

**KATHY L. RAPP, MEMBER**  
65TH LEGISLATIVE DISTRICT

□ **Harrisburg Office:**

P.O. Box 202065 • Harrisburg, PA 17120-2065  
Phone: (717) 787-1367 • Fax: (717) 787-5854

□ **Warren Office:**

404 Market Street • Warren, PA 16365  
Phone: (814) 723-5203 • Fax: (814) 728-3564

□ **Titusville Office:**

109 South Washington Street • Titusville, PA 16354  
Phone: (814) 827-6054 • Fax: (814) 878-5778



**House of Representatives**  
Commonwealth of Pennsylvania  
Harrisburg

**COMMITTEES**  
**HEALTH, MAJORITY CHAIR**  
ENVIRONMENTAL RESOURCES & ENERGY

**PRO-LIFE CAUCUS CO-CHAIR**

**APPOINTMENTS**  
HARDWOODS DEVELOPMENT COUNCIL

[krapp@pahousegop.com](mailto:krapp@pahousegop.com)  
[RepRapp.com](http://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 Act<sup>1</sup>, 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 committee<sup>2</sup> finds that a published or unpublished document should be promulgated as a regulation, the committee may present the matter to the Joint Committee on Documents for a determination.<sup>3</sup>

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.<sup>4</sup> 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,

<sup>1</sup> 71 P.S. § 745.7a.

<sup>2</sup> “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.

<sup>3</sup> 71 P.S. § 745.7a.

<sup>4</sup> 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).

regardless of vaccination status.”<sup>5</sup> 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.<sup>6</sup>

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”)<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

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

---

<sup>5</sup> *Id.* at § 2.

<sup>6</sup> *Id.* at § 3.

<sup>7</sup> 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.

<sup>8</sup> 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).

<sup>9</sup> *See* 55 Pa. Code §§ 3270.14, 3270.21, 3280.14, 3280.20 and 3290.18.

<sup>10</sup> Answers to FAQs, Dept. of Education,

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

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

Secretary of Health to impose general control measures under section 5 of the DPCL,<sup>11</sup> 28 Pa. Code § 27.60<sup>12</sup> and section 2101 (a) of the Administrative Code of 1929.<sup>13</sup>

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.<sup>14</sup> The Regulatory Review Act fosters executive branch accountability and provides ultimate review of regulations by the General Assembly.<sup>15</sup>

Only when an agency’s substantive regulations are properly enacted under the Commonwealth Documents Law, do they have the force and effect of law.<sup>16</sup> 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.”<sup>17</sup>

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

---

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 71 P.S. § 745.3.

<sup>15</sup> 71 P.S. § 745.2.

<sup>16</sup> 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)).

<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

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]."<sup>21</sup>

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.<sup>22</sup>

---

<sup>18</sup> 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)).

<sup>19</sup> See id. at 349-350.

<sup>20</sup> Eastwood Nursing, 910 A.2d at 144.

<sup>21</sup> Order of the Acting Secretary, supra note 4, § 2.

<sup>22</sup> Id.

Furthermore, an individual must exhaust all alternatives to a face covering, including the use of a face shield, before he or she is excepted from the order.<sup>23</sup> In addition, noncompliance with the order subjects an offender to possible criminal penalties under the DPCL and the Administrative Code of 1929.<sup>24</sup>

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.<sup>25</sup>

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.”<sup>26</sup> 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.<sup>27</sup> 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.

---

<sup>23</sup> Id. at § 3.

<sup>24</sup> 35 P.S. § 521.20 and 71 P.S. § 1409.

<sup>25</sup> Order of the Acting Secretary, supra note 4.

<sup>26</sup> 71 P.S. § 532 and § 1403.

<sup>27</sup> Order of the Acting Secretary, supra note 4, § 2.

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

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

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

Respectfully,



Kathy L. Rapp, Chair  
House Health Committee



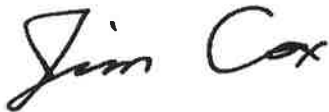
Representative Aaron Bernstine  
10th Legislative District



Representative Timothy R. Bonner  
8th Legislative District



Representative Stephanie Borowicz  
76th Legislative District



Representative Jim Cox  
129th Legislative District



Representative Valerie S. Gaydos  
44th Legislative District



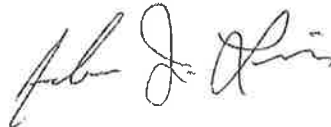
Representative Johnathan D. Hershey  
82nd Legislative District



Representative Dawn W. Keefer  
92nd Legislative District



Representative Kate A. Klunk  
169th Legislative District



Representative Andrew Lewis  
105th Legislative District

Vincent C. DeLiberato, Jr.

Page 7

September 14, 2021



Representative Clint Owlett  
68th Legislative District



Representative Brad Roae  
6th Legislative District



Representative Paul Schemel  
90th Legislative District



Representative Tim Twardzik  
123rd Legislative District



Representative David H. Zimmerman  
99th Legislative District

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.