

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.W., INDIVIDUALLY AND ON BEHALF
OF MINOR CHILDREN C.W., D.W. AND
M.W., *et al.*,

Petitioners

v.

ACTING SECRETARY OF THE
PENNSYLVANIA DEPARTMENT OF
HEALTH ALISON BEAM,

Respondent

NO. 297 MD 2021

**RESPONDENT’S ANSWER TO PETITIONERS’ APPLICATION FOR
EMERGENCY RELIEF SEEKING A PRELIMINARY INJUNCTION**

INTRODUCTION

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

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

ANSWER TO PETITIONER’S APPLICATION FOR SPECIAL RELIEF

Respondent, by and through her undersigned counsel, hereby submits this Answer to Petitioners’ Application for Emergency Relief Seeking a Preliminary Injunction, as follows.

1. DENIED as stated. It is ADMITTED that a novel Coronavirus, commonly known as COVID-19, emerged in Pennsylvania in March 2020 and continues to spread throughout the Commonwealth and the world.

2. DENIED as stated. It is ADMITTED that the Governor issued a Proclamation of Disaster Emergency with regard to the COVID-19 pandemic on March 6, 2020.

3. ADMITTED.

4. It is ADMITTED that Respondent issued an Order entitled *Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities* (hereinafter “the Order”) on August 31, 2021. Respondent does not know how Petitioners define the term “many schools,” therefore, that averment is DENIED.

5. The Order is a written document that speaks for itself and any characterization thereof is DENIED.

6. It is ADMITTED that the Order applies statewide. By way of further response, the Order is a written document that speaks for itself and any characterization thereof is DENIED.

7. It is ADMITTED that the Order does not expressly include an exemption based upon religious beliefs.

8. ADMITTED. By way of further response, it is specifically DENIED that Respondent, having already promulgated regulations on this topic, was required to again submit to the rulemaking procedures under the Commonwealth Documents Law and/or the Regulatory Review Act when acting in furtherance of the Department’s statutory and existing regulatory authority. The law vests the Department of Health with authority to prevent and control disease in the general public and in schools. In furtherance of that authority, the Department further promulgated regulations at 28 Pa. Code. Ch. 27. The Disease Prevention and

Control Law of 1955, Act of Apr. 23, 1956, P.L. (1955) 1510, 35 P.S. §§ 521.1 *et seq.*; the Administrative Code of 1929, Act of Apr. 9, 1929, P.L. 177, No. 175, 71 P.S. §§ 51 *et seq.*; and Pennsylvania Department of Health regulations at 28 Pa. Code § 27.60 allow the Pennsylvania Department of Health to carry out appropriate control measures, such as the Order. COVID-19 is a contagious disease that has spread rapidly from person to person and there have been 1,382,933 total cases (up 12,686 over the last 3-days) reported as of 9:00 p.m on Sunday, September 19, 2021, and 28,864 deaths (up 52 over the last 3-days) in this Commonwealth caused by the disease. The Delta variant of SARS-CoV-2, the virus that causes COVID-19, is more infectious and is leading to increased transmissibility. Delta Variant: What we Know about the Science, CDC, <https://www.cdc.gov/coronavirus/2019-nCoV/variants/delta-variant.html> (last visited Sept. 9, 2021); Rachel Herlihy, et al., “Rapid Increase in Circulation of SARS-CoV-2 B.1.617.2 (Delta) Variant,” Aug. 6, 2021, CDC, https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e2.htm?s_cid=mm7032e2_w (last visited Sept. 9, 2021); Megan Scudellari, “How the Coronavirus Infects Cells – and Why Delta is so Dangerous,” Nature, <https://www.nature.com/articles/d41586-021-02039-y> (last visited Sept. 9, 2021). Accordingly, the Order is an appropriate disease control measure under the laws and regulations of the Commonwealth of

Pennsylvania. Simply put, to the extent that Petitioners believe a separate rule or regulation is required to implement a control measure, they are incorrect.¹

9. ADMITTED.

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

11. DENIED. By way of further response, the Order does not cause a threat of immediate and irreparable harm as it protects the ability of commonwealth schools to continue to provide in-person education to children and follows recommendations of masking in schools from the Centers for Disease Control and Prevention (“CDC”) and the American Academy of Pediatrics to, in part, protect students from the spread of COVID-19. Guidance for COVID-19 Prevention in K-12 Schools, CDC, updated Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last visited Sept. 7, 2021); COVID-19 Guidance for Safe Schools, American Academy of Pediatrics, <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19->

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

[infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/](#) (last visited Sept. 7, 2021).

Additionally, Petitioners cannot show that greater injury would result from refusing an injunction than from granting it or that the injunction will not adversely affect the public interest. SARS-CoV-2 infection is transmitted predominantly by inhalation of respiratory droplets when people cough, sneeze, sing, talk or breath and masks help reduce the emission of virus-laden droplets and reduce the inhalation of these droplets by the wearer. Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2, CDC, updated May 7, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html> (last visited Sept. 7, 2021). COVID-19 has caused hospitalizations and deaths within the Commonwealth and the United States. As such, the “CDC recommends indoor masking for individuals age 2 years and older, including students, teachers, staff, and visitors, regardless of vaccination status.” Guidance for COVID-19 Prevention in K-12 Schools, CDC, updated Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last visited Sept. 7, 2021).

“Research supports that mask wearing has no significant adverse health effects for wearers.” “Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2.” CDC, <https://www.cdc.gov/coronavirus/2019->

[ncov/science/science-briefs/masking-science-sars-](https://www.cdc.gov/science/science-briefs/masking-science-sars-cov2.html#anchor_1619457210222)

[cov2.html#anchor_1619457210222](https://www.cdc.gov/science/science-briefs/masking-science-sars-cov2.html#anchor_1619457210222) (last visited 9/20/21). Moreover, there is evidence that COVID-19 is a worldwide pandemic that has cost countless lives and that masking helps prevent the spread of the virus. Moreover, many children have not yet had the benefit of the vaccine and are, therefore, susceptible to getting COVID-19. There can be no more fundamental interest to the public than protecting its children from an unnecessary disease or death.

Finally, Petitioners cannot establish they are likely to succeed on the merits or that the injunction sought is reasonably suited to abate the alleged offending activity.

12. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. By way of further response, please see response to Paragraph 11.

13. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED.

14. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual

in nature, they are DENIED. By way of further response, please see response to Paragraph 11.

15. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. By way of further response, it is DENIED that masks interfere with the ability of children to breathe. Moreover, the Order specifically permits medical exemptions for children who have respiratory or other medical conditions.

16. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. By way of further response, it is DENIED that masks interfere with the rights of students to religious freedom, to receive a public education, or to clean air.

17. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED.

18. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. By way of further response, please see response to Paragraph 11.

19. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. It is specifically denied that the Order interferes with students' breathing, anxiety, mental health or medical issues. Additionally, the Order provides an exemption for students with a medical condition.

20. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED.

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

22. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. It is specifically denied that any individual with a medical condition which makes them unable to wear a mask is forced to do so.

23. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED. By way of further response, please see response to Paragraph 11.

24. The averments of this paragraph constitute conclusions of law to which no response is required. To the extent that averments are determined to be factual in nature, they are DENIED.

25. DENIED.

26. DENIED. By way of further response, please see response to Paragraph 11. Moreover, Petitioners raise nothing more than a policy dispute which is not properly resolved by the Court.

Respectfully submitted,

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DATE: September 20, 2021

CERTIFICATE OF COUNSEL

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Karen M. Romano

KAREN M. ROMANO
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Karen M. Romano, Chief Deputy Attorney General, do hereby certify that I have this day caused to be served the foregoing Respondent's Answer to Petitioners' Application for Emergency Relief, via PACFile notification, on the following:

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DATE: September 20, 2021