christian Academy

Brief

Due: September 16, 2021

Filed: October 7, 2021

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

McClure, Adam

Brief

Due: September 16, 2021

Filed: October 7, 2021

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

McClure, Chelsea

Brief

Due: September 16, 2021

Filed: October 7, 2021

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

Neiman, Klint

Brief

Due: September 16, 2021

Filed: October 7, 2021

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

Palmer, Amanda

Brief

Due: September 16, 2021

Filed: October 7, 2021

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

Penncrest School District

Reply Brief

Due: September 29, 2021

Filed: September 29, 2021

Miscellaneous Docket Sheet**Docket Number: 294 MD 2021****Page 20 of 39****November 10, 2021****BRIEFING SCHEDULE****Petitioner****Reich, James****Brief**

Due: September 16, 2021 Filed: October 7, 2021

Reply Brief

Due: September 29, 2021 Filed: September 29, 2021

Reich, Michelle**Brief**

Due: September 16, 2021 Filed: October 7, 2021

Reply Brief

Due: September 29, 2021 Filed: September 29, 2021

Topper, Jesse Wills**Brief**

Due: September 16, 2021 Filed: October 7, 2021

Reply Brief

Due: September 29, 2021 Filed: September 29, 2021

West York Area School District**Reply Brief**

Due: September 29, 2021 Filed: September 29, 2021

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 3, 2021	Petition for Review Filed			
	Corman, Jacob Doyle		Petitioner	
	Topper, Jesse Wills		Petitioner	
	Calvary Academy		Petitioner	
	Hillcrest Christian Academy		Petitioner	
	Reich, James		Petitioner	
	McClure, Adam		Petitioner	
	Baptiste, Victoria T.		Petitioner	
	Baldacci, Jennifer D.		Petitioner	
	Neiman, Klint		Petitioner	
	Palmer, Amanda		Petitioner	
	McClure, Chelsea		Petitioner	
	Reich, Michelle		Petitioner	
	Penncrest School District		Petitioner	
	Chestnut Ridge School District		Petitioner	
	West York Area School District		Petitioner	

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 3, 2021	Application for Emergency Relief			
	Breth, Thomas E.	Corman, Jacob Doyle	Petitioner	
	Elliott, Ronald Troy	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	Shuber, Jordan Peter	Corman, Jacob Doyle	Petitioner	
	Breth, Thomas E.	Neiman, Klint	Petitioner	
	Breth, Thomas E.	Palmer, Amanda	Petitioner	
	Breth, Thomas E.	Topper, Jesse Wills	Petitioner	
	Breth, Thomas E.	Baptiste, Victoria T.	Petitioner	
	Breth, Thomas E.	Baldacci, Jennifer D.	Petitioner	
	Breth, Thomas E.	Calvary Academy	Petitioner	
	Breth, Thomas E.	Reich, James	Petitioner	
	Breth, Thomas E.	McClure, Adam	Petitioner	
	Breth, Thomas E.	Hillcrest Christian Academy	Petitioner	
	Elliott, Ronald Troy	Neiman, Klint	Petitioner	
	Elliott, Ronald Troy	Palmer, Amanda	Petitioner	
	Elliott, Ronald Troy	Topper, Jesse Wills	Petitioner	
	Elliott, Ronald Troy	Baptiste, Victoria T.	Petitioner	
	Elliott, Ronald Troy	Baldacci, Jennifer D.	Petitioner	
	Elliott, Ronald Troy	Calvary Academy	Petitioner	
	Elliott, Ronald Troy	Reich, James	Petitioner	
	Elliott, Ronald Troy	McClure, Adam	Petitioner	
	Elliott, Ronald Troy	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	Shuber, Jordan Peter	Neiman, Klint	Petitioner	
	Shuber, Jordan Peter	Palmer, Amanda	Petitioner	
	Shuber, Jordan Peter	Topper, Jesse Wills	Petitioner	
	Shuber, Jordan Peter	Baptiste, Victoria T.	Petitioner	
	Shuber, Jordan Peter	Baldacci, Jennifer D.	Petitioner	
	Shuber, Jordan Peter	Calvary Academy	Petitioner	
	Shuber, Jordan Peter	Reich, James	Petitioner	
	Shuber, Jordan Peter	McClure, Adam	Petitioner	
	Shuber, Jordan Peter	Hillcrest Christian Academy	Petitioner	

Document Name: Petitioner's Application for Special Relief in the for of an Emergency Preliminary Injunction

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 3, 2021	Order Filed Per Curiam			09/03/2021
	Document Name: Order scheduling PI hearing and directing answer to emergency application for PI			
	Comment: NOW, September 3, 2021, hearing on Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction Under Pa. R.A.P. 1532, is set for September 16, 2021, commencing at 10:00 a.m. The Court will issue further scheduling information and COVID protocols by subsequent order.			
	Respondent shall file and serve an answer to the Application for Special Relief, via PACFile, no later than September 8, 2021.			
	Petitioners shall promptly serve Respondent with a copy of this Order and shall thereafter promptly file proof of service with this Court.			
September 7, 2021	Entry of Appearance Neary, Keli Marie	Beam, Alison	Respondent	
	Document Name: Keli M. Neary, Esq. on behalf of respondent Acting Secretary Alison Beam			
September 7, 2021	Entry of Appearance Romano, Karen Mascio	Beam, Alison	Respondent	
	Document Name: Karen M. Romano, Esq. on behalf of respondent Acting Secretary Alison Beam			
September 8, 2021	Certificate of Service Filed			
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	Document Name: (Per 9/3/2021 Order) Petition and 9/3/2021 Order served upon Respondent.			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 8, 2021	Hearing Scheduled Per Curiam			09/08/2021
	Document Name: September 16, 2021 / Pre-hearing Conference September 13, 2021 Via WebEx			
	Comment: NOW, September 8, 2021, the Court hereby ORDERS as follows:			
	1. Hearing on Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction Under Pa.R.A.P. 1532, is set for September 16, 2021, commencing at 10:00 a.m., in Courtroom 3001, Third Floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania.			
	2. A Pre-Hearing Conference shall be conducted on September 13, 2021, at 1 :00 p.m., by WebEx video conferencing.			
	3. Counsel of record shall participate in the pre-hearing conference via WebEx. The parties shall provide the Court with their name, email address and telephone number within 24 hours of receiving this order. The contact email address for the Court is: CommCourtRemote@pacourts.us. The Court will provide counsel with the information for connecting to the conference. To facilitate participation in the conference, various W ebEx applications are available for download at pacourts. webex.com. Please see the Protocol for W ebEx Video Proceedings, attached to this order. The parties are directed to connect to the conference 15 minutes before the starting time. In the event of technical difficulties, please contact the Court's IT staff at 717-255-1626. All other inquiries should be directed to the Prothonotary's Office.			
	4. Petitioners shall file a list of all witnesses to be called at the hearing with a short offer of proof for each witness, the curriculum vitae and expert report for any expert witness, and a list of exhibits.			
	5. Respondents shall file a list of all witnesses to be called at the hearing with a short offer of proof for each witness, the curriculum vitae and expert report for any expert witness, and a list of exhibits.			
	6. The parties are directed to provide their witnesses with copies of the exhibits in advance of the hearing to which the witnesses can refer during their testimony.			
	7. The parties are strongly encouraged to consult prior to the filing of their list of witnesses and exhibits and, if possible, enter into evidentiary and/or factual stipulations and/or agreed-upon protocols in order to streamline the proceedings. The parties may PAC-file any joint stipulations or protocols prior to the hearing.			
	8. Unless otherwise ordered, all filings required or permitted by paragraphs 4 and 5 of this Order shall be filed no later than 12:00 noon on September 14, 2021.			
	9. Petitioners shall secure the services of a court stenographer for the injunction hearing.			
	10. A Decorum Order with regard to the hearing shall follow.			
	Petitioners shall promptly serve a copy of this Order on Respondents and thereafter promptly file a proof of service of same.			
September 8, 2021	Answer to Application for Relief Romano, Karen Mascio	Beam, Alison	Respondent	
	Document Name: Resp.'s Answer to Pet.'s App. for Special Relief in the Form of an Emergency Preliminary Injunction			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 9, 2021	Notice			
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	Document Name: Notice to Attend			

September 10, 2021 Order Filed 09/10/2021
Per Curiam

Document Name: Amending 9-8-21 Order

Comment: NOW, September 10, 2021, this Court's September 8, 2021 order is amended to reflect that hearing on Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction Under Pa.R.A.P. 1532, is set for September 16, 2021, commencing at 10:00 a.m., in Courtroom 3002, Third Floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania. In all other respects, the September 8, 2021 order remains in effect.

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Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 10, 2021	Order Filed Per Curiam			09/10/2021
Document Name: Decorum Order				

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
	Comment:			
	<p>NOW, this 10th day of September, 2021, after consultation with the Capitol Police and the Administrative Office of Pennsylvania Courts (AOPC) regarding the hearing on Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction, that is scheduled for September 16, 2021, at 10:00 a.m., in Courtroom 3002 (Courtroom), Third Floor, Pennsylvania Judicial Center (PJC), and to reduce the risk of transmission of the COVID-19 virus, the Court hereby ORDERS as follows:</p> <ol style="list-style-type: none"> 1. This matter will be held in an open courtroom with two overflow courtrooms. Decorum shall be maintained at all times by all persons present in the courtrooms. 2. Seating for the public and media to observe the hearing shall be limited to 23 persons in Courtroom 3002 on a "first come, first seated" basis, and will comport with relevant social distancing guidelines. Five of these seats will be reserved for properly credentialed members of the media until 9:50 a.m. An additional 41 seats will be available to the public on a "first come, first seated" basis in two additional courtrooms to view the proceedings via live closed circuit television broadcast. An additional 10 seats (five in each overflow courtroom) will be reserved in these designated areas for viewing the broadcast of the proceeding for properly credentialed members of the media. After 9:50 a.m., any remaining reserved seats for properly credentialed members of the media will be released to the public. 3. Other than the public and media gallery seating in the three courtrooms provided for in Paragraph 2 above, access to the courtrooms will be limited to counsel of record, their clients, witnesses identified in the parties' witness lists, and Court personnel. 4. Signs are not permitted in the Courtroom. 5. No electronic devices or cameras of any kind may be used in the Courtroom except by the Court and by counsel of record. Except for those electronic devices used by the Court and the attorneys, no electronic devices will be allowed in the Courtroom, with the exception of cellular or smart phones. Cellular or smart phones may be carried into the Courtroom, but they must be turned off at all times. 6. Each of the three courtrooms will be unlocked and available for seating approximately 20 minutes before the opening of Court. Counsel of record who require earlier access must make prior arrangements with the Prothonotary. The Capitol Police will begin processing members of the media approximately 30 minutes before the opening of Court. 7. Counsel shall address the Court and examine witnesses from their places at the counsel tables or podium in the Courtroom. Court personnel shall wipe down the witness stand, chair, and microphone with a disinfecting wipe between each witness. 8. All persons participating in or observing the hearing shall adhere to existing PJC and Commonwealth Court COVID-19 protocols, including the Court's COVID-19 Protocols for In-Person, Single-Judge Proceedings and the Commonwealth Court September 20-24, 2021 Oral Argument Session To Be Conducted In Person In Harrisburg Revised Notice with Updated COVID-19 Protocols referenced therein, both posted September 10, 2021. 9. No person who demonstrates symptoms of respiratory illness or fever, or is currently diagnosed with COVID-19, or has had close contact within 14 days of the hearing with a person who is currently diagnosed with COVID-19, may attend the hearing as counsel, a party, witness, credentialed member of the media, or public observer. 10. The Court requests that all members of the public, including counsel, wear a facemask in the public 			

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Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
	<p>areas of the PJC and the courtrooms regardless of vaccination status. Counsel may remove their facemask when they are at the podium. Judges, who will be physically distanced from each other and others in the courtroom, may also remove their masks during argument. The Court will make facemasks available at the entrances to the courtrooms.</p> <p>11. Following the conclusion of the hearing, all participants and observers must exit the Courtroom and the PJC promptly and in a manner that provides for social distancing.</p> <p>12. Persons who fail to comply with this Order or maintain proper courtroom decorum will be removed by Court personnel or the Capitol Police.</p>			
September 12, 2021	Application to Quash Romano, Karen Mascio	Beam, Alison	Respondent	
	<p>Document Name: Motion to Quash Notice to Attend and Subpoena Ad Testificandum Directed to Alison M. Beam, Comment: Acting Sec. of Health.</p>			
September 13, 2021	Order Filed Per Curiam			09/13/2021
	<p>Document Name: September 16, 2021 Hearing and September 8, 2021 Order are stayed/ Briefing Set Comment: NOW, September 13, 2021, following a pre-hearing conference, and upon joint stipulation of the parties, the hearing on Petitioners' "Application for Special Relief in the Form of an Emergency Preliminary Injunction under Pa. R.A.P. 1532" (Application), previously set for September 16, 2021, commencing at 10:00 a.m., in Courtroom 3002, Third Floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, is hereby stayed. The remaining provisions of this Court's September 8, 2021 scheduling order are likewise stayed. Pursuant to the parties' stipulation, Petitioners shall file a brief on or before September 16, 2021, addressing the limited legal issues concerning whether the August 31, 2021 "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (Order) constitutes a rule or regulation subject to the provisions of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, as amended, 71 P.S. §§745.1 - 745.15, and whether said Order violates the principles governing the delegation of administrative authority. Respondent's responsive brief addressing these issues shall be due on or before September 23, 2021. Following the parties' submission of their respective briefs, the Court will schedule oral argument as to these issues. Respondent's "Application for Relief in the Nature of a Motion to Quash Notice to Attend and Subpoena Ad Testificandum Directed to Allison M. Beam, Acting Secretary of Health" will be held in abeyance pending further order of this Court.</p>			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 16, 2021	Petitioner's Brief Filed			
	Corman, Jacob Doyle		Petitioner	
	Topper, Jesse Wills		Petitioner	
	Calvary Academy		Petitioner	
	Hillcrest Christian Academy		Petitioner	
	Reich, James		Petitioner	
	McClure, Adam		Petitioner	
	Baptiste, Victoria T.		Petitioner	
	Baldacci, Jennifer D.		Petitioner	
	Neiman, Klint		Petitioner	
	Palmer, Amanda		Petitioner	
McClure, Chelsea		Petitioner		
Reich, Michelle		Petitioner		
September 23, 2021	Respondent's Brief Filed			
	Beam, Alison		Respondent	
	Document Name: Brief Addressing Legal Issues Framed in the Court's 9/13/21 Order			
September 24, 2021	Application to Amend			
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	Document Name: Pet.'s Motion for Leave to File Amended Petition for Review			
September 24, 2021	Order Filed			09/24/2021
	Per Curiam			
	Document Name: Regarding Conference			
	Comment: NOW, September 24, 2021, in accordance with the parties' joint stipulation at the September 13, 2021 pre-hearing conference, the Court having received the parties' respective briefs concerning the legal issues identified by the parties and set forth in this Court's September 13, 2021 Order, a further status conference shall be conducted on September 27, 2021, at 10:00 a.m., by WebEx video conferencing. The Court will provide counsel with the information for connecting to the conference. The parties are directed to connect to the conference 15 minutes before the starting time. In the event of technical difficulties, please contact the Court's IT staff at 717-255-1626. All other inquiries should be directed to the Prothonotary's Office.			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 27, 2021	Order Granting Application to Amend Per Curiam			09/27/2021
	Document Name: Petitioner's First Amended Petition for Review			
	Comment: NOW, September 27, 2021, upon consideration of Petitioners' "Motion for Leave to File Amended Petition for Review" (Motion), which is generally opposed by Respondent, wherein Petitioners seek to add Penncrest School District, Chestnut Ridge School District, and West York Area School District as additional Petitioners, with each School District adopting and incorporating the previously filed pleadings herein, said Motion is hereby GRANTED. The Prothonotary shall docket Petitioners' First Amended Petition for Review, which is attached to Petitioners' Motion as Exhibit A.			
September 27, 2021	Amended - Petition for Review			
	King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Chestnut Ridge School District	Petitioner	
	Document Name: First Amended Petition for Review			
September 27, 2021	Order Filed Per Curiam			09/27/2021
	Document Name: Scheduling Order			
	Comment: NOW, September 27, 2021, following a status conference in the above matter, and upon agreement of the parties, the Court hereby ORDERS as follows: 1. No later than September 29, 2021, Petitioners shall withdraw their "Application for Special Relief in the Form of an Emergency Preliminary Injunction Under Pa.R.A.P. 1532." 2. No later than September 29, 2021, Petitioners shall file a reply brief in response to Respondent's brief addressing the limited legal issues previously identified in this Court's September 13, 2021 Order. 3. No later than September 30, 2021, Petitioners and Respondent shall file respective applications for summary relief. Any responses to these applications shall be filed on or before October 7, 2021. Upon receipt of the applications and responses, the Court will schedule oral argument regarding the same.			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 28, 2021	Application for Relief			
	King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
King, Thomas W., III	Chestnut Ridge School District	Petitioner		
	Document Name: Notice of Withdrawal of "App. for Special Relief in the Form of an Emergency Preliminary			
	Comment: Injunction Under Pa.R.A.P. 1532".			
September 29, 2021	Petitioner's Reply Brief Filed			
	Corman, Jacob Doyle		Petitioner	
	Topper, Jesse Wills		Petitioner	
	Calvary Academy		Petitioner	
	Hillcrest Christian Academy		Petitioner	
	Reich, James		Petitioner	
	McClure, Adam		Petitioner	
	Baptiste, Victoria T.		Petitioner	
	Baldacci, Jennifer D.		Petitioner	
	Neiman, Klint		Petitioner	
	Palmer, Amanda		Petitioner	
	McClure, Chelsea		Petitioner	
	Reich, Michelle		Petitioner	
	Penncrest School District		Petitioner	
	Chestnut Ridge School District		Petitioner	
West York Area School District		Petitioner		
September 30, 2021	Application for Summary Relief			
	Romano, Karen Mascio	Beam, Alison	Respondent	
	Document Name: Resp.'s App. for Summary Relief			

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Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 30, 2021	Application for Relief			
	King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	King, Thomas W., III	Chestnut Ridge School District	Petitioner	
	Breth, Thomas E.	Corman, Jacob Doyle	Petitioner	
	Elliott, Ronald Troy	Corman, Jacob Doyle	Petitioner	
	Shuber, Jordan Peter	Corman, Jacob Doyle	Petitioner	
	Breth, Thomas E.	Reich, James	Petitioner	
	Breth, Thomas E.	McClure, Adam	Petitioner	
	Breth, Thomas E.	Neiman, Klint	Petitioner	
	Breth, Thomas E.	Palmer, Amanda	Petitioner	
	Breth, Thomas E.	Calvary Academy	Petitioner	
	Breth, Thomas E.	Reich, Michelle	Petitioner	
	Breth, Thomas E.	McClure, Chelsea	Petitioner	
	Breth, Thomas E.	Topper, Jesse Wills	Petitioner	
	Breth, Thomas E.	Baptiste, Victoria T.	Petitioner	
	Breth, Thomas E.	Baldacci, Jennifer D.	Petitioner	
	Breth, Thomas E.	Penncrest School District	Petitioner	
	Breth, Thomas E.	Hillcrest Christian Academy	Petitioner	
	Breth, Thomas E.	West York Area School District	Petitioner	
	Breth, Thomas E.	Chestnut Ridge School District	Petitioner	
	Elliott, Ronald Troy	Reich, James	Petitioner	
	Elliott, Ronald Troy	McClure, Adam	Petitioner	
	Elliott, Ronald Troy	Neiman, Klint	Petitioner	
	Elliott, Ronald Troy	Palmer, Amanda	Petitioner	
	Elliott, Ronald Troy	Calvary Academy	Petitioner	
	Elliott, Ronald Troy	Reich, Michelle	Petitioner	
	Elliott, Ronald Troy	McClure, Chelsea	Petitioner	
	Elliott, Ronald Troy	Topper, Jesse Wills	Petitioner	
	Elliott, Ronald Troy	Baptiste, Victoria T.	Petitioner	
	Elliott, Ronald Troy	Baldacci, Jennifer D.	Petitioner	
	Elliott, Ronald Troy	Penncrest School District	Petitioner	
	Elliott, Ronald Troy	Hillcrest Christian Academy	Petitioner	
	Elliott, Ronald Troy	West York Area School District	Petitioner	

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
	Elliott, Ronald Troy	Chestnut Ridge School District	Petitioner	
	Shuber, Jordan Peter	Reich, James	Petitioner	
	Shuber, Jordan Peter	McClure, Adam	Petitioner	
	Shuber, Jordan Peter	Neiman, Klint	Petitioner	
	Shuber, Jordan Peter	Palmer, Amanda	Petitioner	
	Shuber, Jordan Peter	Calvary Academy	Petitioner	
	Shuber, Jordan Peter	Reich, Michelle	Petitioner	
	Shuber, Jordan Peter	McClure, Chelsea	Petitioner	
	Shuber, Jordan Peter	Topper, Jesse Wills	Petitioner	
	Shuber, Jordan Peter	Baptiste, Victoria T.	Petitioner	
	Shuber, Jordan Peter	Baldacci, Jennifer D.	Petitioner	
	Shuber, Jordan Peter	Penncrest School District	Petitioner	
	Shuber, Jordan Peter	Hillcrest Christian Academy	Petitioner	
	Shuber, Jordan Peter	Chestnut Ridge School District	Petitioner	
	Shuber, Jordan Peter	West York Area School District	Petitioner	

Document Name: Pet.'s App. for Summary Relief and Entry of Judgment Pursuant to Pa.R.A.P.1532 and in

Comment: accordance w/ Court's 9/27/2021 Order.

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 4, 2021	Stipulation Filed			
	Romano, Karen Mascio	Beam, Alison	Respondent	
	Elliott, Ronald Troy	Reich, Michelle	Petitioner	
	Breth, Thomas E.	Corman, Jacob Doyle	Petitioner	
	Elliott, Ronald Troy	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	Shuber, Jordan Peter	Corman, Jacob Doyle	Petitioner	
	Breth, Thomas E.	Reich, James	Petitioner	
	Breth, Thomas E.	McClure, Adam	Petitioner	
	Breth, Thomas E.	Neiman, Klint	Petitioner	
	Breth, Thomas E.	Palmer, Amanda	Petitioner	
	Breth, Thomas E.	Calvary Academy	Petitioner	
	Breth, Thomas E.	Reich, Michelle	Petitioner	
	Breth, Thomas E.	McClure, Chelsea	Petitioner	
	Breth, Thomas E.	Topper, Jesse Wills	Petitioner	
	Breth, Thomas E.	Baptiste, Victoria T.	Petitioner	
	Breth, Thomas E.	Baldacci, Jennifer D.	Petitioner	
	Breth, Thomas E.	Penncrest School District	Petitioner	
	Breth, Thomas E.	Hillcrest Christian Academy	Petitioner	
	Breth, Thomas E.	West York Area School District	Petitioner	
	Breth, Thomas E.	Chestnut Ridge School District	Petitioner	
	Elliott, Ronald Troy	Reich, James	Petitioner	
	Elliott, Ronald Troy	McClure, Adam	Petitioner	
	Elliott, Ronald Troy	Neiman, Klint	Petitioner	
	Elliott, Ronald Troy	Palmer, Amanda	Petitioner	
	Elliott, Ronald Troy	Calvary Academy	Petitioner	
	Elliott, Ronald Troy	McClure, Chelsea	Petitioner	
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	Elliott, Ronald Troy	West York Area School District	Petitioner	
	Elliott, Ronald Troy	Chestnut Ridge School District	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	

Miscellaneous Docket Sheet

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November 10, 2021



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Chestnut Ridge School District	Petitioner	
	Shuber, Jordan Peter	Reich, James	Petitioner	
	Shuber, Jordan Peter	McClure, Adam	Petitioner	
	Shuber, Jordan Peter	Neiman, Klint	Petitioner	
	Shuber, Jordan Peter	Palmer, Amanda	Petitioner	
	Shuber, Jordan Peter	Calvary Academy	Petitioner	
	Shuber, Jordan Peter	Reich, Michelle	Petitioner	
	Shuber, Jordan Peter	McClure, Chelsea	Petitioner	
	Shuber, Jordan Peter	Topper, Jesse Wills	Petitioner	
	Shuber, Jordan Peter	Baptiste, Victoria T.	Petitioner	
	Shuber, Jordan Peter	Baldacci, Jennifer D.	Petitioner	
	Shuber, Jordan Peter	Penncrest School District	Petitioner	
	Shuber, Jordan Peter	Hillcrest Christian Academy	Petitioner	
	Shuber, Jordan Peter	Chestnut Ridge School District	Petitioner	
	Shuber, Jordan Peter	West York Area School District	Petitioner	
October 4, 2021	Order Filed Per Curiam			10/04/2021
	Document Name: Cross Applications for Summary Relief Shall be Listed for Oral Argument En Banc Oct. 20, 2021 Comment: NOW, October 4, 2021, Petitioners' Application for Summary Relief and Respondent's Application for Summary Relief (Cross-Applications) shall be listed for oral argument before the Court en banc on October 20, 2021, seriatly with the Cross-Applications filed at 297 M.D. 2021.			
October 4, 2021	Tentative Session Date Krimmel, Michael			
	Document Name: October 2021			
October 4, 2021	Argument Scheduled Krimmel, Michael			
	Document Name: Wednesday, October 20, 2021, 9:30 a.m. (En Banc) CR 5001, Pennsylvania Judicial Center, Harrisburg Comment: No. 46 on the list.			
October 5, 2021	Application for Leave to File Amicus Brief			
	Harris, Christopher Lee	Central York School District	Amicus Curiae	
	Harris, Christopher Lee	Spring Grove Area School District	Amicus Curiae	
	Pahowka, Gareth David	Central York School District	Amicus Curiae	
	Pahowka, Gareth David	Spring Grove Area School District	Amicus Curiae	
	Document Name: of the Spring Grove Area School Dist. and Central York School Dist. in Support of No Party.			
October 5, 2021	Amicus Curiae Brief			
	Spring Grove Area School District		Amicus Curiae	
	Penn-Trafford School District		Amicus Curiae	
	Document Name: PACFiled			

Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

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November 10, 2021



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 6, 2021	Order Filed Per Curiam			10/06/2021
	Document Name: Responses to Application for Leave to Filed Amicus Due October 8, 2021			
	Comment: NOW, October 6, 2021, in consideration of the Application for Leave to File Amicus Curiae Brief of the Spring Grove Area School District and Central York School District in Support of No Party (Application), the parties are directed to file any responses to the Application by October 8, 2021.			
October 7, 2021	Answer to Application for Relief Romano, Karen Mascio	Beam, Alison	Respondent	
	Document Name: Resp.'s Answer to Petitioners' App. for Summary Relief			
October 7, 2021	Answer to Application for Relief			
	Breth, Thomas E.	Penncrest School District	Petitioner	
	Breth, Thomas E.	West York Area School District	Petitioner	
	Breth, Thomas E.	Corman, Jacob Doyle	Petitioner	
	Breth, Thomas E.	Topper, Jesse Wills	Petitioner	
	Breth, Thomas E.	Hillcrest Christian Academy	Petitioner	
	Breth, Thomas E.	Baptiste, Victoria T.	Petitioner	
	Breth, Thomas E.	Baldacci, Jennifer D.	Petitioner	
	Breth, Thomas E.	Neiman, Klint	Petitioner	
	Breth, Thomas E.	Palmer, Amanda	Petitioner	
	Breth, Thomas E.	McClure, Adam	Petitioner	
	Breth, Thomas E.	McClure, Chelsea	Petitioner	
	Breth, Thomas E.	Reich, James	Petitioner	
	Breth, Thomas E.	Reich, Michelle	Petitioner	
	Breth, Thomas E.	Calvary Academy	Petitioner	
	Breth, Thomas E.	Chestnut Ridge School District	Petitioner	
	Document Name: Petitioner's Answer to Application for Summary Relief			
October 7, 2021	Petitioner's Brief Filed			
	Corman, Jacob Doyle		Petitioner	
	Topper, Jesse Wills		Petitioner	
	Calvary Academy		Petitioner	
	Hillcrest Christian Academy		Petitioner	
	Reich, James		Petitioner	
	McClure, Adam		Petitioner	
	Baptiste, Victoria T.		Petitioner	
	Baldacci, Jennifer D.		Petitioner	
	Neiman, Klint		Petitioner	
	Palmer, Amanda		Petitioner	
	McClure, Chelsea		Petitioner	
	Reich, Michelle		Petitioner	
	Document Name: In opposition to respondent's application for summary relief			
October 7, 2021	Amicus Curiae Brief			
	Korns, Michael Thurman, 2nd	Penn-Trafford School District	Amicus Curiae	
	Penn-Trafford School District		Amicus Curiae	

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Commonwealth Court of Pennsylvania

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November 10, 2021



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 8, 2021	Answer Filed Romano, Karen Mascio	Beam, Alison	Respondent	
	Document Name: Resp.'s Opposition to the App. for Leave to file Amicus Curiae Brief			
October 8, 2021	Answer Filed King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	King, Thomas W., III	Chestnut Ridge School District	Petitioner	
	Document Name: Pet.'s Consent to the App. for Request for Leave to File Amicus Curiae Briefs			
October 13, 2021	Order Granting Application for Leave to File Amicus Brief Per Curiam			10/13/2021
	Document Name: Spring Grove Area School District is Accepted			
	Comment: NOW, October 13, 2021, in consideration of the Application for Leave to File Amicus Curiae Brief of the Spring Grove Area School District and Central York School District in Support of No Party (Application), Respondent's Opposition			
	2			
	to the Applciation [sic] of Spring Grove School District and Central York School District for Leave to file Amicus Curiae Brief, and Petitioners' Consent to the Application of Spring Grove School District and Central York School Districts' [sic] Reqeust [sic] for Leave to File Amicus Curiae Briefs [sic], the Application is GRANTED.			
	The Prothonotary is instructed to accept the Amicus Curiae Brief of the Spring Grove Area School District and Central York School District In Support of No Party attached to the Application when filed on October 5, 2021, as filed and docket the same.			
October 27, 2021	Application for Relief Romano, Karen Mascio	Beam, Alison	Respondent	
	Document Name: Resp.'s Motion for Leave to Supplement the Record			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 29, 2021	Order Granting Application for Relief Per Curiam			10/29/2021
	Document Name: Application to Supplement the Record Granted			
	Comment: AND NOW, this 29th day of October, 2021, upon consideration of "Respondents' [sic] Application for Relief in the Nature of a Motion for Leave to Supplement the Record" (Application), which the Court will treat as a postsubmission communication under Pa.R.A.P. 2501(a), the Application is GRANTED. The Prothonotary is directed to docket the October 21, 2021, Order of the Joint Committee on Documents, attached to the Application as Exhibit A, as an addendum to Respondent's Application for Summary Relief.			
October 29, 2021	Application for Relief			
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	King, Thomas W., III	Chestnut Ridge School District	Petitioner	
	Document Name: Pet.'s App. for Relief to Respond to Resp.'s Motion for Leave to Supplement the Record			
October 29, 2021	Order Denying Application for Relief Per Curiam			10/29/2021
	Document Name: Petitioner's Application for Relief Denied as Moot			
	Comment: NOW, October 29, 2021, upon review of Petitioners' Application for Relief to Respond to Respondents' Application for Relief in the Nature of a Motion for Leave to Supplement the Record (Application), the Application is DENIED as moot.			

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
November 8, 2021	Application for Relief			
	King, Thomas W., III	Penncrest School District	Petitioner	
	King, Thomas W., III	West York Area School District	Petitioner	
	King, Thomas W., III	Corman, Jacob Doyle	Petitioner	
	King, Thomas W., III	Topper, Jesse Wills	Petitioner	
	King, Thomas W., III	Hillcrest Christian Academy	Petitioner	
	King, Thomas W., III	Baptiste, Victoria T.	Petitioner	
	King, Thomas W., III	Baldacci, Jennifer D.	Petitioner	
	King, Thomas W., III	Neiman, Klint	Petitioner	
	King, Thomas W., III	Palmer, Amanda	Petitioner	
	King, Thomas W., III	McClure, Adam	Petitioner	
	King, Thomas W., III	McClure, Chelsea	Petitioner	
	King, Thomas W., III	Reich, James	Petitioner	
	King, Thomas W., III	Reich, Michelle	Petitioner	
	King, Thomas W., III	Calvary Academy	Petitioner	
	King, Thomas W., III	Chestnut Ridge School District	Petitioner	

Document Name: to Supplement the Record

November 10, 2021 Summary Relief Granted 11/10/2021
 Fizzano Cannon, Christine

Document Name: Opinion (55 pages)

Comment: AND NOW, this 10th day of November, 2021, Petitioners' Application for Summary Relief and Entry of Judgment Pursuant to Pa.R.A.P. 1532 and In Accordance with the Court's September 27, 2021 Order is GRANTED, and Respondent's Application for Summary Relief filed by Alison M. Beam, the Acting Secretary of Health (Acting Secretary), is DENIED. The "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities," issued by the Acting Secretary on August 31, 2021, is declared void ab initio. Respondent's "Application for Relief in the Nature of a Motion to Quash Notice to Attend and Subpoena Ad Testificandum Directed to Alison M. Beam, Acting Secretary of Health" is DISMISSED as moot. Judges Brobson, Cohn Jubelirer, Covey, and Crompton did not participate in the decision.

SESSION INFORMATION

Journal Number: 46-10-2021
 Consideration Type: En Banc Argument
 Listed/Submitted Date: October 20, 2021

Panel Composition:

The Honorable Mary Hannah Leavitt	Judge
The Honorable Patricia A. McCullough	Judge
The Honorable Michael H. Wojcik	Judge
The Honorable Christine Fizzano Cannon	Judge
The Honorable Ellen Ceisler	Judge

DISPOSITION INFORMATION

Final Disposition: Yes

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Commonwealth Court of Pennsylvania

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DISPOSITION INFORMATION

Related Journal No:		Judgment Date:	
Category:	Decided	Disposition Author:	Fizzano Cannon, Christine
Disposition:	Summary Relief Granted	Disposition Date:	November 10, 2021
Disposition Comment:	AND NOW, this 10th day of November, 2021, Petitioners' Application for Summary Relief and Entry of Judgment Pursuant to Pa.R.A.P. 1532 and In Accordance with the Court's September 27, 2021 Order is GRANTED, and Respondent's Application for Summary Relief filed by Alison M. Beam, the Acting Secretary of Health (Acting Secretary), is DENIED. The "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities," issued by the Acting Secretary on August 31, 2021, is declared void ab initio. Respondent's "Application for Relief in the Nature of a Motion to Quash Notice to Attend and Subpoena Ad Testificandum Directed to Alison M. Beam, Acting Secretary of Health" is DISMISSED as moot. Judges Brobson, Cohn Jubelirer, Covey, and Crompton did not participate in the decision.		
Dispositional Filing:	Opinion	Filing Author:	Fizzano Cannon, Christine
Filed Date:	11/10/2021 12:00:00AM		
Dispositional Filing:	Dissenting Opinion	Filing Author:	Wojcik, Michael H.
Filed Date:	11/10/2021 12:00:00AM		

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 AND
MICHELLE REICH**, individually
and as parents of three minor
school children; **ADAM 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**,

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

FIRST AMENDED PETITION
FOR REVIEW



NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this Petition for Review and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, Pennsylvania 17101
(717) 232-7536

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III,
individually and as a parent of two
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v.

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

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

FIRST AMENDED PETITION
FOR REVIEW

NOTICE TO PLEAD

TO: RESPONDENT.

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

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

Dated: September 24, 2021

By: /s/ Thomas W. King, III

Thomas W. King, III

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Counsel for Petitioners

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
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AMANDA PALMER**, individually
and as parents of two minor school
children; **PENNCREST SCHOOL
DISTRICT; CHESTNUT RIDGE
SCHOOL DISTRICT; and WEST
YORK AREA SCHOOL
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Petitioners,

v.

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

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

FIRST AMENDED PETITION
FOR REVIEW

FIRST AMENDED PETITION FOR REVIEW

INTRODUCTION

This case requires a detailed analysis of the authority granted the Secretary of Health under the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, et seq.; the procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power; the rules and regulations lawfully promulgated thereunder; and the judiciary's role in protecting the public against the arbitrariness of *ad hoc* decision making by an administrative agency.

Pursuant to the non-delegation Doctrine, the General Assembly is prohibited from granting or delegating "to any other branch of government or to any other body or authority" the power to make law. *Blackwell*, 567 A.2d at 636; *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 441 Pa. 293, 272 A.2d 478, 480 (1971). The General Assembly is the sole branch of government vested with the authority "to make laws, and not to make legislators." John Locke, *Second Treatise of Government* 87 (R. Cox ed.1982). See *Dep't of Transp. v. Ass'n of Am. Rail-roads*, — U.S. —, 135 S.Ct. 1225, 1237, 191 L.Ed.2d 153 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty."); see also *The Federalist* No. 47, at 301 (J. Cooke ed.

1961) (J. *656 Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”).

This does not mean that the General Assembly is unable to delegate to administrative agencies the authority to administer and/or execute the laws of the Commonwealth of Pennsylvania. To the contrary, numerous administrative agencies, commission and boards within the Commonwealth regularly exercise such authority consistent with the limitations and procedures established by the General Assembly. *Blackwell*, 567 A.2d at 637.

When the General Assembly delegates authority to administrative agencies, Pennsylvania’s Constitution requires the General Assembly to make the policy decisions and to establish “adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383, 418 (2005); *State Bd. of Chiropractic Exam’rs*, 272 A.2d at 481 (quoting *Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 418 Pa. 520, 211 A.2d 487, 492–93 (1965)).

The standards guiding and restraining the exercise of the delegated administrative authority are an essential protection against the arbitrary and

capricious exercise of the authority. *Tosto*, 331 A.2d at 203; see *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 966 (2016). Absent appropriate and meaningful standards to guide and restrain the exercise of the delegated administrative functions, the legislation violates the non-delegation Doctrine. *Protz v. Workers' Compen. App. Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833–35 (Pa. 2017)

In furtherance of this legal principal, the General Assembly passed the Regulatory Review Act which contains a Legislative Intent section that states in relevant part as follows:

“The General Assembly has enacted a large number of statutes and has conferred on boards, commissions, departments and agencies within the executive branch of government the authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without undergoing effective review concerning ... conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to

assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. ..." 71 P.S. §745.2

On August 31, 2021, the Acting Secretary of the Pennsylvania Department of Health, Alison V. Beam (the "**Secretary of Health**"), issued an Order, effective September 7, 2021, entitled, "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (the "**Order**"). A copy of the Order is attached and incorporated by reference as if fully set forth at length herein as Exhibit "A."

The Order imposes a "General Masking Requirement" upon Petitioners. Pursuant to the terms contained within the Order, the Secretary of Health asserts that she has the authority to issue the Order under the provisions of the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, et seq. Petitioners challenge such alleged authority and ask this Honorable Court to review the Secretary of Health's authority under the Disease Prevention and Control Law of 1955 as well as her failure to comply with Pennsylvania law in regard to the promulgation of such "Order" (or rule or regulation).

This Petition for Review further addresses the failure of the Secretary to comply with the requirements of the Disease Prevention and Control Law

of 1955 in the particulars therein contained, it further challenges the ability of the Executive Branch to circumvent the Pennsylvania Constitution and the actions of the Legislature in declaring an end to the Governor's Emergency Declaration.

The Petition further challenges the right of the Secretary of Health to enforce the provisions of her Order in either public or private schools and to enforce such Order with regard to students, staff and visitors from such schools in regard to the application of her Order.

STATEMENT OF JURISDICTION

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

2. This action is in the nature of a Declaratory Judgment action pursuant to 42 Pa.C.S.A. § 7531, *et seq.*

3. Petitioners filed an Application for Special Relief in the form of an Emergency Preliminary Injunction pursuant to Pennsylvania Rule of Appellate Procedure 1532(a). A copy of the Application for Special Relief is attached and incorporated by reference as if fully set forth at length herein as Exhibit "B."

PARTIES SEEKING RELIEF

4. Petitioner, Jacob Doyle Corman, III ("**Mr. Corman**"), is an adult individual residing in the Commonwealth of Pennsylvania and is the parent of two minor school children, DTC and JCC, enrolled in the Bellefonte Area School District and brings this action as parent and guardian of said children and as a taxpayer.

5. Petitioner, Jesse Wills Topper ("**Mr. Topper**"), is an adult individual residing in the Commonwealth of Pennsylvania and is a parent of two minor school children, JT and JT, enrolled in the Bedford Area School District and brings this action as parent and guardian of said children and as a taxpayer.

6. Petitioner, Calvary Academy ("**Calvary**"), is a private school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 199 Great Belt Road, Butler, PA 16002.

7. Petitioner, Hillcrest Christian Academy ("**Hillcrest**"), is a private school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 2500 Bethel Church Road, Bethel Park, PA 15102.

8. Petitioner, Penncrest School District ("**Penncrest**") is a public school organized and existing in accordance with the laws of the

Commonwealth of Pennsylvania with an address of 18741 State Highway 198, Saegertown, PA 16433, and is directly affected by the Order which is the subject of this Petition.

9. Petitioner, Chestnut Ridge School District ("**Chestnut Ridge**") is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 3281 Valley Road, Fishertown, PA 15539, and is directly affected by the Order which is the subject of this Petition.

10. Petitioner, West York Area School District ("**West York**") is a public school organized and existing in accordance with the laws of the Commonwealth of Pennsylvania with an address of 1891 Loucks Road, Suite 100, York, PA 17408, and is directly affected by the Order which is the subject of this Petition.

11. Petitioners, James and Michelle Reich (the "**Reichs**"), are husband and wife with three sons in the Slippery Rock Area School District in grades 6, 7, and 9. The Reichs are suing as parents and guardians of said children and as taxpayers.

12. Petitioners, Adam and Chelsea McClure (the "**McClures**"), are husband and wife with one son who is a special need student in the Butler

Area School District in grade 2. The McClures are suing as parents and guardians of said children and as taxpayers.

13. Petitioner, Victoria T. Baptiste ("**Ms. Baptiste**"), is a parent with two daughters, one of whom is a special need student in the Butler Area School District in kindergarten. Ms. Baptiste is suing as parent and guardian of said child and as a taxpayer.

14. Petitioner, Jennifer D. Baldacci ("**Ms. Baldacci**"), is a parent with one daughter in the Butler Area School District in pre-school and is suing as parent and guardian of said child and as a taxpayer.

15. Petitioners, Klint Neiman ("**Mr. Neiman**") and Amanda Palmer ("**Ms. Palmer**"), are parents of two minor school children enrolled in the Wyomissing Area School District and is suing as parents and guardians of said children and as taxpayers.

16. The above parties will be collectively referred to herein as "**Petitioners.**"

GOVERNMENTAL UNIT WHOSE ACTION IS AT ISSUE

17. Petitioners seek appeal from and review and reversal of the Acting Secretary of Health's Order, Ex. A., based upon the factual allegations and reasons as more fully set forth below.

MATERIAL FACTS UPON WHICH THE CAUSE OF ACTION IS BASED

18. On March 6, 2020, the Governor issued a Proclamation of Disaster Emergency regarding the COVID-19 pandemic.

19. On May 18, 2021, the citizens of the Commonwealth of Pennsylvania approved two constitutional amendments that curtailed the Governor's emergency powers under Pennsylvania's Emergency Management Services Act.

20. On June 10, 2021, the General Assembly approved a Concurrent Resolution terminating the Governor's March 6, 2020, Proclamation. A copy of the Concurrent Resolution is attached and incorporated by reference as if fully set forth at length herein as Exhibit "C."

21. The Concurrent Resolution was approved in the Pennsylvania Senate by a 30-20 vote and in the Pennsylvania House of Representatives by a 121-81 vote.

22. The Governor's administration maintains that "dissolving the disaster emergency does not affect a health secretary's disease-prevention authority to issue **mask-wearing** and stay-at-home orders or shut down schools and nonessential businesses." See Marc Levy, Lawmakers vote to end emergency declaration, extend waivers, The Associated Press: PA Wire (June 10, 2021), <https://apnews.com/article/pa-state-wire-health->

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23. On August 31, 2021, the Secretary of Health issued her Order, which among other things, contains a "General Masking Requirement."

24. Section 2 - General Masking Requirement of the Order states, "[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering, regardless of vaccination status, except as set forth in Section 3." See Ex. A, p. 4.

25. The term "School Entity" is defined by the Order as follows:

"'School Entity' means any of the following:

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

26. Section 3 - Exceptions to Coverings Requirement of the Order

lists exceptions to the face covering requires in Section 2, as follows:

A. If wearing a face covering while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state, or federal regulators or workplace safety guidelines.

B. If wearing a face covering would either cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition or a disability.

C. When necessary to confirm the individual's identity.

D. When working alone and isolated from interaction with other people with little or no expectation of in-person interaction.

E. If an individual is communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication.

F. When the individual is under two (2) years of age.

G. When an individual is:

1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing an instrument that would be obstructed by the face covering; or

2) Participating in high intensity aerobic or anerobic activities, including during a physical education class in a well-ventilated location and

able to maintain a physical distance of six feet from all other individuals.

H. When a child/student is participating in a sports practice activity or event, whether indoors or outdoors." *Id.* pp. 4-5.

27. Section 4 - School Entity Obligations of the Order states in relevant part as follows:

A. A School Entity must:

1. Require and enforce the requirement that all teachers, children/students, staff, and visitors (subject to the exceptions in Section 3) wear a face covering indoors, regardless of whether this Order is reflected in a school entity's Health and Safety Plan.

2. [Order does not contain a Paragraph 4(A)(2)].

3. Post prominent signs in conspicuous locations for teachers, children/students, staff, and visitors stating that face coverings are required by the Order of the Secretary of Health.

4. Provide reasonable accommodations for individuals who state they have a medical condition, mental health condition, or disability that makes it unreasonable for the person to maintain a face covering." *Id.* p. 5.

28. As authority for her Order, the Acting Secretary of Health indicates as follows:

"... This authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 35 P.S.

§ 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures). Particularly, the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. ..." *Id.* p. 3.

29. Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, as cited by Respondent, states as follows:

"Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measures in such manner and in such place ***as is provided by rule or regulation.***" 35 P.S. §521.5. (emphasis added).

30. Pursuant to Section 521.5, the Secretary of Health has the authority to utilize "isolation, quarantine, or any other control measures" but only "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

31. Since the Secretary of Health's Order does not mandate "isolation" or "quarantine," it must and does rely upon the term "any other control measures." 35 P.S. §521.5.

32. The "other control measure" at-issue is the Secretary of Health's mandated wearing of face coverings by teachers, children,

students, staff, or visitors working, attending, or visiting a School Entity which must be “in such manner and in such place as is provided by rule or regulation.” 35 P.S. §521.5.

33. There is no rule or regulation that exists within the Commonwealth of Pennsylvania that provides for a mask mandate.

PETITIONERS' OBJECTIONS TO THE ORDER

The Order fails to Comply with the Requirements of the Regulatory Review Act.

34. Paragraphs 1 through 33 of this Petition are incorporated herein by reference as if fully set forth.

35. When the General Assembly delegates authority to administrative agencies, Pennsylvania’s Constitution requires the General Assembly to make the policy decisions and to establish “adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383, 418 (2005); *State Bd. of Chiropractic Exam’rs*, 272 A.2d at 481 (quoting *Chartiers Valley Joint Sch. v. Cty. Bd. of Sch. Dirs. of Allegheny Cty.*, 418 Pa. 520, 211 A.2d 487, 492–93 (1965)).

36. The standards guiding and restraining the exercise of the delegated administrative authority are an essential protection against the

arbitrary and capricious exercise of the authority. *Tosto*, 331 A.2d at 203; see *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 966 (2016). Absent appropriate and meaningful standards to guide and restrain the exercise of the delegated administrative functions, the legislation violates the non-delegation Doctrine. *Protz v. Workers' Compen. App. Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833–35 (Pa. 2017)

37. In furtherance of this legal principal, the General Assembly passed the Regulatory Review Act which contains a Legislative Intent section that states in relevant part as follows:

“The General Assembly has enacted a large number of statutes and has conferred on boards, commissions, departments and agencies within the executive branch of government the authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without undergoing effective review concerning ... conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise,

independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. ..." 71 P.S. §745.2

38. Section 745.5a of the Act establishes the procedure by which a proposed regulation is to be reviewed, including, but not limited to, the obligation to publish and republish the proposed rule or regulation, various opportunities for public comment, and extensive review and input regarding the appropriateness of the proposed rule or regulation. 71 P.S. §745.5a.

39. Section 745.5b of the Act establishes the criteria to be applied in the review of a proposed regulation and states in relevant part as follows:

"In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General." 71 P.S. §745.5b.

40. The Regulatory Review Act defines the term "regulation" as follows:

"Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating

to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency. ... The term shall not include a proclamation, executive order, directive or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor." 71 P.S. §745.3.

41. As authority for her Order, the Acting Secretary of Health indicates as follows:

"... This authority is granted to the Secretary of Health pursuant to Pennsylvania law. See section 5 of the Disease Prevention and Control Law, 35 P.S. § 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures). Particularly, the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. See 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. ..." *Id.* p. 3.

42. Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, as cited by Respondent, states as follows:

"Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measures in such manner and in such place **as is provided by rule or regulation**." 35 P.S. §521.5. (emphasis added).

43. As discussed in greater detail below, Petitioners assert that there is no existing rule or regulation granting the Secretary of Health the authority to issue her Order.

44. Without an existing rule or regulation, the Secretary of Health is required to comply with the requirements of the Regulatory Review Act prior to issuing her Order which is included within the definition of a regulation under the Regulatory Review Act. 71 P.S. §745.3.

45. The rule making function set forth in the Regulatory Review Act is not waivable and is not impacted by any emergency declaration of the Governor inasmuch as any and all emergency declarations relative to COVID-19 have expired, and/or have been revoked by the General Assembly.

46. The Secretary of Health has no authority and/or ability to issue regulations, as the term is defined by the Act, except through the requirements of the Regulatory Review Act.

47. By failing to comply with the Regulatory Review Act, the Secretary of Health has issued an invalid and unenforceable Order under Pennsylvania's Regulatory Review Act and the Order is therefore void *ab initio*.

Insufficient Regulatory Support for a Mask Mandate.

48. Paragraph 1 through 47 of this Petition are incorporated herein by reference as if fully set forth.

49. The Secretary of Health's Order cites Paragraph (a) of Regulation 27.60 - Disease control measures, of the Department of Health's regulations, 28 Pa. Code §27.60(a), which states in relevant part as follows:

"(a) The Department or local health authority shall direct *isolation* of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or animal with a communicable disease or infection; and any other disease control measure the Department or local health authority considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infectious agents." See 28 Pa. Code §27.60(a).

50. The term "isolation," as used in Regulation 27.60(a), is defined as follows:

The separation for the communicable period of an infected person or animal from other persons or animals, in such a manner as to prevent the direct or indirect transmission of the infectious agent from infected persons or animals to other persons or animals who are susceptible or who may spread the disease to others. See 28 Pa. Code §27.1.

51. The Secretary of Health's Order does not utilize, or mandate the imposition of isolation as permitted by the Regulations.

52. The term "surveillance" as used in Regulation 27.60(a) is defined as follows:

Surveillance of disease – The continuing scrutiny of all aspects of occurrence and spread of disease that are pertinent to effective control. See 28 Pa. Code §27.1

53. The Secretary of Health's Order mandating the wearing of face coverings by teachers, children, students, staff, or visitors working, attending, or visiting a School Entity does not constitute "continuing scrutiny" or the "surveillance of disease" as the term is use in Regulation 27.60(a). See 28 Pa. Code §27.60(a).

54. Instead, the Secretary of Health's Order subjects health, non-infected teachers, children, students, staff, and visitors working at, attending, or visiting School Entities to the wearing of face coverings, regardless of vaccination status.

55. The term "segregation," as used in Regulation 27.60(a), is defined as follows:

The separation for special control and observation of one or more persons or animals from other persons or animals to facilitate the control of a communicable disease. See 28 Pa. Code §27.1.

56. Regulation 27.60 - Disease control measures, Paragraph (b), of the Department of Health's regulations, 28 Pa. Code §27.60(b), as cited by The Secretary of Health, states in relevant part as follows:

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

based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection. See 28 Pa. Code §27.60(b).

57. Petitioners' are not patients, they are healthy, non-infected teachers, children, students, staff, visitors, and schools covered by The Secretary of Health's Order.

58. Although Respondent cites Regulation 27.60 as authority for her August 31, 2021, Order Directing Face Coverings in School Entities, such assertion is misplaced.

59. Nowhere in the clear and unambiguous language of Regulation 27.60, does it provide Respondent with the authority to mandate the wearing of face coverings in School Entities for healthy, non-infected teachers, children, students, staff, and visitors.

60. Although Respondent cites Regulation 27.60, Respondent ignores Regulation 27.71 - Exclusion of children, and staff having contact with children, for specified diseases and infectious conditions, which states in relevant part as follows:

A person in charge of a public, private, parochial, Sunday or other school or college shall exclude from school a child, or a staff person, including a volunteer, who has contact with children, who is suspected by a physician or the school nurse of having any of the communicable diseases, infections or conditions. ... See 28 Pa. Code §27.71.

61. Further, Regulation 27.72 - Exclusion of children and staff having contact with children, for showing symptoms, which states in relevant part as follows:

"A person in charge of a public, private, parochial, Sunday or other school or college shall, following consultation with a physician or school nurse, exclude immediately a child, or staff person, including a volunteer, having contact with children, showing any of the following symptoms, unless that person is determined by the school nurse, or a physician, to be noncommunicable: ..." See 28 Pa. Code §27.72.

62. Both of the above-referenced Regulations vest in the persons in charge of public, private, parochial, and other schools the authority and control over persons suspected of having a communicable disease and/or persons exhibiting symptoms of a communicable disease.

Respondent lacks the Authority to mandate the wearing of face coverings in Schools.

63. Paragraphs 1 through 62 of this Petition are incorporated herein by reference as if fully set forth.

64. Petitioners assert that Respondent is without the statutory or regulatory authority to mandate the wearing of face coverings by teachers, children, students, staff, or visitors working, attending, or visiting a School Entity.

65. Petitioner's assertion that Section 521.5 - Control Measures of the Disease Prevention and Control Law of 1955, provides her to issue her August 31, 2021, Order is misplaced.

66. Pursuant to Section 521.5, Respondent has the authority to utilize "isolation, quarantine, or any other control measures" but only "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

67. Since Respondent's Order does not mandate "isolation" or "quarantine," it must and does rely upon the term "any other control measures." 35 P.S. §521.5.

68. The "other control measure" at-issue is Respondent's mandated wearing of face coverings by teachers, children, students, staff, or visitors working, attending, or visiting a School Entity which must be "in such manner and in such place as is provided by rule or regulation." 35 P.S. §521.5.

69. Petitioners assert that Respondent's Order fails to cite any such rule or regulation, and that, no such rule or regulation exists within the Commonwealth of Pennsylvania.

Respondent's Order usurps the exclusive powers and authority granted to Schools under the Public School Code.

70. Paragraphs 1 through 69 of this Petition are incorporated herein by reference as if fully set forth.

71. Section 2-211 of the School Code states, “[t]he several school districts in this Commonwealth shall be, and hereby are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of [the School Code].”

72. Section 3-301 of the School Code states, “[t]he public school system of the Commonwealth shall be administered by a board of school directors, to be elected or appointed...” (emphasis added).

73. Section 4-407 of the School Code states, “[e]ach board of school directors may adopt reasonable rules and regulations for its government and control.”

74. Section 5-510 of the School Code states, “[t]he board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employes[sic] during the time they are engaged in their duties to the district, as well as regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the board of

school directors and teachers, including the time necessarily spent in coming to and returning from school.”

75. Section 5-515 of the School Code states, “[i]n every school district the board of school directors shall continue to have and possess, all the powers, rights, and privileges, not inconsistent with this act...”

76. Boards of School Directors are authorized to act during war. See 24 P.S. § 5-520 (“any board of school directors may—[k]eep the schools of the district in session such days and number of days per week as they deem necessary or desirable...”). (emphasis added).

77. Boards of School Directors are authorized to act during temporary emergencies. See 24 P.S. § 5-520.1 (“any board of school directors may—[k]eep the schools of the district in session such days and number of days per week as they deem necessary or desirable...”). (emphasis added).

78. Department of Health Regulation 27.71 - Exclusion of children, and staff having contact with children, for specified diseases and infectious conditions, states in relevant part as follows:

“A person in charge of a public, private, parochial, Sunday or other school or college shall exclude from school a child, or a staff person, including a volunteer, who has contact with children, who is suspected by a physician or the school nurse of having any of the communicable diseases, infections or conditions. ...” *28 Pa. Code §27.71*

79. Further, Regulation 27.72 - Exclusion of children, and staff having contact with children, for showing symptoms, states in relevant part as follows:

"A person in charge of a public, private, parochial, Sunday or other school or college shall, following consultation with a physician or school nurse, exclude immediately a child, or staff person, including a volunteer, having contact with children, showing any of the following symptoms, unless that person is determined by the school nurse, or a physician, to be noncommunicable: ..." 28 Pa. Code §27.72

80. Both of these Regulations vest in the persons in charge of public, private, parochial, and other schools the authority and control over persons suspected of having a communicable disease and/or persons exhibiting symptoms of a communicable disease.

81. Pursuant to the Public School Code, as amended, 24 P.S. §§1-101, et seq., grants the sole and exclusive authority over the operation of public school, its student, staff, volunteers and visitors with the Board of School Directors and superintendents of school appointed thereby.

STATEMENT OF RELIEF SOUGHT

1. Petitioners seek a declaration of their rights under the circumstances set forth in this Petition and a declaration addressing the lack of compliance by the Secretary with Pennsylvania law. Petitioners further seek relief in the nature of an injunction as is more fully set forth in the Petition for Special Relief attached hereto;

2. An Order reversing the Secretary of Health's August 31, 2021 Order, declaring such Order and any subsequent Amendments thereto to be void ab initio;

3. An Order granting a preliminary and/or permanent injunction to enjoin the Secretary of Health from issuing such Order as is the subject of this Petition and further enjoining the Secretary of Health from attempting to enforce the provisions of such Order; and

4. An Order granting any such further relief as may be just under the circumstances, with costs on the Secretary of Health.

Respectfully Submitted,

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

Dated: September 24, 2021

By: /s/ Thomas W. King, III

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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

RESPONDENT’S APPLICATION FOR SUMMARY RELIEF

Respondent, Acting Secretary Alison Beam, pursuant to Pennsylvania Rule of Appellate Procedure 1532(b), hereby moves this Court for summary relief and, in support thereof, avers the following:

PROCEDURAL HISTORY

1. Petitioners, private schools and parents of school-aged children, commenced this action on September 3, 2021, with the filing of a petition for review.
2. On September 27, 2021, Petitioners were granted leave to amend the Petition to add certain public school districts as Petitioners. *See Amended Petition.*
3. The Amended Petition alleges that the Acting Secretary of Health, Alison Beam (hereinafter “the Secretary”) lacked authority to issue the August 31, 2021, *Order of the Acting Secretary of the Pennsylvania Department of Health*

Directing Face Coverings in School Entities (hereinafter “the Order”). See *Amended Petition, generally*.

4. Specifically, Petitioners allege the Order fails to comply with the requirements of the Regulatory Review Act and the Non-Delegation Doctrine.

5. Whether the Secretary had legal authority to enter the Order is a legal issue ripe for disposition.

6. There are no material facts in dispute.

7. The Secretary now files the within Application for Summary relief, seeking judgment in her favor finding that the Order was lawfully entered pursuant to The Disease Prevention and Control Law, 35 P.S. § 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health’s regulation at 28 Pa. Code § 27.60 (relating to disease control measures).

8. Pursuant to this Court’s September 13, 2021, Order, Respondent has already filed a brief in support of this Application.

SCOPE AND STANDARD OF REVIEW

9. Pennsylvania Rule of Appellate Procedure 1532(b) provides that “[a]t any time after the filing of a petition for review in ... an original jurisdiction matter[,] the court may on application enter judgment if the right of the applicant thereto is clear.” Pa. R.A.P. 1532(b).

10. Summary relief will be granted where the party's right to judgment is clear and no issues of material fact are in dispute. *See Pa. State Education Ass'n v. Dept. of Community and Economic Development*, 110 A.3d 1076, 1095 n. 3 (Pa. Cmwlth. 2015)(citing *Unified Sportsmen of Pa. v. Pa. Game Comm'n*, 18 A.3d 373, 382 (Pa. Cmwlth. 2011)). A fact is considered to be material if its resolution could affect the outcome of the case under the governing law. *Hospital & Healthsystem Ass'n v. Commonwealth*, 77 A.3d 587 (Pa. 2013).

11. Any evidence must be viewed in the light most favorable to the non-moving party. *Northwestern Youth Services, Inc. v. Dep't of Public Welfare*, 1 A.3d 988 (Pa. Cmwlth. 2010), *aff'd*, 66 A.3d 301 (Pa. 2013).

THE AUGUST 31, 2021 "ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES" DOES NOT CONSTITUTE A RULE OR REGULATION SUBJECT TO THE PROVISIONS OF THE REGULATORY REVIEW ACT

12. The Secretary derives her authority to enter the Order from The Disease Prevention and Control Law (hereinafter "DPCL"), the Administrative Code of 1929, and the Department's regulations. *Amended Petition, Exhibit A*.

13. In interpreting these statutes, the Department is entitled to "strong deference." *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

14. The DPCL grants the Department of Health (hereinafter “the Department”) the authority to “carry out the appropriate control measures” in response to a disease. The law provides:

[u]pon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.

35 P.S. § 521.5.

15. The Administrative Code of 1929 mandates that it is the duty of the Department “[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.” 71 P.S. §§ 532(a), 1403(a). *See also* 71 P.S. § 1403(a) (“It shall be the duty of the Department of Health 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.”).

16. It is the duty of the Department “to declare certain diseases to be communicable” and “to establish such regulations for the prevention of the spread of such diseases.” 71 P.S. § 536(a).

17. Under the authority of these sections, the Department promulgated a regulation, which provides:

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

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

18. The Department’s regulations further permit the Department to “determine the *appropriate disease control measure based upon the disease or infection*, the patient’s circumstances, the type of facility available and any other available information relating to the patient and the disease or infection. 28 Pa. Code 27.60(b) (emphasis added).

19. In promulgating this regulation, the Department stated its intention: “[t]his proposed section is important to the Department's disease control and prevention function, in that *it would allow the Department the discretion to implement the most appropriate disease control measures for the situation.*” 30 Pa. B. 2715 at § 27.60 (emphasis added).¹

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<http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol30/30-22/930.html&search=1&searchunitkeywords=communicable,noncommunicable>
(last visited 9/18/2021)

20. The final regulation, which was subject to the Regulatory Review Act, was approved by the Independent Regulatory Review Commission (hereinafter “IRRC”) as proposed on December 20, 2001.

21. The IRRC found the regulation “consistent with the statutory authority of the Department of Health . . . and the intention of the General Assembly,” and that its promulgation was “in the public interest.” Approval Order, IRRC, Regulation No. 10-156 (IRRC No. 2119) (Dec. 20, 2001).²

22. As part of this regulatory promulgation process, this regulation was submitted to the House Health and Human Services Committee and the Senate Public Health Committee, and was deemed approved by both.³

23. The existing law and regulations provided the Secretary with authority to implement appropriate disease control measures, therefore, it was not necessary for the Department to promulgate a new regulation to effectuate the Order.

² <http://www.irrc.state.pa.us/docs/2119/IRRC/2119%2012-20-01%20APPROVAL.pdf>

³ See 32 Pa.B. 520 (January 26, 2002); <https://www.pacodeandbulletin.gov/secure/pabulletin/data/vol32/32-4/32-4.pdf>; <http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=2080> ; see also Regulatory Transmittal Sheet at <http://www.irrc.state.pa.us/docs/2119/AGENCY/2119FF.pdf>

24. The DPCL mandates that that Department “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.*” 35 P.S. § 521.3(b) (emphasis added).

25. Municipalities that have a local board or department of health operate under the guidance and supervision of the Department. 35 P.S. § 521.4(a).

26. The Department sets the floor for any disease control measures. When it does so, the local board or department of health may enact more stringent measures, but not less. 35 P.S. § 521.16 (“[m]unicipalities which have . . . county departments of health may enact ordinances or issue rules and regulations relating to disease prevention and control, which are not less strict than the provisions of this act or the rules and regulations issued thereunder by the [Health Advisory] board.”); *see also* 71 P.S. § 541 (rules and regulations of the Health Advisory Board become the regulations of the Department).

27. “If a local health authority is not [a local morbidity reporting office], it shall consult with and receive approval from the Department prior to taking any disease control measure.” 28 Pa. Code § 27.60.

28. As a result, the Order was lawfully enacted to prevent the spread of disease within all public and private schools.

WHEREFORE, the Secretary respectfully requests that this Honorable Court enter an Order finding that the Order was lawfully entered, entering judgment in her favor, and dismissing the Petition for Review with prejudice.

THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES” DOES NOT VIOLATE THE PRINCIPLES GOVERNING THE DELEGATION OF ADMINISTRATIVE AUTHORITY

29. Article II, Section 1 of the Pennsylvania Constitution provides: “[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.”

30. The Supreme Court has interpreted the provision to be an exclusive grant of the “power to make law”; thus, only the legislative branch may exercise “legislative power.” *Wolf v. Scarnati*, 233 A.3d 679, 704 (Pa. 2020) (citing *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827, 833 (Pa. 2017)).

31. The General Assembly may delegate the execution or administration of law (including the power to issue orders or regulations that have the force of law), subject to only two constraints: the General Assembly must (1) make the basic policy choices and (2) include adequate standards which will guide and restrain the exercise of the delegated administrative functions. *Wolf v. Scarnati*, 233 A.3d at 704 (citing *Bell Tel. Co. of Pa. v. Lewis*, 177 A. 36 (1935)); *Protz*, 161 A.3d at 834 (cleaned up);

32. “This does not mean, however, that all details of administration must be precisely or separately enumerated in the statute.” *Gilligan v. Pa. Horse Racing Comm’n*, 422 A.2d 487, 489 (Pa. 1980) (citations omitted).

33. In enacting the DPCL, the General Assembly made the basic policy choice that the Department, and local boards of health, should be responsible for preventing and controlling disease. 35 P.S. § 521.3.

34. The General Assembly specifically granted the Department the power and duty to “carry out the appropriate control measures” upon receiving a report of disease, 35 P.S. § 521.5, and provided definitions to guide the Secretary’s interpretation of the DPCL and subsequent regulations, 35 P.S. § 521.2(k)(b) [sic] (defining, e.g., a “reportable disease” as “any unusual or group expression of illness which, in the opinion of the secretary, may be a public health emergency.”).

35. A straightforward reading of the DPCL makes it clear that the General Assembly made the policy choices and charged the Secretary with carrying them out, thus exemplifying the typical relationship between the Legislative and Executive Branches.

36. The General Assembly also set standards to guide the Department’s exercise of authority. Specifically, the DPCL requires the “receipt . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure” and

requires the Department to follow certain procedures when promulgating regulations.

37. In evaluating whether the General Assembly provided adequate standards, the Court is “not limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect.” *Gilligan*, 422 A.2d at 490 (quoting *St. Joe Mins. Corp.*, 382 A.2d at 735); *see also Dauphin Deposit Tr. Co. v. Myers*, 130 A.2d 686, 688 (Pa. 1957) (“Significantly, in reviewing the adequacy of guiding standards incorporated in a law, this Court looks to the law as a whole, considering its purpose and scope, the subject matters covered therein, the duties prescribed and the broad or narrow powers granted.”)

38. The General Assembly may provide for a “pervasive system of regulation and supervision” through a “broad legislative mandate,” including “clearly and unmistakably confer[ing]” a “general rule making power.” *Gilligan*, 422 A.2d at 490 (quoting *St. Joe Mins. Corp.*, 382 A.2d at 735).

39. It is “not required to provide a detailed how-to manual within each and every legislative act in order to supply adequate standards . . . and all details of administration need not be precisely or separately enumerated in the statute.” *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 970 (cleaned up) (Baer, (then) J., dissenting).

40. The clear and unmistakable purpose of the DPCL is to empower and charge the Department with controlling and preventing disease.

41. This critical mission requires wide discretion on the part of the Secretary but must be in response to actual disease and, other than isolation, quarantine, or modified quarantine (including “the exclusion of children from school”) must be authorized by rule or regulation. 35 P.S. §§ 521.2, 521.5.

42. As such, it is clear that the General Assembly made the basic policy choices and set adequate standards when delegating the responsibility to prevent and control disease within the Commonwealth to the Department.

WHEREFORE, the Secretary respectfully requests that this Honorable Court enter an Order finding that the Order was lawfully entered, entering judgment in her favor, and dismissing the Petition for Review with prejudice.

Respectfully submitted,

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By: /s/ Karen M. Romano
KAREN M. ROMANO
Chief Deputy Attorney General
Chief, Litigation Section
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DATE: September 30, 2021

NOTICE TO PLEAD

TO: RESPONDENT.

You are hereby notified to file a written response to the enclosed Petition for Review on or before October 7, 2021, as set forth by Order of Court dated September 27, 2021.

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

Dated: September 30, 2021,

By: /s/ Thomas W. King, III

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Counsel for Petitioners

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 AND
MICHELLE REICH**, individually
and as parents of three minor
school children; **ADAM 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**,

Respondent.

No.: 294 M.D. 2021

ORIGINAL JURISDICTION

**PETITIONERS' APPLICATION FOR SUMMARY RELIEF AND
ENTRY OF JUDGMENT PURSUANT TO PA. R.A.P. 1532
AND IN ACCORDANCE WITH THE COURT'S
SEPTEMBER 27, 2021, ORDER**

AND NOW, come Petitioners, by and through their undersigned counsel, to file the within Application for Summary Relief and Entry of Judgment pursuant to Pa. R.A.P. 1532, stating in support thereof as follows:

FACTUAL BACKGROUND

1. On August 31, 2021, Respondent issued an Order, in which she mischaracterizes her legal authority, stating as follows:

“Particularly, the Department of Health (Department) has the authority to take ***any disease control measure*** appropriate to protect the public from the spread of infectious disease. See 35 P.S. §521.5; 71 P.S. §§532(a), and 1403(a); 28 Pa. Code §27.60. ” *A true and correct copy of Respondent’s Order is attached hereto as Appendix “B”, see p. 3. [emphasis added]*

2. Section 2 - General Masking Requirement of the Order states as follows:

“[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering, regardless of vaccination status, except as set forth in Section 3.” Appendix “B” p. 4.

3. The Secretary's Order defines terms that are not contained in the Disease Prevention and Control Law of 1955, or any of the subsequent regulations, such as:

"Alternative to a face covering may include a plastic shield that covers the nose and mouth, extends below the chin and to the ears, and leaves no exposed gap between the forehead and the shield's headpiece. The Centers for Disease Control and Prevention (CDC) has advised there is currently not enough evidence to determine how much protection a face shield provides to individuals around the person wearing the face shield because of gaps where respiratory droplets may escape. The CDC does state, however, that face shields may still be an option in situations where wearing a cloth face covering is not otherwise feasible." Appendix "B", p. 3.

"Face covering means covering of the nose and mouth with material that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face. A "face covering" can be made of a variety of synthetic or natural fabrics, including cotton, silk, or linen. A "face covering" may be factory-made, sewn by hand, or be improvised from household items, including but not limited to, scarfs, bandanas, t-shirts, sweatshirts, or towels. While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, meet those requirements, these specialized masks should be reserved for appropriate occupational and health care personnel." Appendix "B", p. 3.

"School entity means any of the following:

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

- (5) An intermediate unit (IU).
- (6) A PA Pre-K Counts program, Head Start Program, Preschool Early Intervention program, or Family Center.
- (7) A private academic nursery school and locally-funded prekindergarten activities.
- (8) A childcare provider licensed by the Department of Human Services of the Commonwealth." Appendix "B", p. 3.

4. These definitions were not subject to the scrutiny of the regulatory review process but were created at the sole discretion of the Secretary.

5. Section 3 - Exceptions to Coverings Requirement of the Order lists exceptions to the face covering requires in Section 2, as follows:

A. If wearing a face covering while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state, or federal regulators or workplace safety guidelines.

B. If wearing a face covering would either cause a medical condition, or exacerbate an existing one, including respiratory issues that impede breathing, a mental health condition or a disability.

C. When necessary to confirm the individual's identity.

D. When working alone and isolated from interaction with other people with little or no expectation of in-person interaction.

E. If an individual is communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication.

F. When the individual is under two (2) years of age.

G. When an individual is:

1) Engaged in an activity that cannot be performed while wearing a mask, such as eating and drinking, or playing an instrument that would be obstructed by the face covering; or

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

H. When a child/student is participating in a sports practice activity or event, whether indoors or outdoors." Appendix "B", pp. 4-5.

6. Section 4 - School Entity Obligations of the Order states in relevant part as follows:

A. A School Entity must:

1. Require and enforce the requirement that all teachers, children/students, staff, and visitors (subject to the exceptions in Section 3) wear a face covering indoors, regardless of whether this Order is reflected in a school entity's Health and Safety Plan.

2. [Order does not contain a Paragraph 4(A)(2)].

3. Post prominent signs in conspicuous locations for teachers, children/students, staff, and visitors stating that face coverings are required by the Order of the Secretary of Health.

4. Provide reasonable accommodations for individuals who state they have a medical condition, mental health condition, or disability that makes it unreasonable for the person to maintain a face covering." Appendix "B", p. 5.

7. The Order references four statutory and regulatory provisions in support of Acting Secretary's alleged authority to issue the Order. See 35 P.S. §521.5; 71 P.S. §§532(a), and 1403(a); 28 Pa. Code §27.60." Appendix "B" p. 3.

8. Of the four statutory and regulatory provisions cited by the Acting Secretary, Title 71 P.S. §532, and Title 71 P.S. §1403, do not even use or reference the term disease control measure.

9. Section 532 does impose an obligation upon the Secretary to promulgate rules and regulations in accordance with the Regulatory Review Act.

10. With respect to Section 521.5 – Control Measures of the Disease Prevention and Control Law of 1955, there can be no dispute that this

Section expressly limits the Secretary of Health's authority to carry out disease control measures.

11. Section 521.5 states in relevant part as follows:

"Upon the receipt ... by the department ... of a report of a disease which is subject to isolation, quarantine, or other control measure, ... the department 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]

12. The language in Section 521.5 is clear and unambiguous.

13. There is no rule or regulation authorizing any portion of her Order.

14. With respect to Regulation 27.60, Respondent has asserted to the Court that "The existing regulation provides the Department with three distinct options for disease control: (1) isolation; (2) surveillance, segregation, quarantine; and (3) other disease control measures." Respondent's Brief Addressing Legal Issues, p. 7.

15. This assertion misstates the Acting Secretary's authority.

16. The full text of Paragraph (a) of Regulation 27.60 reads as follows:

"The Department or local health authority shall direct isolation of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease

or infection; and any other disease control measure the Department or the local health authority **considers to be appropriate for the surveillance of disease**, when the disease control measure is necessary to protect the public from the spread of infectious agents.” 28 Pa. Code §27.60(a). [emphasis added]

17. The language in Regulation 27.60 is also clear and unambiguous.

18. The Secretary’s Order does not “direct isolation of a person or an animal with a communicable disease or infection” so this part of Regulation 27.60(a) is not applicable or at-issue.

19. The Secretary’s Order does not direct or require the “surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection” so this part of Regulation 27.60(a) is not applicable or at-issue.

20. It is important to note that as part of the definition of “Quarantine,” the Disease Prevention and Control Law defines the term “Surveillance” as “the close supervision of persons and animals exposed to a communicable disease without restricting their movement.” 35 P.S. §521.1(i)(2).

21. The first two parts of Regulation 27.60(a) are not applicable to the Secretary’s Order, so the third part must be what the Secretary is relying upon when citing Regulation 27.60(a).

22. This part states “and any other disease control measure the Department or the local health authority considers to be ***appropriate for the surveillance of disease***, when the disease control measure is necessary to protect the public from the spread of infectious agents.” *28 Pa. Code §27.60(a). [emphasis added]*

23. This language is clear and unambiguous.

24. Like most of the terms in Regulation 27.60, *the term “Surveillance of disease” is defined. It is defined as “The continuing scrutiny* of all aspects of occurrence and spread of disease that are pertinent to effective control.”

25. The term “scrutiny” is generally defined as “critical observation or examination.” See New Oxford American Dictionary 2021 on-line version.

26. Paragraph (b) of Regulation 27.60, states in relevant part as follows:

“The Department ... will determine the appropriate disease control measure based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection.” *28 Pa. Code §27.60*

27. Paragraph (b) contains the term “patient” as the object of the continued scrutiny.

28. There is no reference within Paragraph (b) to healthy, non-infected individuals.

29. The individuals covered by the Order are not “patients.”

30. These individuals do not need a facility because they are healthy, non-infected educators, students, and visitors.

31. There is no other available information related to the “patient” because the individuals covered by the Secretary’s Order are not patients.

32. There is no part of Paragraph (b) of Regulation 27.60 that can reasonably be said to apply to the individuals “working, attending, or visiting a School Entity.”

33. The Acting Secretary’s Order fails to rely upon any existing rule or regulation.

34. The disease control measure at-issue, “wearing a face covering indoors” while in a School Entity, cannot be found to exist anywhere in the Disease Prevention and Control Law of 1955, or any of the subsequent regulations.

35. The House of Representatives Health Committee has now spoken regarding the Acting Secretary of Health’s issuance of her August 31, 2021, “Order.” In reviewing the Respondent’s “Order,” Pennsylvania’s

House of Representatives Health Committee approved a letter to the Commonwealth Joint Committee on Documents stating,

“Based upon the facts above, acting Secretary Beam violated the law by issuing the August 31 Order because the order is a “rule” or “regulation”, and Beam did not follow the rulemaking procedures that are required under the Commonwealth Documents Law and the Regulatory Review Act.” *Kathy L. Rapp, Chairperson of the House Health Committee, Letter to Commonwealth Joint Committee on Documents re: Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities, September 14, 2021. A true and correct copy of the Pennsylvania House of Representatives Health Committee letter to the Commonwealth Joint Committee on Documents is attached hereto as Appendix “G.”*

36. Respondent does not require school entities to report, as part of the required contact tracing, whether the infected individual or those who have had close contact with an infected individual, were wearing masks at the time of the close contact. *Appendix (A)(i) Affidavit of Luigi DeFransesco; and Appendix (A)(ii) Affidavit of Dr. Mark Kudlawiec.*

37. The intent section of the Regulatory Review Act states in relevant part as follows

“The General Assembly has enacted a large number of statutes and has conferred on boards, commissions, departments and agencies within the executive branch of government the authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without

undergoing effective review concerning ... conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; ..." 71 P.S. §745.2

ARGUMENT

38. Paragraphs 1 through 37 of this Application for Summary Relief are incorporated herein by reference as if fully set forth.

39. Pennsylvania Rule of Appellate Procedure 1532(b) provides as follows:

"At any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear." *Pa. R.A.P. Rule 1532(b)*

40. By Order dated September 27, 2021, this Court directed the parties to file respective applications for summary relief no later than September 30, 2021.

41. An application for summary relief may be granted if "a party's right to judgment is clear and no material issues of fact are in dispute."

Jubelirer v. Rendell, 953 A.2d 514, 521 (Pa. 2008); *quoting Calloway v. Pa. Bd. of Prob. & Parole*, 857 A.2d 218, 220 n.3 (Pa. Commw. 2001).

42. In the case before this Court, there are no material facts in dispute; and the Acting Secretary's Order was clearly issued without legal authority and in violation of the clear and unambiguous provisions of the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, *et seq.*; 35 P.S. §521.5; the regulations promulgates thereunder, 28 Pa. Code §27.1, *et seq.*, 28 Pa. Code §27.60; the Regulatory Review Act, 71 P.S. §745.1, *et seq.*; and the Non-delegation Doctrine.

43. The following material facts are clear and not in dispute. Further, the following legal conclusions are clear, and Petitioners have thereby established a clear right to judgment in this matter.

44. Respondent asks this Court to find that she has limitless authority to create and implement disease control measures at her sole discretion.

45. If affirmed by this Court, the Secretary's limitless authority would also include the authority to introduce and define new terms, to introduce and define new procedures for the implementation of new disease control measures, to introduce and define enforcement provisions, to introduce and impose disease control measures on healthy, non-infected individuals, and

any other matters the Secretary wishes to include with the disease control measure.

46. If so permitted, all of these actions would circumvent the scrutiny of the regulatory review process as set forth in the Regulatory Review Act and violate the Non-delegation Doctrine.

47. Respondent asks this Court to ignore the clear and unambiguous language of the Disease Prevention and Control Act of 1955 and to blindly acquiesce to the Secretary's interpretation of Regulation 27.60 related to disease control measures.

48. Respondent would have this Court hold that an administrative agency's regulation trumps a clear and unambiguous statute; and that when an administrative agency believes there is a conflict between an agency regulation purporting to implement a statute, that it is the statute must give way to the agency's regulation.

49. Such an assertion is misplaced and contrary to the law.

50. This Court has held that "a statute is law and trumps an administrative agency's regulation." *Victory Bank v. Commonwealth of Pennsylvania*, 219 A.3d 1236, 1239 (2019) (citing *Commonwealth v. Kerstetter*, 62 A.3d 1065, 1069 (Pa. Cmwlth. 2013), *aff'd*, 626 Pa. 89, 94

A.3d 991 (2014); Success Against All Odds v. Department of Public Welfare, 700 A.2d 1340, 1351 n.6 (Pa. Cmwlth 1997)).

51. If “there is a conflict between a statute and regulation which purports to implement the statute’s provisions the regulation must give way.”
Id.

52. In her Order, the Acting Secretary references four statutory and regulatory provisions in support of her alleged authority to issue the Order. See 35 P.S. §521.5; 71 P.S. §§532(a), and 1403(a); 28 Pa. Code §27.60. ”
August 31, 2021, Order, p. 3.

53. Of the four statutory and regulatory provisions cited by the Acting Secretary, Title 71 P.S. §532, and Title 71 P.S. §1403, do not even use or reference the term disease control measure.

54. Section 532 does impose an obligation upon the Secretary to promulgate rules and regulations in accordance with the Regulatory Review Act.

55. With respect to Section 521.5 – Control Measures of the Disease Prevention and Control Law of 1955, there can be no dispute that this Section expressly limits the Secretary of Health’s authority to carry out disease control measures.

56. Section 521.5 states in relevant part as follows:

“Upon the receipt ... by the department ... of a report of a disease which is subject to isolation, quarantine, or other control measure, ... the department 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]

57. The language in Section 521.5 is clear and unambiguous which is clearly why the Acting Secretary omitted the words “in such manner and in such place as is provided by rule or regulation” from her Order.

58. There is no rule or regulation authorizing any portion of the Acting Secretary’s Order.

59. The Acting Secretary has simply and breathtakingly omitted the language of the Statute and claims unlimited authority.

60. Petitioners have consistently asserted to the Court that the Acting Secretary’s Order must comply with Section 521.5 of the Disease Prevention and Control Law.

61. The Attorney General clearly agrees with Petitioners. In Respondent’s Brief Addressing Legal Issues Framed in the Court’s September 13, 2021, Order, the Attorney General acknowledged to the Court that:

“... the Department cannot implement any control measure it wishes; its action is confined to those allowed under an existing rule or regulation – in this case.” *Respondent’s Brief*, p. 21.

62. With respect to Regulation 27.60, Respondent has asserted to the Court that “The existing regulation provides the Department with three distinct options for disease control: (1) isolation; (2) surveillance, segregation, quarantine; and (3) other disease control measures.” Respondent’s Brief, p. 7.

63. This assertion misstates the Acting Secretary’s authority. Respondent omits and ignores controlling language within the regulation.

64. The omitted language clearly demonstrates that Regulation 27.60 does not provide the Acting Secretary any legal authority to issue her own new disease control measures in the absence of a “rule or regulation.”

65. The full text of Paragraph (a) of Regulation 27.60 reads as follows:

“The Department or local health authority shall direct isolation of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection; and any other disease control measure the Department or the local health authority **considers to be appropriate for the surveillance of disease**, when the disease control measure is necessary to protect the public from the spread of infectious agents.” *28 Pa. Code §27.60(a)*. [emphasis added]

66. The language in Regulation 27.60 is also clear and unambiguous.

67. The Secretary's Order does not "direct isolation of a person or an animal with a communicable disease or infection" so this part of Regulation 27.60(a) is not applicable or at-issue.

68. The Secretary's Order does not direct or require the "surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection" so this part of Regulation 27.60(a) is not applicable or at-issue.

69. It is important to note that as part of the definition of "Quarantine," the Disease Prevention and Control Law defines the term "Surveillance" as "the close supervision of persons and animals exposed to a communicable disease without restricting their movement." 35 P.S. §521.1(i)(2).

70. If the first two parts of Regulation 27.60(a) are not applicable to the Secretary's Order, then the third part must be what the Secretary is relying upon when citing Regulation 27.60(a).

71. This part states "and any other disease control measure the Department or the local health authority considers to be **appropriate for the surveillance of disease**, when the disease control measure is necessary to protect the public from the spread of infectious agents." 28 Pa. Code §27.60(a). *[emphasis added]*

72. This language is clear and unambiguous.

73. Respondent simply ignores “for the surveillance of disease.”

74. Respondent’s position is that Paragraph (a) of Regulation 27.60 should be read “any other disease control measure the Department or the local health authority considers to be appropriate ~~for the surveillance of disease~~, when the disease control measure is necessary to protect the public from the spread of infectious agents.” [*emphasis added*]

75. The Acting Secretary incorporates the above referenced language almost verbatim, except for “for the surveillance of disease.”

76. The Acting Secretary’s Order states “... the Department of Health (Department) has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease.”
Appendix “B” p. 3.

77. Like most of the terms in Regulation 27.60, *the term “Surveillance of disease” is defined. It is defined as “The **continuing scrutiny** of all aspects of occurrence and spread of disease that are pertinent to effective control.”*

78. Under no circumstance could the Acting Secretary’s Order requiring the wearing of face coverings be considered “continuing scrutiny.”

79. The term “scrutiny” is generally defined as “critical observation or examination.” See New Oxford American Dictionary 2021 on-line version.

80. The Order mandates the wearing of face coverings which in no way constitute critical observation or examination.

81. To conclude otherwise would require the Court to rewrite the regulations.

82. How does the Department determine which disease control measures are “appropriate for the surveillance of disease”? The language in Paragraph (b) of Regulation 27.60, answers this question.

83. Paragraph (b) of Regulation 27.60 states in relevant part as follows:

“The Department ... will determine the appropriate disease control measure based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection.” *28 Pa. Code §27.60*

84. The Court will note the use in Paragraph (b) of the term “patient.”

85. Is Respondent asserting that the individuals covered by her Order are “patients” under 27.60(b)? No, because the Secretary’s newly created disease control measure is imposed upon healthy individuals who do not have a communicable disease.

86. These individuals are not “patients” so the Secretary cannot look at the patient’s circumstances as required by Paragraph (b).

87. These individuals do not need a facility because they are healthy, non-infected educators, students, and visitors.

88. There is no other available information related to the “patient” because the individuals covered by the Secretary’s Order are not patients.

89. If they were patients, they would not be “working, attending, or visiting a School Entity” in the first place.

90. There is no part of Paragraph (b) of Regulation 27.60 that can reasonably be said to apply to the individuals “working, attending, or visiting a School Entity.”

91. If Paragraph (b) is not applicable, Respondent cannot argue that the disease control measure is appropriate for the surveillance of the disease.

92. The Acting Secretary didn’t rely upon any existing rule or regulation.

93. The Acting Secretary created and implemented her own disease control measure in direct violation of Section 521.5.

94. The disease control measure at-issue, “wearing a face covering indoors” while in a School Entity, cannot be found to exist anywhere in the Disease Prevention and Control Law of 1955, or any of the subsequent regulations.

95. The Secretary simply invented this new disease control measure and imposed it upon healthy, non-infected individuals based solely upon the individual's "... working, attending, or visiting a School Entity ..." *Appendix "B" p. 3.*

96. The Secretary's Order defines terms that are not contained in the Disease Prevention and Control Law of 1955, or any of the subsequent regulations, such as:

"Alternative to a face covering may include a plastic shield that covers the nose and mouth, extends below the chin and to the ears, and leaves no exposed gap between the forehead and the shield's headpiece. The Centers for Disease Control and Prevention (CDC) has advised there is currently not enough evidence to determine how much protection a face shield provides to individuals around the person wearing the face shield because of gaps where respiratory droplets may escape. The CDC does state, however, that face shields may still be an option in situations where wearing a cloth face covering is not otherwise feasible." *Appendix "B" p. 3.*

"Face covering means covering of the nose and mouth with material that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face. A "face covering" can be made of a variety of synthetic or natural fabrics, including cotton, silk, or linen. A "face covering" may be factory-made, sewn by hand, or be improvised from household items, including but not limited to, scarfs, bandanas, t-shirts, sweatshirts, or towels. While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, meet those requirements, these specialized masks should be reserved for appropriate occupational and health care personnel." *Appendix "B" p. 3.*

“School entity means any of the following:

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

97. These definitions did not come out of the regulatory review process but were created at the sole discretion of the Secretary.

98. In addition to creating new control measures, the Secretary asserts that her authority under Regulation 27.60, includes the authority to define new regulatory terms and to impose those newly defined terms upon healthy, non-infected individuals.

99. The Secretary’s Order defines the individuals subject to the Order without regard for whether the individuals are infected with a communicable disease or infection; whether the individuals have come in contact with an individual infected with a communicable disease or infection; or whether the individuals are exhibiting any symptoms of a communicable disease or infection.

100. Unlike any other existing disease control measure, the Secretary's Order imposes restrictions on healthy, non-infected individuals within the Commonwealth.

101. The imposition of the restrictions are unrelated to the individual's exposure to a communicable disease or infection.

102. The restrictions are based solely upon the type of facility occupied by the individual, namely, when an individual is "... working, attending, or visiting a School Entity ..." *Appendix "B" p. 3.*

103. The same individuals covered by the Secretary's Order are free to have unlimited indoor non-mask wearing contact with each other outside of school entities.

104. The Order permits the wearing of face shields while acknowledging "[t]he Centers for Disease Control and Prevention (CDC) has advised there is currently not enough evidence to determine how much protection a face shield provides to individuals around the person wearing the face shield because of gaps where respiratory droplets may escape." *Definition of Face Shield, Appendix "B" p. 3.*

105. The Order requires the wearing of a face covering that can "be improvised from household items, including but not limited to, scarfs, bandanas, t-shirts, sweatshirts, or towels." *Appendix "B" p. 3.*

106. The Order discourages the wearing of face coverings actually designed to protect the individual. *Appendix "B" p. 3.*

107. The Acting Secretary's Order states:

"While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, meet those requirements, these specialized masks should be reserved for appropriate occupational and health care personnel."
Appendix "B" p. 3.

108. The arbitrary nature of the Secretary's Order illustrates exactly why the scrutiny of the regulatory review process as set forth in the Regulatory Review Act is essential and it is exactly why Section 521.5 requires disease control measures to be "in such manner and in such place as is provided by rule or regulation."

109. The Secretary's Order sets forth the procedures that school entities are required to follow when implementing her Order, including, the incorporation by reference of unspecified state and federal anti-discrimination laws. *Appendix "B" p. 4-5.*

110. The procedures mandated by the Secretary did not undergo the scrutiny of the regulatory review process during which educational, medical, and psychological experts, along with school administrators, parents, students, and others would have had an opportunity to scrutinize the Secretary's Order, seek clarification and if needed, revisions to the Order.

111. Respondent has acknowledged "... the Department cannot implement any control measure it wishes; its action is confined to those allowed under an existing rule or regulation ...” *Respondent’s Brief Addressing Legal Issues, p. 21.*

112. Respondent has pointed to Regulation 27.60 as the existing regulation that provided her with the authority to issue her Order.

113. If Respondent is correct, then the Secretary has limitless authority to create and implement other disease control measures at her sole discretion.

114. The Attorney General acknowledges that the General Assembly may not delegate “limitless discretion” to the Secretary. *Respondent’s Brief Addressing Legal Issues, p. 20.*

115. The alleged authority, as asserted by the Respondent, would also include the authority to define new terms, to define procedures for the implementation of the new disease control measure, to define the enforcement provisions, to impose the disease control measure on healthy, non-infected individuals, and any other matters the Secretary wishes to include with the disease control measure.

116. If there are limitations to the Respondent’s asserted authority, none have been articulated by the Respondent.

117. There is no aspect of Respondent's Order that can be found in any existing regulation, except Respondent's reference to disease control measures.

118. If that's the case, then as long as any future Secretary characterizes his or her Order as a disease control measure, he or she is free to define new terms, procedures, obligations, etc., and impose the same on healthy, non-infected citizens of the Commonwealth.

119. In the absence of such a regulation, the Acting Secretary of Health must follow the procedures established by the General Assembly in the Regulatory Review Act.

120. Pennsylvania's Regulatory Review Act applies to any regulations promulgated by an agency. 71 P.S. § 745.5.

121. The Act further defines a regulation to be,

"Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency or amending, revising, or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency. . . The term shall not include a proclamation, executive order, directive, or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor." 71 P.S. § 745.3.

122. Respondent's August 31, 2021, Order constitutes a "regulation" as defined by the Regulatory Review Act.

123. The Pennsylvania Supreme Court has explained and clarified the distinction between substantive rules which must be promulgated through rule-making procedures and statements of policy requiring no such procedures.

124. In making such a distinction, the Court noted:

"The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency. A general statement of policy, on the other hand, does not establish a 'binding norm'. . . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. *PHRC v. Norristown Area School Dist.*, 374 A.2d 671, 679 (Pa. 1977); citing *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. App. 1974).

125. Section 4 – School Entity Obligations, of Respondent's August 31, 2021, Order states that, "[a] School Entity must: Require and enforce the requirement that all teachers, children/students, staff, and visitors wear a face covering indoors, regardless of whether this Order is reflected in a school entity's Health and Safety Plan." *Appendix "B" p. 5.*

126. Respondent's Order clearly establishes a mandatory standard of conduct that any included "School Entity" must abide by.

127. The Acting Secretary of the Commonwealth's August 31, 2021, Order is a "regulation" subject to the procedures and requirements of Pennsylvania's Regulatory Review Act.

128. The procedures for review of proposed regulations are codified in Sections 745.5a and 745.5b of the Act.

129. Section 745.5a of the Act requires the regulation to be published and republished, requires public comment on the regulation, requires the agency's response to the public comments received, mandates extensive review and input by the reviewing Committees and the Independent Regulatory Review Commission, and requires the Commission's approval or disapproval of the final-form regulation. *71 P.S. § 745.5a.*

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

131. In promulgating the August 31, 2021, Order, Respondent has failed to comply with any of the above cited requirements of the Regulatory Review Act.

132. Respondent failed to submit the proposed regulation to the Independent Regulatory Review Commission for any form of review, to conduct adequate notice and public comment, and to provide the Commission with any rationale for the Order.

133. Respondent's Order dated August 31, 2021, is non-compliant and is therefore an illegal regulation, and void *ab initio*.

134. The Pennsylvania General Assembly has recently had occasion to speak to the validity of Respondent's Order in a letter from the Pennsylvania House of Representatives Health Committee to the Commonwealth Joint Committee on Documents.

135. Under section 7.1 of Pennsylvania's Regulatory Review Act, if a committee finds that an issued document should be promulgated as a regulation, the committee may present the matter to the Joint Committee on Documents for a determination. *See 71 P.S. § 745.7a.*

136. In the Health Committee's letter pursuant to section 7.1 of the Regulatory Review Act, the Committee concluded that Respondent's Order was, in fact, a rule or regulation, stating as follows,

“Based upon the facts above, acting Secretary Beam violated the law by issuing the August 31 Order because the order is a “rule” or “regulation”, and Beam did not follow the rulemaking procedures that are required under the Commonwealth Documents Law and the Regulatory Review Act.” *Kathy L. Rapp, Chairperson of the House Health Committee, Letter to Commonwealth Joint Committee on Documents re: Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities, September 14, 2021.*

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

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

“In ascertaining whether an agency has established a binding norm, the reviewing court must consider: 1) the plain language of the provision; 2) the manner in which the agency has implemented the provision; and 3) whether the agency’s discretion is restricted by the provision.” *Eastwood Nursing & Rehab. Ctr. v. Dep’t of Pub. Welfare*, 910 A.2d 134, 144 (Pa.

Commw. 2006); *see also Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. App. 1974).

139. The first prong of the test asks whether the plain language of the order shows that it is an order of general application, applies to a class of individuals clearly set forth in general terms, establishes mandatory conduct or affirmatively prohibits conduct for that class of individuals, and subjects those individuals to a penalty at law for violation thereof.

140. Applying the above to Respondent's Order clearly shows that the plain language of the Order evince its status as a rule or regulation as Respondent's Order mandates that all individuals connected to, or required to enter into, a school entity must wear a mask unless qualifying for any applicable exemptions. Further, noncompliance with the Order subjects the offending individual to potential criminal sanctions under the Disease Prevention and Control Law of 1955, 35 P.S. § 521.20 and Pennsylvania's Administrative Code of 1929, 71 P.S. § 1409.

141. The next prong analyzes how the agency implemented its Order. Regulations implement and interpret law while prescribing policy and procedure before an agency.

142. Respondent relies on the provisions of the Disease Prevention and Control Law of 1955, 35 P.S. § 532 and Pennsylvania's Administrative Code of 1929, 71 P.S. § 1403, which grants the Department of Health the

power, “to determine and employ the most efficient and practical means for the prevention and suppression of disease.”

143. Respondent’s Order is not an announcement of the implementation of a face covering policy through future rulemaking.

144. Rather, Respondent’s Order sets forth an affirmative mandate of a new rule which interprets the authority allegedly granted to the Department by the General Assembly.

145. The third and last prong of the test examines the discretion granted to the agency by the Order.

146. As stated by the House of Representatives Health Committee,

“[t]he order, when applied, restricts the discretionary power of the Department of health and is, thus, like a regulation. It mandates all individuals connected to a school entity to wear a face covering unless they qualify under one of the state exceptions. [citation omitted] The Department is not free to exercise discretion to follow or not follow the new policy on an individual basis, and the Department is bound by the order until it rescinds it. Appendix “G” p. 5-6.

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

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

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

149. This Court's most recent non-delegation decision involved a provision in the Public-School Code, see 24 P.S. §§ 1–101–27–2702, that gave a five-member School Reform Commission (comprised mostly of individuals appointed by the Governor) sweeping powers to improve the finances of distressed school districts.

150. Among other things, the law delegated to the School Reform Commission the authority to suspend regulations of the State Board of

Education and to suspend provisions of the Public-School Code. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 959.

151. The General Assembly placed only minor restrictions upon the Commission's authority.

152. First, the General Assembly put a few provisions of the Public-School Code beyond the reach of the Commission's suspension power, most of which related to local school-board elections. *Protz v. Workers' Compensation Appeal Bd. (Derry Area School District)*, 161 A.3d 827, 833-835 (Pa. 2017).

153. Second, the General Assembly required that the Commission submit annually a report to the Governor and the Education Committees of both the House and the Senate detailing the progress made in fiscal and academic performance. *Id. at 833-835*.

154. Finally, individual members of the Commission, as public employees, could be removed by the Governor for "malfeasance or misfeasance." *Id. at 971* (Baer, J., dissenting).

155. This Court held that the law violated the non-delegation doctrine because it did not include concrete measures to channel the Commission's discretion to wield its suspension power, nor did it include safeguards to protect against arbitrary, *ad hoc* decision making, such as a requirement that

the Commission hold hearings, allow for public notice, and comment, or explain the grounds for its suspensions in a reasoned opinion subject to judicial review. *Protz v. Workers' Compensation Appeal Bd. (Derry Area School District)*, 161 A.3d 827, 833-835 (Pa. 2017).

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

157. Pursuant to the "Non-Delegation Doctrine," the General Assembly is prohibited from granting, "to any other branch of government or to any other body or authority," the power to make law. *Blackwell v. Com., State Ethics Com'n*, 567 A.2d 630, 636 (Pa. 1989); see also *State Bd. or Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 480 (Pa. 1971).

158. The General Assembly is the sole branch of government vested with the authority, "to make laws, and not to make legislators." John Locke, *Second Treatise of Government*, 87 (R. Cox Ed. 1982); see also *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015) (Alito, J.

concurring) (“[t]he principle that Congress cannot delegate away its vested power exists to protect liberty.”)

159. Despite the principle that the General Assembly has the power to make law, and it cannot constitutionally delegate such authority to any other branch of government, the General Assembly may still delegate authority, “in connection with the execution and administration of a law to an independent agency or an executive branch agency where the General Assembly first establishes primary standards and imposes upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation.” *Blackwell*, 567 A.2d at 637.

160. In such a circumstance where the General Assembly chooses to delegate authority, two critical limitations apply.

161. The first is that “the basic policy choices must be made by the [l]egislature;” and the second is that “the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Blackwell*, 567 A.2d at 637; citing *Gilligan v. Pa. Horse Racing Commission*, 422 A.2d 487, 489 (Pa. 1980).

162. The Pennsylvania Supreme Court has had occasion to interpret the Non-Delegation Doctrine in the case of *Protz v. Workers’ Compensation Appeal Bd. (Derry Area School District)*, 161 A.3d 827 (Pa. 2017).

163. The *Protz* case deals with an individual who sustained a work-related injury during her employment with the Derry Area School District.

164. Pennsylvania's Workers' Compensation Act allows for an employer to demand that a claimant undergo an "impairment-rating evaluation (IRE)" in which a physician determines the degree and extent of impairment that is attributable to the claimant's compensable injury. *Id.* at 830.

165. The Act further required physicians to apply the methodology as set forth in, "the most recent edition" of the American Medical Association *Guides to the Evaluation of Permanent Impairment*.

166. The Plaintiff in the *Protz* case challenged the Pennsylvania Workers' Compensation Act's mandate to utilize the AMA's Guide as violative of the constitutional requirement that all legislative power "be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." *Id.* at 831; *citing* Pa. Const. Art. II, § 1.

167. In reviewing the Workers' Compensation Act, the Pennsylvania Supreme Court, "stressed the importance of procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power." *Id.* at 834; *See e.g., Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975) ("the statute at issue required that the

administrative agency establish neutral operating procedures, develop standardized documents, and give the public notice of proposed agency rules and regulations before promulgating them.”); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975) (“a plurality of [the Pennsylvania Supreme Court] found it significant that the General Assembly had assigned the [power to assess whether certain local taxes were excessive or reasonable] to the courts, rather than to an administrative body, because the very structure of the judiciary serves to protect against the arbitrariness of *ad hoc* decision making.”)

168. The *Protz* Court subsequently held that the authority delegated to the American Medical Association by Section 306(a.2) of the Workers’ Compensation Act is unduly broad and unbridled as, “[t]he General Assembly did not favor any particular policies relative to the Guides’ methodology for grading impairments, nor did it prescribe any standards to guide and restrain the AMA’s discretion to create such a methodology.” *Protz*, 161 A.3d at 835.

169. The Court additionally held, “[e]qually problematic, the General Assembly did not include in Section 306(a.2) any of the procedural mechanisms that this Court has considered essential to protect against ‘administrative arbitrariness and caprice.’ [citation omitted].

170. The General Assembly did not, for example, require that the AMA hold hearings, accept public comments, or explain the grounds for its methodology in a reasoned opinion, which then could be subject to judicial review.” *Id.* at 836; *citing Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975).

171. As an initial matter, it should be noted that the Petitioners do not concede that provisions cited in the Order actually vest in Respondent the authority to issue her August 31, 2021, Order.

172. Notwithstanding this fact, assuming that the provisions of the Disease Prevention and Control Law of 1955 do grant Respondent the authority to issue her August 31, 2021, Order, such excessive delegation of authority would violate the non-delegation doctrine.

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

“Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such a manner and in such place as is provided by rule or regulation.” 35 P.S. § 521.5.

174. Respondent’s interpretation, through the Attorney General, of the above cited statute is breathtakingly bold in that they claim that no additional

regulation or rule is necessary to give Respondent the authority to issue her August 31, 2021, Order. See Respondent's Answer to Petitioners' Application for Special Relief in the Form of an Emergency Preliminary Injunction, ¶ 3, Pages 2-4 ("Simply put, to the extent that Petitioners believe a separate rule or regulation is required to implement a control measure, they are incorrect.")

175. Such an interpretation clearly runs afoul of the non-delegation doctrine as the Respondent's interpretation would allow the Acting Secretary of Health in Pennsylvania to issue any appropriate control measures to prevent and control disease in the general public, "without any parameters cabining its authority." See *Protz*, 161 A.3d at 835.

176. As has already been discovered by those subjected to Respondent's Order, the Order is deficient in its terms.

177. The Order fails to specify what types of face coverings will be acceptable, fails to specify the duration of the Order, and fails to provide an exception for individuals who have already been infected with COVID-19 and have since recovered, thereby providing the individual with natural immunity.

178. Respondent's Order also fails to contain any obligations requiring a student subjected to the Order to provide a doctor's note to be exempted from the Order, resulting in many students opting out of the Order

by providing an exemption form signed by a parent or guardian (note that pursuant to the Pennsylvania School Code, Parents and Guardians have, for generations, provided “notes” regarding their children’s health and excusing them from attending school or other events such as field trips.) Michael Rubinkam, Mark Scolforo, and Marc Levy, *Some Pennsylvania students skirt mask rule with loophole*, Associated Press, Published September 9, 2021.

179. As further evidence of the Order’s deficiency, resulting perhaps from the failure to subject it to the regulatory process, is the lack of an exemption for religious reasons.

180. The Order is a perfect example of why such documents need to undergo public and legislative scrutiny prior to subjecting the populace of the Commonwealth to such Orders.

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

182. Similar to the statute at issue in the *Protz* case, Respondent’s interpretation of Pennsylvania’s Disease Prevention and Control Law of 1955 would fail to include any procedural mechanisms that the Pennsylvania

Supreme Court has held to be essential to protect against “administrative arbitrariness and caprice.” *Id.* at 836; *citing Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975).

183. For example, 35 P.S. § 521.5 fails to require that the Department of Health hold public hearings on the proposed regulation, accept public comments, or otherwise explain the grounds for its Order in a reasoned opinion.

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

185. Petitioners’ right to relief is clear and there is no dispute of material fact.

186. In support of this Application, Petitioners incorporate their previously filed First Amended Petition for Review, Brief of Petitioners, Reply Brief of Petitioners, and the Exhibits thereto by reference as if set forth fully herein.

187. In support of this Application, Petitioners have attached an appendix containing true and correct copies of the following documents:

A. Affidavits from the individuals listed below:

- i. Mr. Luigi DeFrancesco
- ii. Dr. Mark Kudlawiec
- iii. Klint Neiman and Amanda Palmer
- iv. Adam and Chelsea McClure

B. Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities dated August 31, 2021.

C. 35 P.S. §521.5.

D. 28 Pa. Code § 27.60.

E. 71 P.S. § 532.

F. 71 P.S. §1403.

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

H. K-12 School COVID-19 Self-Report Form

WHEREFORE, for the foregoing reasons, Petitioners pray that this Honorable Court:

1. Declare the Respondent's Order dated August 31, 2021, void ab initio, invalid, and unenforceable; and,
2. Enjoin the Respondent from enforcing any provisions of her Order dated August 31, 2021; and,

3. Grant such other relief that this Honorable Court deems just and proper.

Respectfully submitted,

**DILLON, McCANDLESS, KING,
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III, et al.,

Petitioners,

vs.

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

Respondent.

No. 294 MD 2021

APPENDIX

In support of Petitioners' Application for Summary Relief, Petitioners have attached true and correct copies of the following documents:

A. Affidavits from the individuals listed below:

- i. Mr. Luigi DeFrancesco, President of the Penncrest School Board;
- ii. Dr. Mark Kudlawiec, Superintendent of the Chestnut Ridge School District;
- iii. Klint Neiman and Amanda Palmer; and
- iv. Adam and Chelsea McClure.

B. Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities dated August 31, 2021;

C. 35 P.S. § 521.5;

D. 28 Pa. Code § 27.60;

E. 71 P.S. § 532;

F. 71 P.S. § 1403;

G. Letter from Kathy L. Rapp, Chair of the Pennsylvania House

Health Committee; and

H. K-12 School COVID-19 Self-Report Form.

Ai

“A person in charge of a public, private, parochial, Sunday or other school or college shall exclude from school a child, or a staff person, including a volunteer, who has contact with children, who is suspected by a physician or the school nurse of having any of the communicable diseases, infections or conditions. ...”

28 Pa. Code §27.71

5. Regulation 27.72 - Exclusion of children, and staff having contact

with children, for showing symptoms, states in relevant part as follows:

“A person in charge of a public, private, parochial, Sunday or other school or college shall, following consultation with a physician or school nurse, exclude immediately a child, or staff person, including a volunteer, having contact with children, showing any of the following symptoms, unless that person is determined by the school nurse, or a physician, to be noncommunicable...”

28 Pa. Code §27.72

6. The above-cited regulations grant authority to, “a person in charge,” of a public, private, parochial, Sunday, or other school or college to control persons suspected of having a communicable disease and/or persons exhibiting symptoms of a communicable disease.

7. However, despite this clear grant of authority to the individuals in charge of school districts, Respondent’s Order seeks to usurp such authority and unilaterally provide for the management and control of students/children across the Commonwealth.

8. Moreover, at no point did the Penncrest School District have an opportunity to provide public comment or any other form of input regarding the Acting Secretary of Health's Order dated August 31, 2021.

9. Additionally, when issuing the Order dated August 31, 2021, the Acting Secretary of Health has failed to provide for adequate standards regarding the enforcement of such Order, leaving the daunting task of managing compliance with this illegal Order to the School Districts.

10. For example, the Order fails to specify the duration of the Order, and fails to provide for adequate exceptions for individuals who have already been infected with COVID-19, thereby developing natural immunity.

11. Further, the Order fails to contain any obligations requiring a student subjected to the Order to provide a doctor's note for exemption from the Order, resulting in many students opting out of the Order by providing an exemption form signed by a parent or guardian. See Michael Rubinkam, Mark Scolforo, and Marc Levy, *Some Pennsylvania students skirt mask rule with loophole*, Associated Press, Published September 9, 2021.

12. As a direct consequence of the Acting Secretary of Health's Order dated August 31, 2021, the Penncrest School Board has received numerous complaints by parents, students, and employees of the district,

who are all outraged over being subjected to such an Order, especially with no input or opportunity to be heard on this Regulation.

13. School districts are required to provide contact tracing information to the Commonwealth of Pennsylvania Department of Health. The information required by the Department of Health does not include information related to the wearing of face coverings. At no time relevant to this matter have school districts been required to report to the Department of Health whether an individual, who has been identified with a communicable disease or infection, or an individual who has had close contact with an individual who has been identified with a communicable disease or infection, was wearing a face covering at the time of infection and/or close contact.

14. I believe that the Acting Secretary of Health's Order mandating the use of face coverings by individuals entering into a school entity to be illegal for the reasons set forth herein.

15. To the extent that I have personal knowledge regarding any of the averments contained within the First Amended Petition for Review, I incorporated them by reference as if fully set forth herein.

VERIFICATION

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

9/30/2021
Date

Luigi DeFrancesco
Luigi DeFrancesco
President of the Penncrest School
Board

A.ii

"A person in charge of a public, private, parochial, Sunday or other school or college shall exclude from school a child, or a staff person, including a volunteer, who has contact with children, who is suspected by a physician or the school nurse of having any of the communicable diseases, infections or conditions. ..."

28 Pa. Code §27.71

5. Regulation 27.72 - Exclusion of children, and staff having contact with children, for showing symptoms, states in relevant part as follows:

"A person in charge of a public, private, parochial, Sunday or other school or college shall, following consultation with a physician or school nurse, exclude immediately a child, or staff person, including a volunteer, having contact with children, showing any of the following symptoms, unless that person is determined by the school nurse, or a physician, to be noncommunicable..."

28 Pa. Code §27.72

6. The above-cited regulations grant authority to, "a person in charge," of a public, private, parochial, Sunday, or other school or college to control persons suspected of having a communicable disease and/or persons exhibiting symptoms of a communicable disease.

7. However, despite this clear grant of authority to the individuals in charge of school districts, Respondent's Order seeks to usurp such authority and unilaterally provide for the management and control of students/children across the Commonwealth.

8. Additionally, when issuing the Order dated August 31, 2021, the Acting Secretary of Health has failed to provide for adequate standards regarding the enforcement of such Order, leaving the daunting task of managing compliance with this illegal Order to the School Districts.

9. For example, the Order fails to specify the duration of the Order, and fails to provide for adequate exceptions for individuals who have already been infected with COVID-19, thereby developing natural immunity. It also requires healthy non-infected persons to wear masks of questionable quality. Often these masks are worn over and over without being discarded or sanitized.

10. Further, the Order fails to contain any obligations requiring a student subjected to the Order to provide a doctor's note for exemption from the Order, resulting in many students opting out of the Order by providing an exemption form signed by a parent or guardian. See Michael Rubinkam, Mark Scolforo, and Marc Levy, *Some Pennsylvania students skirt mask rule with loophole*, Associated Press, Published September 9, 2021.

11. As a direct consequence of the Acting Secretary of Health's Order dated August 31, 2021, students of the Chestnut Ridge Area School District are left with inadequate standards regarding the use of face coverings.

12. The Acting Secretary of Health's Order dated August 31, 2021 permits students to create face coverings from discarded t-shirts, sweaters, scarves, and other fabrics, with no consideration of the efficacy of such coverings.

13. As a result of this lack of guidance, students are mandated to wear face coverings that may or may not be effective, with no way for the District to ascertain the efficacy of any given fabric used as a covering.

14. I believe that the Acting Secretary of Health's Order mandating the use of face coverings by individuals entering into a school entity to be illegal for the reasons set forth herein.

15. To the extent that I have personal knowledge regarding any of the averments contained within the First Amended Petition for Review, I incorporated them by reference as if fully set forth herein.

VERIFICATION

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

9/30/21
Date

Dr. Mark Kudlawiec
Dr. Mark Kudlawiec
Superintendent of Chestnut
Ridge School District

A.iii

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al.,

Petitioners

v.

Acting Secretary of the Pennsylvania
Department of Health,

Respondents.

No. 294 M.D. 2021

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF BERKS

ss.

AFFIDAVIT OF KLINT NEIMAN AND AMANDA PALMER

1. Our names are Klint Neiman and Amanda Palmer. We reside at 125 South 4th Avenue, West Reading, PA 19611.

2. We have a daughter in the 4th grade and a son in the 1st grade in the Wyomissing Area School District.

3. We do not believe that Pennsylvania's Acting Secretary of Health had the authority to issue her Order dated August 31, 2021 requiring the wearing of face coverings by any individual entering into a school entity.

4. As private citizens subjected to the Acting Secretary's Order, we were not given any opportunity to make comments on the Order prior to its issuance, and further were denied any opportunity to voice our concerns regarding the defects of Respondent's Order dated August 31, 2021.

5. We were denied any explanation by the Pennsylvania Department of Health stating why such an Order is necessary or how long the Order is to be in effect.

6. Moreover, we were denied any opportunity to provide input into the Acting Secretary of Health's Order due to the Acting Secretary of Health's failure to follow Pennsylvania's regulatory procedures.

7. The terms of the Order itself are deficient in that it fails to provide for any obligation requiring a student to provide a doctor's note to be exempted from the Order, leaving parents of students across the Commonwealth unsure of how to obtain an exemption to the Order.

8. The Acting Secretary of Health's Order dated August 31, 2021 permits individuals subject thereto to create face coverings from discarded t-shirts, sweaters, scarves, and other fabrics, with no consideration of the efficacy of such coverings.

9. As such, pursuant to the Acting Secretary of Health's Order dated August 31, 2021, our children are being forced to wear face coverings to school, with no way for us to determine whether such face coverings are actually safe for our child to wear.

10. We believe that the Acting Secretary of Health's Order dated August 31, 2021 mandating the use of face coverings by individuals entering into a school entity to be illegal for the reasons set forth herein.

11. To the extent that we have personal knowledge regarding any of the averments contained within the First Amended Petition for Review, we incorporated them by reference as if fully set forth herein.

VERIFICATION

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

9-30-2021
Date

Klint Neiman
Klint Neiman

9-30-2021
Date

Amanda Palmer
Amanda Palmer

A.iv

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, et al.,

Petitioners

v.

Acting Secretary of the Pennsylvania
Department of Health,

Respondents.

No. 294 M.D. 2021

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF BUTLER

ss.

AFFIDAVIT OF ADAM AND CHELSEA MCCLURE

1. Our names are Adam and Chelsea McClure. We reside at 329 South Home Avenue, Butler, PA 16001.
2. We have a son who is special needs and in the Second Grade in the Butler Area School District.
3. We do not believe that Pennsylvania's Acting Secretary of Health had the authority to issue her Order dated August 31, 2021 requiring the wearing of face coverings by any individual entering into a school entity.
4. As private citizens subjected to the Acting Secretary's Order, we were not given any opportunity to make comments on the Order prior to its issuance, and further were denied any opportunity to voice our concerns regarding the defects of Respondent's Order dated August 31, 2021.

5. We were denied any explanation by the Pennsylvania Department of Health stating why such an Order is necessary or how long the Order is to be in effect.

6. Moreover, we were denied any opportunity to provide input into the Acting Secretary of Health's Order due to the Acting Secretary of Health's failure to follow Pennsylvania's regulatory procedures.

7. The terms of the Order itself are deficient in that it fails to provide for any obligation requiring a student to provide a doctor's note to be exempted from the Order, leaving parents of students across the Commonwealth unsure of how to obtain an exemption to the Order.

8. Moreover, as private citizens as well as parents of a special needs student, we were not given any opportunity to be heard regarding our concerns of the use of a face coverings by special needs students and the impacts that such a requirement may have on a special needs student.

9. We believe that the Acting Secretary of Health's Order dated August 31, 2021 mandating the use of face coverings by individuals entering into a school entity to be illegal for the reasons set forth herein.

10. To the extent that we have personal knowledge regarding any of the averments contained within the First Amended Petition for Review, we incorporated them by reference as if fully set forth herein.

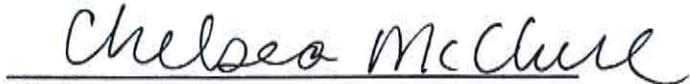
VERIFICATION

I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I declare, certify, verify, or state under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. Section 1746, relating to unsworn declarations under penalty of perjury.

9/30/21
Date


Adam McClure

9/30/21
Date


Chelsea McClure

C

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 35 P.S. Health and Safety (Refs & Annos)
Chapter 3. Prevention of Spread of Diseases (Refs & Annos)
Disease Prevention and Control Law of 1955 (Refs & Annos)

35 P.S. § 521.5

§ 521.5. Control measures

Currentness

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

Credits

1956, April 23, P.L. (1955) 1510, § 5.

35 P.S. § 521.5, PA ST 35 P.S. § 521.5

Current through 2021 Regular Session Act 70. Some statute sections may be more current, see credits for details.

D

West's Pennsylvania Administrative Code
Title 28. Health and Safety
Part III. Prevention of Diseases
Chapter 27. Communicable and Noncommunicable Diseases
Subchapter C. Quarantine and Isolation
General Provisions

28 Pa. Code § 27.60

§ 27.60. Disease control measures.

Currentness

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

(b) The Department and local health authority will determine the appropriate disease control measure based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection.

(c) If a local health authority is not an LMRO, it shall consult with and receive approval from the Department prior to taking any disease control measure.

Credits

Adopted Jan. 26, 2002.

Current through Pennsylvania Bulletin, Vol. 51, Num. 36, dated September 4, 2021. Some sections may be more current, see credits for details.

28 Pa. Code § 27.60, 28 PA ADC § 27.60

E

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 71 P.S. State Government
Part I. The Administrative Codes and Related Provisions
Chapter 2. The Administrative Code of 1929 (Refs & Annos)
Article XXI. Powers and Duties of the Department of Health and Its Departmental Administrative
and Advisory Boards (Refs & Annos)

71 P.S. § 532

§ 532. General health administration (Adm. Code § 2102)

Currentness

The Department of Health shall have the power, and its duty shall be:

- (a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease;
- (b) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hindrance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;
- (c) To order nuisances, detrimental to the public health, or the causes of disease and mortality, to be abated and removed, and to enforce quarantine regulations;
- (d) If the owner or occupant of any premises, whereon any nuisance detrimental to the public health exists, fails to comply with any order of the department for the abatement or removal thereof, to enter upon the premises, to which such order relates, and abate or remove such nuisance, as may now or hereafter be provided by law;
- (e) For the purpose of collecting or recovering the expense of the abatement or removal of a nuisance, to file a claim, or maintain an action, in such manner as may now or hereafter be provided by law, against the owner or occupant of the premises upon or from which such nuisance shall have been abated or removed by the department;
- (f) To revoke or modify any order, regulation, by-law, or ordinance, of a local board of health, concerning a matter which, in the judgment of the department, affects the public health beyond the territory over which such local board has jurisdiction;
- (g) To promulgate its rules and regulations;
- (h) Whenever, in the opinion of the department, conditions exist in any borough, or any township of the first class, within the Commonwealth, which constitute a menace to the lives and health of the people living outside the corporate limits of such

borough or township, or, after it be known to the department that any borough or any township of the first class is without an existing or efficient board of health, to enter and take full charge of and administer the health laws, regulations, and ordinances, of such borough or township, and to continue in charge thereof, until the department shall decide that a competent and efficient board of health has been appointed and qualified for such borough or township and is ready, able, and willing to assume and carry into effect the duties imposed upon it by law, and to collect all expenses incurred by the department in performing its duties hereunder, as may now or hereafter be provided by law;

(i) To take over the administration of the health laws in any such borough or township, at the expense of the department, whenever the borough or township shall request the department to do so, and the department shall deem it advisable to comply with such request;

(j) To prescribe standard requirements for the conduct of the medical inspection of the pupils of the public schools throughout the Commonwealth, and to appoint medical inspectors to make such school inspections, as may now or hereafter be provided by law;

(k) To investigate, hold hearings upon and determine any question of fact regarding the purity of water supplied to the public by any public utility over which the Pennsylvania Public Utility Commission has jurisdiction, whenever said commission shall certify such question to the department.

The findings of the department upon any such questions shall be incorporated in and made a part of the determination or decision of said commission of the controversy or other proceeding in connection with which the question arose and shall be binding upon the parties to such controversy or other proceeding unless either party shall take an appeal from the commission's determination or decision as may now or hereafter be provided by law.

(l) To train and make available appropriate facilities to train certain otherwise qualified State, county and municipal employes in the field of public health work, to become more familiar with, and therefore better understand, the various administrative and technical problems peculiar to public health services.

(m) To make a bacteriological examination and report of any sample of water sent by any person to the department's laboratory at Philadelphia or Pittsburgh. A fee of one dollar (\$1.00) shall be charged for the service rendered in making the examination and report.

(n) To designate the Health Care Policy Board to adjudicate appeals, in accordance with 2 Pa.C.S. (relating to administrative law and procedure), of decisions made under Chapters 7 and 8 of the act of July 19, 1979 (P.L. 130, No. 48),¹ known as the "Health Care Facilities Act." The department shall promulgate regulations establishing appeal procedures to be followed. Until such time as final regulations have been promulgated, procedures set forth in 37 Pa. Code Ch. 197 (relating to practice and procedure) and 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) shall be followed for these appeals.

Credits

1929, April 9, P.L. 177, art. XXI, § 2102. Amended 1941, July 18, P.L. 412, § 1; 1956, April 4, P.L. (1955) 1392, § 1; 1956, May 24, P.L. (1955) 1692, § 1; 1959, Aug. 25, P.L. 764, § 1; 1968, July 31, P.L. 769, No. 240, art. VI, § 609(8); 1996, Feb. 23, P.L. 27, No. 10, § 3, imd. effective.

Notes of Decisions (2)

Footnotes

¹ 35 P.S. §§ 448.701 et seq. (expired), 448.801 et seq.

71 P.S. § 532, PA ST 71 P.S. § 532

Current through 2021 Regular Session Act 70. Some statute sections may be more current, see credits for details.

End of Document

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F

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 71 P.S. State Government
Part I. The Administrative Codes and Related Provisions
Chapter 8. Provisions Similar or Closely Related to Provisions of the Administrative Code (Refs & Annos)
Secretary and Department of Health

71 P.S. § 1403

§ 1403. Duty to protect health of the people

Currentness

- (a) It shall be the duty of the Department of Health 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.
- (b) The Secretary of Health shall cause examination to be made of nuisances or questions affecting the security of life and health in any locality, and for that purpose the secretary, and any person authorized by him so to do, may, without fee or hindrance, enter, examine and survey all grounds, vehicles, apartments, buildings, and places within the State, and all persons so authorized by him shall have the powers and authority conferred by law upon constables.
- (c)(1) With the exception of the three State health centers selected for the review program established in paragraph (2), the department shall operate those public State health centers and provide at a minimum those public health services in effect as of July 1, 1995. Except as provided in paragraph (2), the department shall not enter into contracts with any additional private providers that would result in the elimination of any State health center nor reduce the scope of services currently provided nor reduce the number of centers.
- (2), (3) Expired Dec. 31, 1997, pursuant to [1996, July 2, P.L. 518, No. 87, § 4](#).
- (4) On or before December 31, 1997, the department shall submit a report to the General Assembly, which shall include, but not be limited to, the following:
- (i) A review and analysis of the three health care centers or of the provision of equivalent services in the review program, including patient utilization and services provided.
 - (ii) An analysis of the performance of each local health care provider, including patient satisfaction with the provision of services.
 - (iii) A review of other delivery systems for health services in the community, both public and private.
 - (iv) A comparison of the cost and effectiveness of the operation of each of the three health care centers by the Commonwealth with the cost of the provision of equivalent services by local health care providers.

(v) Recommendations regarding continuation of the provision of the services previously provided by the three health care centers included in the study program by local health care providers.

(vi) Recommendations regarding the public and private operation of all remaining health care centers or the provision of equivalent services in this Commonwealth.

(d) The department shall maintain and operate a State Public Health Laboratory that shall assure the availability of reliable clinical laboratory services and laboratory-based information that are needed by clinicians and other health providers for proper diagnosis and treatment, prevention of disease and promotion of the health of the citizens of this Commonwealth. The State Public Health Laboratory shall arrange for and perform clinical tests to identify diseases and provide epidemiological and surveillance support. The State Public Health Laboratory shall not contract with outside laboratories to perform testing in rabies, measles, rubella, Lyme disease, influenza and tuberculosis identification. The State Public Health Laboratory shall be administered and maintained in a manner in effect as of July 1, 1995.

(e) The department shall apportion this Commonwealth into dental health districts administered by a public health dentist within the department, who shall implement dental health policies and programs for the various counties and political subdivisions within this Commonwealth.

Credits

1905, April 27, P.L. 312, § 8. Amended 1996, July 2, P.L. 518, No. 87, § 2, imd. effective.

Notes of Decisions (3)

71 P.S. § 1403, PA ST 71 P.S. § 1403

Current through 2021 Regular Session Act 70. Some statute sections may be more current, see credits for details.

G

KATHY L. RAPP, MEMBER
65TH LEGISLATIVE DISTRICT

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House of Representatives
Commonwealth of Pennsylvania
Harrisburg

COMMITTEES
HEALTH, MAJORITY CHAIR
ENVIRONMENTAL RESOURCES & ENERGY

PRO-LIFE CAUCUS CO-CHAIR

APPOINTMENTS
HARDWOODS DEVELOPMENT COUNCIL

klrapp@pnhousegop.com
RepRapp.com

September 14, 2021

HAND DELIVERED

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

Dear Chairman DeLiberato:

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

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

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

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

¹ 71 P.S. § 745.7a.

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

³ 71 P.S. § 745.7a.

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

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

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

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

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

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

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

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

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

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

⁵ *Id.* at § 2.

⁶ *Id.* at § 3.

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

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

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

¹⁰ Answers to FAQs, Dept. of Education,

[https://www.education.pa.gov/Schools/safe-schools/emergencyplanning/COVID-](https://www.education.pa.gov/Schools/safe-schools/emergencyplanning/COVID-19/SchoolReopeningGuidance/ReopeningPreKto12/MaskingOrder/Pages/FAQs.aspx)

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

Vincent C. DeLiberato, Jr.
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September 14, 2021

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

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

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

Only when an agency’s substantive regulations are properly enacted under the Commonwealth Documents Law, do they have the force and effect of law.¹⁶ Under the Commonwealth Documents Law and the Regulatory Review Act, a “regulation” is defined as “any rule or regulation, *or order in the nature of a rule or regulation*, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency.”¹⁷

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

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

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

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

¹⁴ 71 P.S. § 745.3.

¹⁵ 71 P.S. § 745.2.

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

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

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

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

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

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

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

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

1. Plain Language

The Department's Order is straight-forward: "Each teacher, child/student, staff, or visitor working, attending or visiting a School Entity *shall* wear a face covering indoors, regardless of vaccination status, except as set forth in section 3 [of the order]."²¹

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

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

¹⁹ See id. at 349-350.

²⁰ Eastwood Nursing, 910 A.2d at 144.

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

²² Id.

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

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

2. Implementation

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

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

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

3. Department’s Discretion

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

²³ *Id.* at § 3.

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

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

²⁶ 71 P.S. § 532 and § 1403.

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

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

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

Respectfully,

Kathy L. Rapp, Chair
House Health Committee

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

H

K-12 School
COVID-19
Self-Report Form

Instructions: To be completed upon notification of a confirmed case of COVID-19 in a student, staff member, or employee of the school district:

1. Please complete the following information and forward it to RA-DHK12Epi@pa.gov.
2. Please fill out a separate document for each positive case.
 - If you have 3 cases to report, the form below will need to be filled out 3 separate times, though all can be submitted in the same email
3. Please include the district/school/building name in the subject of your email.

Once we review the information below, we will contact you with interim guidance.

POINT OF CONTACT INFORMATION

School District	
County	
Building Affected (School Name/Address)	
Name and Position	
Phone* and Email	

CASE INFORMATION

Name	
Date of Birth	
Home Address	
Phone Number**	
Does this person have a positive test result?	Choose an item.
If no or unknown, did they have exposure to someone with COVID-19?	Choose an item.
Symptom Onset Date	
List Symptoms, if Yes above	
Last Date at school or school sponsored event	
Date of Test Collection	Click or tap to enter a date.
Student or Staff: If student, specify grade: If staff, specify position:	Student Choose an item. Choose an item.
District Transportation (if yes, list type)	<small>List Transportation Type</small> Choose an item.
Extracurriculars (if yes, list type)	<small>List Extracurricular Activity</small> Choose an item.

Close Contacts*** (if yes, list number)	Enter Number of Close Contacts Choose an item.
Special Circumstances (special education, school closure, siblings, etc.) or additional questions	
Do you need return dates for case and/or close contacts?	Choose an item.
Do you need additional Epidemiology Consultation (i.e., identifying close contacts, determining school closure)?	

CASE INFORMATION

*Please note that the DOH hours of operation extend outside normal operating hours for schools therefore it's crucial to provide a phone number that can be reached at all hours of the day.

**If a student, please provide the phone number for the appropriate family member or legal guardian.

***If you have a line-list completed, please include it when submitting this form to the K-12 School Epidemiology email account. For more information on Close Contacts please review PA HAN [533](#) and [583](#).

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

STIPULATION

The parties, through their undersigned counsel, hereby stipulate to the following:

1. Petitioners filed a Petition for Review on September 3, 2021.
2. Petitioners were granted leave to file an Amended Petition for Review on September 27, 2021, and the Amended Petition was docketed the same day.
3. The parties have agreed to proceed with expedited cross-applications for summary relief. *See September 13, 2021 and September 27, 2021 Orders.*
4. Pursuant to Pa.R.A.P. 1516(b), Respondent's pleading in response to the Petition for Review is due within 30 days of service.
5. In the interests of efficiency, both for the parties and the Court, the parties jointly stipulate that Respondent's deadline to file a pleading in response to

the Amended Petition for Review, if any pleading is needed, be stayed until 14 days after the Court resolves the cross-applications for summary relief.

Respectfully submitted,

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COULTER & GRAHAM, L.L.P.

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Counsel for Respondent

Dated: October 4, 2021

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

**RESPONDENT’S ANSWER TO PETITIONERS’
APPLICATION FOR SUMMARY RELIEF**

Respondent, Acting Secretary of the Pennsylvania Department of Health, Alison Beam (hereinafter “the Secretary”), through her undersigned counsel, pursuant to this Court’s September 13, 2021, Order, responds to Petitioners’ Application for Summary Relief as follows:

1. It is admitted only that on August 31, 2021, the Secretary issued and order titled *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities* (hereinafter “the Order”). It is denied that the Order mischaracterizes the Secretary’s authority. By way of further response, the averments refer to a written document that speaks for itself and any characterization thereof is denied.

2. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

3. It is admitted that the terms “alternative to a face covering”, “face covering”, and “school entity” are not defined in the Disease Prevention and Control Law of 1955 (hereinafter “DPCL”) or the Department of Health’s (hereinafter “the Department”) regulations. By way of further response, the averments of this paragraph refer to written documents that speak for themselves and any characterization thereof is denied.

4. Denied. By way of further response, the Secretary was not required to follow the regulatory review process because the Department had existing regulations.

5. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

6. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

7. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied. By way of further response, Respondent’s authority is derived from The Disease Prevention and Control Law, 35 P.S. § 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health’s regulation at 28 Pa. Code § 27.60 (relating to disease control measures).

8. The averments of this paragraph refer to written documents that speak for themselves and any characterization thereof is denied.

9. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, Section 532 lists 14 duties of the Department, one of which is to promulgate its rules and regulations, which it has done. Additionally, the averments refer to a written document that speaks for itself and any characterization thereof is denied

10. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

11. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

12. The averments of this paragraph constitute a conclusion of law to which no response is required. By way of further response, to the extent this Court determines the language at issue is ambiguous, the Department is entitled to strong deference. *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

13. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, see 28 Pa. Code § 27.60(a)-(b).

14. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

15. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

16. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

17. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, to the extent this Court determines the language at issue is ambiguous, the Department is entitled to strong deference. *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

18. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the Order is a written document that speaks for itself and any characterization thereof is denied.

19. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the Order applies to all individuals within a school entity, some of whom may be infected with COVID-19 but asymptomatic yet

still able to transmit the virus. To the extent an infected individual is present within a school entity, others present within the school may be “contacts of a person ... with a communicable disease or infection” who are subject to “surveillance, segregation, quarantine, or modified quarantine.” The Regulations define “modified quarantine” as “[a] selected, partial imitation of freedom of movement determined on the basis of differences in susceptibility or danger of disease transmission which is designated to meet particular situations.” 28 Pa. Code. § 27.1. Further, the Order is a written document that speaks for itself and any characterization thereof is denied.

20. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

21. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

22. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

23. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, to the extent this Court determines the language at issue is ambiguous, the Department is entitled to strong deference. *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

24. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied.

25. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

26. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied.

27. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied.

28. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied. By way of further response, Paragraph (a) of the Regulation refers to “contacts of a person ... with a communicable disease or infection.” 28 Pa. Code § 27.60(a).

29. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, to the extent any individual located within a school entity is infected with COVID-19 they may be considered a “patient.”

30. Denied. By way of further response, an individual can be infected with COVID-19, capable of transmitting the virus to others, and be either symptomatic or asymptomatic.

31. Denied as stated.

32. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

33. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

34. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

35. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied. By way of further response, the letter of the House of Representatives Health Committee is not dispositive of the issue before this Court. Indeed, the chair of the Joint Committee on Documents has recognized that any decision of the Joint Committee on Documents is appealable to this Court.¹

36. Denied as stated. By way of further response, the Order does not impose any contact tracing requirements and that issue is not relevant to the two

¹ Pa. House panel seeks ruling on health secretary's authority to issue school mask order," PennLive, <https://www.pennlive.com/news/2021/09/pa-house-panel-seeks-ruling-on-health-secretarys-authority-to-issue-school-mask-order.html> (last visited 9/18/2021).

legal issues presently before the Court. Moreover, Petitioners' reliance on factual declarations is not appropriate as part of the resolution of the pending Applications. Petitioners have admitted the issues currently before the Court are purely legal in nature and there are no facts in dispute. *Petitioner's Application for Summary Relief*, ¶ 42. *See also, September 27, 2021, Order.* As such, the declarations should be disregarded.

37. The averments of this paragraph refer to a written law that speaks for itself and any characterization thereof is denied.

38. The Secretary incorporates her responses to Paragraphs 1 through 37 as though set forth at length herein.

39. The averments of this paragraph refer to a written rule that speaks for itself and any characterization thereof is denied.

40. Admitted.

41. The averments of this paragraph constitute conclusions of law to which no response is required.

42. It is admitted only that there are no material facts in dispute. The remaining averments constitute conclusions of law to which no response is required. It is denied that the Order was issued without legal authority or in violation of the law.

43. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature, they are denied. It is specifically denied that Petitioners have established a right to judgment.

44. Denied.

45. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

46. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

47. Denied.

48. Denied.

49. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

50. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

51. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

52. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied. By way of further response, Respondent's authority is derived from The Disease Prevention and Control Law, 35 P.S. § 521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. § 532(a); and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures).

53. The averments of this paragraph refer to written documents that speak for themselves and any characterization thereof is denied.

54. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, Section 532 lists 14 duties of the Department, one of which is to promulgate its rules and regulations, which it has done. Additionally, the averments refer to a written document that speaks for itself and any characterization thereof is denied.

55. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

56. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

57. The averments of this paragraph constitute a conclusion of law to which no response is required. To the extent they are factual in nature they are denied. By way of further response, to the extent this Court determines the language at issue is ambiguous, the Department is entitled to strong deference. *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

58. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, see 28 Pa. Code § 27.60(a)-(b).

59. Denied.

60. The averments of this paragraph state the legal position of the Petitioners to which no response is required. To the extent a response is required, the averments are denied.

61. It is denied that the Attorney General agrees with Petitioners. By way of further response, the averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

62. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

63. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

64. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

65. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

66. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, to the extent this Court determines the language at issue is ambiguous, the Department is entitled to strong deference. *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

67. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the Order is a written document that speaks for itself and any characterization thereof is denied.

68. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the Order applies to all individuals within a

school entity, some of whom may be infected with COVID-19 but asymptomatic yet still able to transmit the virus. To the extent an infected individual is present within a school entity, others present within the school may be “contacts of a person ... with a communicable disease or infection” who are subject to “surveillance, segregation, quarantine, or modified quarantine.” The Regulations define “modified quarantine” as “[a] selected, partial imitation of freedom of movement determined on the basis of differences in susceptibility or danger of disease transmission which is designated to meet particular situations.” 28 Pa. Code. § 27.1. Further, the Order is a written document that speaks for itself and any characterization thereof is denied.

69. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

70. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

71. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

72. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, to the extent this Court determines the language at issue is ambiguous, the Department is entitled to strong

deference. *Bethenergy Mines Inc. v. Com., Dept. of Env't Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996).

73. Denied.

74. Denied as stated. Respondent's position is clearly set forth in its Application for Summary Relief and supporting brief.

75. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

76. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

77. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied.

78. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual, they are denied.

79. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

80. It is admitted only that the Order mandates the wearing of face coverings in school entities. The remaining averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature, they are denied.

81. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual, they are denied.

82. Denied as stated.

83. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied.

84. The averments of this paragraph refer to a written regulation that speaks for itself and any characterization thereof is denied.

85. Denied as stated. By way of further response, the Order applies to all individuals within a school entity, some of whom may be infected with COVID-19 but asymptomatic yet still able to transmit the virus.

86. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, to the extent any individual located within a school entity is infected with COVID-19 they may be considered a “patient.”

87. Denied. By way of further response, an individual can be infected with COVID-19, capable of transmitting the virus to others, and be either symptomatic or asymptomatic.

88. Denied as stated.

89. Denied. By way of further response, an individual can be infected with COVID-19, capable of transmitting the virus to others, and be either symptomatic or asymptomatic.

90. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

91. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

92. Denied. By way of further response, *see* 28 Pa. Code § 27.60(a)-(b).

93. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

94. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

95. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the Order is a written document that speaks for itself and any characterization thereof is denied.

96. It is admitted that the terms “alternative to a face covering”, “face covering”, and “school entity” are not defined in the Disease Prevention and Control Law of 1955 (hereinafter “DPCL”) or the Department of Health’s (hereinafter “the Department”) regulations. By way of further response, the averments of this paragraph refer to written documents that speak for themselves and any characterization thereof is denied.

97. Denied. By way of further response, the Secretary was not required to promulgate additional regulations because the Department had existing regulations.

98. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

99. Denied as stated. It is admitted that the Order applies to all individuals within a school entity, some of whom may be infected with COVID-19 but asymptomatic yet still able to transmit the virus. For this reason, the disease control measure is only effective if it applies to everyone who does not meet a defined exception.

100. Denied.

101. Denied.

102. The averments of this paragraph refer to a written document that speaks for itself a written document that speaks for itself and any characterization thereof is denied.

103. Denied as stated. It is admitted only that, outside of school entities, individuals covered by the Order may interact without masks in locations that do not require face coverings. By way of further response, school entities are unique in that hundreds, if not thousands, of individuals—many of whom are not eligible for vaccines and some of whom are immunocompromised—are in close contact for an extended period of time each day. Mask wearing protects the entire school community.

104. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

105. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

106. Denied as stated.

107. The Order is a written document that speaks for itself and any characterization thereof is denied.

108. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

109. The Order is a written document that speaks for itself and any characterization thereof is denied.

110. It is admitted that the Order was not subject to the regulatory review process because the law did not require it was issued pursuant to existing Department regulations. The remaining averments of this paragraph are denied.

111. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

112. It is admitted that the Secretary relies on the regulation codified at 28 Pa. Code § 27.60 as a source of her authority in conjunction with the DPCL and the Administrative Code of 1929.

113. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

114. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

115. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

116. Denied as stated. By way of further response, the Secretary's position is fully set forth in her Application for Summary Relief and supporting brief.

117. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

118. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

119. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

120. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

121. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

122. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

123. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

124. The averments of this paragraph refer to a written decision that speaks for itself and any characterization thereof is denied.

125. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

126. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

127. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

128. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

129. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

130. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

131. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

132. Admitted. By way of further response, the Order was not required to go through the regulatory review process as it was entered pursuant to existing Department regulations.

133. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

134. Denied as stated. By way of further response, the letter of the House of Representatives Health Committee is not dispositive of the issue before this Court.

135. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

136. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied. By way of further response, the pending petition of the House of Representatives Health Committee is not dispositive of the issue before this Court.

137. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied. By way of further response, the letter of the House of Representatives Health Committee is not dispositive of the issue before this Court.

138. The averments of this paragraph refer to written documents that speak for themselves and any characterization thereof is denied. By way of further

response, the letter of the House of Representatives Health Committee is not dispositive of the issue before this Court.

139. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

140. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

141. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

142. Denied as stated. By way of further response, the Secretary derives her authority from the DPCL, the Administrative Code of 1929, and the Department's regulations.

143. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

144. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

145. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

146. The averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied. By way of further response, the letter of the House of Representatives Health Committee is not dispositive of the issue before this Court.

147. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

148. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

149. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

150. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

151. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

152. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

153. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

154. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

155. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

156. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to written opinions that speak for themselves and any characterization thereof is denied.

157. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to written opinions that speak for themselves and any characterization thereof is denied.

158. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to written opinions that speak for themselves and any characterization thereof is denied.

159. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

160. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

161. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to written opinions that speak for themselves and any characterization thereof is denied.

162. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

163. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

164. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied. By way of further response, the averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

165. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

166. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

167. The averments of this paragraph refer to written opinions that speak for themselves and any characterization thereof is denied.

168. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

169. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

170. The averments of this paragraph refer to a written opinion that speaks for itself and any characterization thereof is denied.

171. Denied as stated. By way of further response, the Secretary had legal authority to enter the Order.

172. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

173. The averments of this paragraph refer to a written statute that speaks for itself and any characterization thereof is denied.

174. Denied as stated. By way of further response, the averments of this paragraph refer to a written document that speaks for itself and any characterization thereof is denied.

175. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

176. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

177. Denied as stated. By way of further response, individuals who have been infected with COVID-19 are not immune from contracting the virus again.

178. The Order is a written document that speaks for itself and any characterization thereof is denied.

179. It is admitted only that the Order does not contain an express exemption for religious reasons. By way of further response, the averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

180. Denied.

181. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

182. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

183. It is admitted that 35 P.S. § 521.5 does not require the Department to submit disease control measures to the regulatory review process.

184. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent the averments are factual in nature they are denied.

185. It is admitted that there is no dispute of material fact. It is denied that Petitioners have a right to relief.

186. This is an incorporation response to which no response is required.

187. No response is required. By way of further response, the Secretary maintains that the affidavits attached to Petitioners' Application for Summary Relief should be disregarded as Petitioners have admitted the issues currently before the Court are purely legal in nature and there are no facts in dispute. *Petitioner's Application for Summary Relief*, ¶ 42. *See also, September 27, 2021, Order.*

WHEREFORE, Acting Secretary of the Department of Health, Alison Beam, respectfully requests that this Honorable Court deny Petitioners' Application for Summary Relief and dismiss the First Amended Petition for Review with prejudice.

Respectfully submitted,

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Attorney General

KELI M. NEARY
Executive Deputy Attorney General
Civil Law Division

By: /s/ Karen M. Romano
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DATE: October 7, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**PETITIONERS' RESPONSE TO RESPONDENT'S APPLICATION
FOR SUMMARY RELIEF**

AND NOW, come Petitioners, by and through their undersigned legal counsel, to file the within Response to Respondent's Application for Summary Relief pursuant to Pa. R.A.P. 1532(b), stating in support thereof as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted in part. It is admitted that Petitioners are asserting that

Respondent's Order was issued in violation of the Regulatory Review Act.

By way of further response, Petitioners are further asserting that Respondent's Order is in violation of the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, et. seq, et. al. By way of further response, Petitioners are further asserting that if The Disease Prevention and Control Law, 35, P.S. §521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. §532(a); and the Department of Health's Regulation 27.60 – Control Measures, 28 Pa. Code §27.60, are interpreted to provide the Respondent with the authority to issue her Order, as asserted by the Respondent, then such statutory and regulatory authority violates the Non-delegation Doctrine because the Respondent would have unfettered discretion to implement disease control measures.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

**THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY
OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING
FACE COVERINGS IN SCHOOL ENTITIES” DOES NOT
CONSTITUTE A RULE OR REGULATION SUBJECT TO THE
PROVISIONS OF THE REGULATORY REVIEW ACT**

12. Denied. Petitioners deny that the Respondent had the authority to issue her Order under or pursuant to The Disease Prevention and Control Law, the Administrative Code of 1929, or the Department’s regulations. By way of further response, with the passage of the Disease Prevention and Control Law of 1955, the General Assembly first made a policy decision to identify the Department of Health as the agency responsible for health related issues with the Commonwealth; and, secondly, the General Assembly included within the Disease Prevention and Control Law standards to guide and restrain the exercise of administrative functions delegated to the Department of Health. *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 652, 161 A. 3d. 827, 834 (2017); also see *Ala. Assoc. of Realtors v. Dep’t of Health and Hum. Servs.*, -- S.Ct. --, 2021 WL 3783142 (2021)

13. Denied. Petitioners deny that the Respondent is entitled to any deference, let alone “strong deference.” By way of further response, the Respondent’s reliance upon *Bethenergy* is misplaced. With respect to the

Respondent's "strong deference" assertion, the Bethenergy Court stated in relevant part as follows:

"Under the 'strong deference' standard, if we determine that the intent of the legislature is clear, that is the end of the matter and we, as well as the agency, must give effect to the unambiguously expressed intent of the legislature. If, however, we determine that the precise question at issue has not been addressed by the legislature, we are not to impose our own construction on the statute as would be necessary in the absence of an administrative interpretation, but review the agency's construction of the statute to determine whether that construction is permissible. *Pennsylvania Electric Company v. Pennsylvania Public Utility Company*. We must give deference to the interpretation of the legislative intent of a statute made by an administrative agency only where the language of that statute is not explicit or ambiguous. 1 Pa.C.S. § 1921(c)(8)." *Bethenergy Mines Inc. v. Com., Dept. of Environmental Protection*, 676 A.2d 711, 715 (1996); citing *Pennsylvania Electric Company v. PPUC*, 166 PaCmwlth, 413, 648 A.2d 63 (1994), petition for allowance of appeal denied, 542 Pa. 680, 668, A.2d 1141 (1995). Also, see add supreme court citation.

14. Denied. The Respondent's interpretation of section 521.5 is denied as an incorrect interpretation and conclusion of law. By way of further response, the language of section 521.5 is clear and unambiguous in that it expressly restrains the Respondent's exercise of its administrative functions.

15. Denied. The Respondent's interpretation of sections 532(a) and 1403(a), 71 P.S. §532(a), 71 P.S. §1403(a), of the Administrative Code of 1929 is denied as an incorrect interpretation and conclusion of law. By way

of further response, if sections 532(a) and 1403(a) Administrative Code of 1929, are interpreted to provide the Respondent with the authority to issue her Order, as asserted by the Respondent, then such sections directly violate Section 521.5 of the Disease Prevention and Control Law of 1955, and the Non-delegation Doctrine because the Respondent would have unfettered discretion to implement disease control measures.

16. Denied. The Respondent's interpretation of sections 532(a) and 1403(a), 71 P.S. §532(a), 71 P.S. §1403(a), of the Administrative Code of 1929 is denied as an incorrect interpretation and conclusion of law. By way of further response, the exercise of the Respondent's statutory and regulatory authority must, at all times, be in accordance with applicable law, including, but not limited to, The Disease Prevention and Control Law of 1995, the Regulatory Review Act, the Non-Delegation Doctrine, and the regulations approved by the Department of Health in accordance with the Regulatory Review Act. The Respondent's Order violates all of the above.

17. Denied. The Petitioners deny the averments contained in Paragraph 17 of Respondent's Application for Summary Relief, as stated. By way of further response, Regulation 27.60 was promulgated in accordance with applicable law, including, but not limited to, The Disease

Prevention and Control Law, 35 P.S. §521.1, et. seq, et. al., and the Regulatory Review Act, 71 P.S. § 745.1, et seq., at al.

18. Denied. The Respondent's interpretation of Paragraph (b) of Regulation 27.60 is denied, as stated. By way of further response, pursuant to section 521.5 – Control measures, 35 P.S. §521.5, the disease must be a disease "which is subject to isolation, quarantine, or any other control measure ..."; and then, and only then, does the Respondent have the authority to "*carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.*" By way of further response, the Respondent's authority is limited to the selection of one or more control measures that are contained within existing regulations. The Respondent does not have the unfettered authority to create a new control measure outside of the regulatory review process.

19. Denied. The Respondent's interpretation of Regulation 27.60 is denied as an incorrect interpretation and conclusion of law. By way of further response, Petitioners believe that the language of Regulation 27.60 is clear and unambiguous and that it does not provide the Respondent with the authority to issue her Order. However, if the Respondent's interpretation of Regulation 27.60 is considered a reasonable interpretation, such a conclusion would establish the language of Regulation 27.60 to be

ambiguous and open to differing interpretations. If the regulation's language is ambiguous, the agency that promulgated and approved the ambiguous regulation, the Department of Health in this case, does not have the authority to interpret its own ambiguous language or regulation.

20. Denied. The IRRC's comments speak for themselves. By way of further response, to the extent that Respondent interpretation of those comments is intended as a legal basis for the Respondent's Order, the same are denied. By way of further response, the IRRC does not possess the authority to grant the Respondent unfettered discretion to implement disease control measures.

21. Denied. The Respondent's interpretation of the IRRC's comments are denied. By way of further response, to the extent that Respondent interpretation of those comments is intended as a legal basis for the Respondent's Order, the same are denied. By way of further response, the IRRC does not possess the authority to grant the Respondent unfettered discretion to implement disease control measures.

22. Admitted.

23. Denied. The existing regulations do not provide the Respondent with the authority to issue her Order. By way of further response, it is admitted that the Disease Prevention and Control Law provides the

Department of Health with the authority to promulgate regulations in accordance with applicable law, including, but not limited to, The Disease Prevention and Control Law of 1995, the Regulatory Review Act, the Non-Delegation Doctrine, and the Regulatory Review Act. By way of further response, there is no existing regulation, including Regulation 27.60 that provides the Respondent with any authority to issue her Order.

24. The averments contained in Paragraph 24 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied.

25. The averments contained in Paragraph 25 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied.

26. The averments contained in Paragraph 26 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied.

27. Admitted.

28. Denied. For all of the reasons previously stated herein, which are incorporated herein by reference, Petitioners deny the averments contained in Paragraph 28 Respondent's Application for Summary Relief.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an Order denying Respondent's Application for Summary Relief and any other relief the Court deems appropriate.

THE AUGUST 31, 2021 "ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES" DOES NOT VIOLATE THE PRINCIPLES GOVERNING THE DELEGATION OF ADMINISTRATIVE AUTHORITY

29. Admitted.

30. Admitted.

31. Admitted.

32. Admitted. The Respondent correctly quotes part of the *Gilligan* decision. By way of further response, the *Gilligan* as follows:

"In evaluating the standards implicit in this mandate, we are not unmindful of the admonition in *Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division*, 476 Pa. 302, 310, 382 A.2d 731, 735 (1978): The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined." *Gilligan at 96-97*.

33. Admitted in part. It is admitted that with the passage of the Disease Prevention and Control Law of 1955, the General Assembly first made a policy decision to identify the Department of Health as the agency responsible for health related issues within the Commonwealth; and, secondly, the General Assembly included within the Disease Prevention and Control Law standards to guide and restrain the exercise of administrative functions delegated to the Department of Health. *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 652, 161 A. 3d. 827, 834 (2017); also see *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, -- S.Ct. -- , 2021 WL 3783142 (2021).

34. Denied. The Respondent's interpretation of section 521.5 – Control Measures, 35 P.S. §521.5, is an incorrect interpretation and conclusion of law. By way of further response, the disease must be a disease “which is subject to isolation, quarantine, or any other control measure ...”; and then, and only then, does the Respondent have the authority to “*carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.*” By way of further response, the Respondent's authority is limited to the selection of one or more control measures that are contained within existing regulations. The

Respondent does not have the unfettered authority to create a new control measure outside of the regulatory review process.

35. Denied. The averments contained in Paragraph 35 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

36. Denied. The averments contained in Paragraph 36 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

37. Denied. To the extent that the averments contained in Paragraph 37 of Respondent's Application for Summary Relief are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth. By way of further response, the Respondent's reliance upon *Gilligan* is misplaced. The *Gilligan* court clearly states as follows:

“In evaluating the standards implicit in this mandate, we are not unmindful of the admonition in *Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division*, 476 Pa. 302, 310, 382 A.2d 731, 735 (1978): The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined.” *Gilligan at 96-97*.

38. Denied. To the extent that the averments contained in Paragraph 38 of Respondent’s Application for Summary Relief are intended to set forth a legal basis for the Respondent’s Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

39. Denied. To the extent that the averments contained in Paragraph 39 of Respondent’s Application for Summary Relief are intended to set forth a legal basis for the Respondent’s Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

40. Denied. To the extent that the averments contained in Paragraph 40 of Respondent’s Application for Summary Relief are intended to set forth a legal basis for the Respondent’s Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

41. Admitted in part and denied in part. It is admitted that the Respondent's responses to a communicable disease are limited to those provided for under existing rules or regulations. By way of further response, to the extent that the averments contained in Paragraph 41 of Respondent's Application for Summary Relief are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

42. Denied. To the extent that the averments contained in Paragraph 42 of Respondent's Application for Summary Relief are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an Order denying Respondent's Application for Summary Relief and any other relief the Court deems appropriate.

Respectfully submitted,

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

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Counsel for Petitioners and *Special
Counsel to the Amistad Project of
the Thomas More Society.*

CERTIFICATE OF COUNSEL

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

/s/ Thomas E. Breth
Thomas E. Breth, Esquire
*Counsel for Petitioners and Special
Counsel to the Amistad Project of
the Thomas More Society.*

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

**RESPONDENTS' APPLICATION FOR RELIEF IN THE NATURE OF A
MOTION FOR LEAVE
TO SUPPLEMENT THE RECORD**

Respondent, Acting Secretary of the Pennsylvania Department of Health, Alison Beam, through her counsel, pursuant to Pennsylvania Rules of Appellate Procedure 123 and 2501(a), hereby moves to supplement the record with the October 21, 2021, Order of the Joint Committee on Documents, and in support thereof, avers as follows:

1. Petitioners' commenced this action on September 3, 2021.
2. Per stipulation, the parties filed cross applications for summary relief on September 30, 2021.
3. Oral argument on the cross applications for summary relief was held on October 20, 2021.

4. One of the key issues before this Court is whether the Acting Secretary of Health had authority to issue the August 31, 2021, *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities* (hereinafter “the Order”) or whether she was required to promulgate a regulation.

5. The Regulatory Review Act establishes that, if a legislative committee suggests that a published document should be promulgated as a regulation, “[t]he Joint Committee on Documents shall determine whether the document should be promulgated as a regulation.” 71 P.S. § 745.7a.

6. On September 14, 2021, the Health Committee of the Pennsylvania House of Representatives sent a letter to the Joint Committee on Documents “to request a determination, pursuant to section 7.1 of the Regulatory Review Act, that [the Order], should be promulgated as a regulation.” *See Petitioners’ Brief* at Exhibit 1.

7. On October 21, 2021, the Joint Committee on Documents issued an Order in favor of the Department of Health determining that the Secretary was not required to promulgate a regulation. The Committee stated:

While the Acting Secretary of Health’s order imposes a legal requirement to wear face coverings in schools and other locations identified in the order, Acting Secretary Beam issued the order under existing statutory and regulatory authority. The department’s regulatory authority to bypass the rulemaking process in issuing the

order is authorized by 28 Pa. Code § 27.60 (October 2021); section 2102(a) of the Administrative Code of 1929, as enacted April 9, 1929 (P.L.177, 278, NO.175), 71 P.S. § 532(a) (2012); section 8(a) of the Department of Health, Creation, as amended July 2, 1996 (P.L. 518, 519, No.87), 71 P.S. § 1403(a) (2012); and section 2106 of the Administrative Code of 1929, as enacted April 9, 1929 (P.L.177, 281, No.175), 71 P.S. § 536 (2012).

Exhibit A.¹

8. The Joint Committee on Documents, reading the statutes and existing regulations *in pari materia*, as they must be, determined that the Secretary was authorized to issue the order under already existing law and that the order is not a new regulation. That determination is directly relevant to the question pending before this Court and should be made part of the record and considered for its persuasive value.

9. The contents of this Application have been disclosed to Petitioners' counsel and they do not concur in the filing.

WHEREFORE, Respondent respectfully requests that this Court grant leave to supplement the record and docket the October 21, 2021, Order of the Joint Committee on Documents (attached hereto as Exhibit A) as Exhibit A to Respondent's Application for Summary Relief.

¹ The Health Committee has voted to appeal this decision. https://www.dailyitem.com/news/pa-house-panel-votes-to-take-health-secretary-to-court-over-school-mask-order/article_fe501dd6-a611-5eba-9148-593268ebc286.html

Respectfully submitted,

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Attorney General

KELI M. NEARY
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DATE: October 27, 2021

**COMMONWEALTH OF
PENNSYLVANIA**



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ORDER

In Favor of

Respondent Department of Health

Pursuant to section 7.1 of the Regulatory Review Act, as amended June 25, 1997 (P.L.252, 273, No.24), 71 P.S. § 745.7a (2012), the Joint Committee on Documents finds the following:

1. Findings.

The Health Committee of the House of Representatives petitioned the Joint Committee on Documents to determine whether the Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities, issued August 31, 2021, should be promulgated as a regulation. A legislative standing committee may challenge an agency's unpromulgated order under section 7.1 of the Regulatory Review Act, as amended June 25, 1997 (P.L.252, 273, No.24), 71 P.S. 745.7a (2012).

The order is an instrument issued by the department under the authority of the Commonwealth and is, therefore, a document for the purposes of Pennsylvania's laws governing Commonwealth documents. Def. of "document," section 102 of the Commonwealth Documents Law, as amended July 9, 1970 (P.L.477, 477, No.162), 45 P.S. § 1102 (2012); see also 1 Pa. Code § 1.4 (October 2021). 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. of "regulation," section 3 of the Regulatory Review Act, as amended June 25, 1997 (P.L.252, 254, No.24), 71 P.S. § 745.3 (2021 P.P.); 1 Pa. Code § 1.4 (October 2021). As a substantive rule issued under an agency's statutory authority, a regulation must be promulgated in accordance with the Commonwealth Documents

Law. Def. of "regulation," section 3 of the Regulatory Review Act, as amended June 25, 1997 (P.L.252, 254, No.24), 71 P.S. § 745.3 (2012); see also Article II of the Commonwealth Documents Law, as amended July 9, 1970 (P.L.477, 477-78, No.162), 45 P.S. § 1201 et seq. (2012).

2. Determination.

Based on the record, the Joint Committee on Documents, by a vote of seven to four¹, finds that the petitioner has failed to show that the Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities, issued August 31, 2021, should be promulgated as a regulation.

While the Acting Secretary of Health's order imposes a legal requirement to wear face coverings in schools and other locations identified in the order, Acting Secretary Beam issued the order under existing statutory and regulatory authority. The department's regulatory authority to bypass the rulemaking process in issuing the order is authorized by 28 Pa. Code § 27.60 (October 2021); section 2102(a) of the Administrative Code of 1929, as enacted April 9, 1929 (P.L.177, 278, No.175), 71 P.S. § 532(a) (2012); section 8(a) of the Department of Health, Creation, as amended July 2, 1996 (P.L.518, 519, No.87), 71 P.S. § 1403(a) (2012); and section 2106 of the Administrative Code

¹The following members voted that the order should be promulgated as a regulation:

Crystal Clark on behalf of President Pro Tempore Corman
Speaker of the House of Representatives Cutler
Director of the Legislative Reference Bureau DeLiberato
Director of the Code and Bulletin Mendelsohn

The following members voted that the order need not be promulgated as a regulation:

C.J. Hafner on behalf of Senate Democratic Leader Costa
Michael Schwoyer on behalf of House Democratic Leader McClinton
Amy Elliott on behalf of Attorney General Shapiro
Shawn Smith on behalf of Secretary Topper
Jennifer Whare on behalf of General Counsel Schwab
Lauren Orazi
Ronald Tomasko

of 1929, as enacted April 9, 1929 (P.L.177, 281, No.175),
71 P.S. § 536 (2012).

BY THE JOINT COMMITTEE ON DOCUMENTS:



VINCENT C. DELIBERATO, Jr.
Chairperson, Joint Committee on Documents
Legislative Reference Bureau

Dated: October 21, 2021

cc: Representative Kathy L. Rapp, Majority Chairperson, House
Health Committee
Representative Dan Frankel, Minority Chairperson, House
Health Committee
Alison Beam, Acting Secretary, Pennsylvania Department of
Health

Supplement the Record” (Application), which the Court will treat as a post-submission communication under Pa.R.A.P. 2501(a), the Application is GRANTED. The Prothonotary is directed to docket the October 21, 2021, Order of the Joint Committee on Documents, attached to the Application as Exhibit A, as an addendum to Respondent’s Application for Summary Relief.

Order Exit
10/29/2021

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

JACOB DOYLE CORMAN, III, <i>et al.</i>,	:	
	:	
Petitioners	:	
	:	
v.	:	NO. 294 MD 2021
	:	
ACTING SECRETARY OF THE	:	
PENNSYLVANIA DEPARTMENT OF	:	
HEALTH,	:	
	:	
Respondent	:	

NOTICE OF APPEAL

Notice is hereby given that Respondent Alison Beam, Acting Secretary of the Pennsylvania Department of Health, appeals to the Supreme Court of Pennsylvania from the order entered in this matter on November 10, 2021. This order has been entered on the docket as evidenced by the attached copy of the docket entry. There is no verbatim record of any proceedings directly before the Commonwealth Court. A Jurisdictional Statement is being filed and served contemporaneously with this Notice of Appeal.

Respectfully submitted,

/s/ Karen M. Romano
KAREN M. ROMANO
Chief Deputy Attorney General
Chief, Litigation Section
Pa. Bar # 88848

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kromano@attorneygeneral.gov

Date: November 10, 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/ Sean A. Kirkpatrick
SEAN A. KIRKPATRICK
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I, Sean A. Kirkpatrick, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Reproduced Record Volume by electronic service to the following:

Via PACFile Electronic Service

Thomas W. King, III, Esquire
Thomas E. Breth, Esquire
Ronald T. Elliott, Esquire
Jordan P. Shuber, Esquire
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/s/ Sean A. Kirkpatrick
SEAN A. KIRKPATRICK
Senior Deputy Attorney General

Date: November 23, 2021