CONSIDERATIONS FOR SCHOOL BOARD MEMBERS ABOUT THE PENNSYLVANIA DEPARTMENT OF HEALTH SCHOOL MASKING ORDER

The situation that school board members are presently in is very difficult. There are a lot of legal, medical, resource and personal considerations that need to be made. I do not envy your position and respect anyone who is approaching this situation with an open mind. I submit to you that there are legal considerations that may not have been presented to you in respect to the Department of Health School Masking Order. I am respectfully requesting that you take these considerations in to account, discuss them with your solicitor and with the full board. This is a discussion that would best occur in public and not in an executive session.

I. The Authority of the School Board

Pennsylvania law has always been slanted away from a strong central state government and towards local control and individual rights. The constitution of 1968 states:

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

Pa. Const. art. I, § 2. The constitution went on to reinforce the right to home rule. Pa. Const. art. IX, § 2. Home rule gives local communities very broad powers to determine the organization and operation of their local governments. A school board is a type of local governmental corporate body.

The school code of 1949 gave broad powers to school districts in terms of how to operate the schools:

> The 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 this act.

24 Pa. Stat. Ann. § 2-211 (West) (Emphasis added). There is nothing in the school code indicating that the authority of the Department of Health supersedes the authority of a school district.

Rather than maintaining the local control that the school district already has, the Department of Health is seeking to take away control of the school district for an indefinite period of time in indefinite circumstances. In other words, there is no end to the Department of Health order. There is no end date, nor end condition. If a school district keeps the control that it is supposed to have, it can decide when and if masking will be used and what the end will be. To accept this loss of power is giving up the power that your constituents have given to you.

II. The Illegality of the Order

A. The Department of Health has based its authority on "section 5 of the Disease Prevention and Control Law, section 2102(a) of the Administrative Code of 1929, 71 PS. § 532(a); and the Department of Health's regulation at 28 Pa. Code § 27.60 (relating to disease control measures)". Those laws do give the Department of Health the authority to issue "control measures" for viral outbreaks.

A law review article from earlier this year explained:

> Nor do these provisions specifically authorize mandatory quarantine of *all* individuals in their homes without regard to a *specific, individualized* determination of their infected status. While the Governor specifically cited 35 P.S. § 521.5 for his authority in this regard, a close examination belies the support sought. It states in relevant part:

> 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.[168]

Regulations that implement this provision make it clear that while the Department of Health may issue isolation or quarantine orders of sick individuals, this does not apply to *all* individuals regardless of their infected status:

> (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 *236 other available information relating to the patient** and the disease or infection.
>
> (c) If a local health authority is not [a Local Morbidity Reporting Office (LMRO)], it shall consult with and receive approval from the Department prior to taking any disease control measure.[169]

Thus, by stating that the appropriate disease control measure should be based on the patient's *circumstances* and other *localized* information, the plain language of the above regulations requires an *individualized* analysis concerning whether the affected individual possesses an infectious disease. Similarly, related regulations merely reinforce this interpretation by referring to the need to identify and isolate *specific* persons known or suspected to be harboring an infectious agent, limited to locations where the infection has occurred.[170]

A reviewing court could therefore reasonably infer that the omission of this language in the Emergency Management Services Code but its inclusion in the Disease Prevention and Control Law was intentional and should be construed consistently with one another.[171]

It is precisely this emphasis in the statute and implementation of regulations upon an *individualized* analysis, based on *localized* circumstances, that the Pennsylvania Supreme Court overlooked in its own statutory analysis. If this is the right interpretation of the statute and its implementing regulations, the Governor surely lacked the statutory authority to impose generalized, across-the-board prohibitions of certain kinds of commerce, or for that matter, ***237** generalized stay-at-home orders, without regard to the specific, individualized and localized circumstances of the affected parties.

Instead, the court, mostly in response to the arguments Petitioners chose to emphasize, based its statutory reading mostly on an extremely strained use of the canon of interpretation "*ejusdem generis*." This canon basically says that if a statute has a series of specific words followed by a general phrase, the general phrase is not to be construed to expand the scope of the preceding phrase.[172] The idea is grounded in the cautionary notion that courts should not unnecessarily expand the scope of statutes beyond what is

> specifically stated, for otherwise, courts would run the risk of engaging in legislation through interpretation, which would ultimately fall afoul of the separation of powers.

Andrew D. Cotlar, Governor Wolf's Emergency Covid-19 Declarations: Illegal and Unconstitutional?, 30 Widener Commonwealth L. Rev. 201, 235–37 (2020)

As Mr. Cotlar observed, and I agree, the Department of Health can only issue orders on an individualized basis. The Department of Health only has authority over schools, businesses or households where there has been an outbreak. There is no authority over non-infected people. Even where there has been a viral outbreak, that control measure must be limited and for an appropriately short duration. This current order could theoretically last forever and covers hundreds of thousands of children who have not been exposed to the virus.

This argument is the "Taste of Sicily" argument. It is an argument that I made successfully in the Taste of Sicily case and in other cases before Magistrate Judges. I am not aware of the Department of Health winning any citation brought under these laws.

B. The U.S. Constitution and PA Constitution require that individual rights only be narrowly restricted by the Government. There are several constitutional rights implicated by the masking mandate- liberty, freedom of speech, freedom of assembly, freedom of movement, freedom of religion. The United States Supreme Court has held that those rights can be restricted, but can only be restricted as to time place and manner:

> Constitutional rights to free speech and assembly, however, are not absolute, and states may place content neutral time, place, and manner regulations on speech and assembly "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 658 (10th Cir. 2006) (the right of assembly and expressive association are " 'no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association' ") (quoting *Walker v. City of Kansas City*, 911 F.2d 80, 89 n. 11 (8th Cir. 1990)); *Duquesne v. Fincke*, 269 Pa. 112, 112 A. 130, 132 (1920) (Article 20 does not grant "the right to assemble with others, and to speak wherever he and they choose to go").

Friends of Danny DeVito v. Wolf, 227 A.3d 872, 902 (Pa.), cert. denied, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020). Prior COVID-19 orders issued by the Governor had a clear end to them. They would end at the end of the disaster declaration, unless extended.

In May 2021, the voters of Pennsylvania approved ballot questions even further limiting the emergency powers of the Governor. It is clear that the people of Pennsylvania do agree that there are emergency situations in which the Governor or Department of Health must be given broad discretion to act; however it is also clear that the voters do not believe that that broad discretion should continue for an unlimited period of time.

That is a major problem with this order- it is literally never-ending. The Department of Health could have easily narrowly tailored the order by only making it effective for a period of weeks, or until certain objective conditions (such as a lower infection rate) are met. Instead the Department of Health has attempted to take this power on an unending basis. I personally believe that seeking broad indefinite control over others is terrifying and is contrary to the principles on which this country and commonwealth were founded.

Why didn't the Department of Health put objective limits on its order? That should be concerning to board members.

C. The Order is irrational.

Virus Conditions in Philadelphia are not the same as Cambria County. The two should not be treated the same. Using an order with no distinction between completely different areas is irrational. It has been proven time and time again that cities will be hit harder by COVID and all viruses. It is a direct result of population density and air quality and cannot be avoided.

Nevertheless, there are counties in Pennsylvania with only a handful of people per square mile. Those counties have minimal virus risk. I've heard from schools in rural counties with no COVID cases this school year. Why should they be treated the same. Why did the Department of Health choose to issue one order for all of Pennsylvania rather than tailoring its order by the population density in particular counties. By this point in the pandemic, there is plenty of data to show where all Pennsylvania counties and municipalities fall in terms of their risk of virus spread. Yet, none of that data is being used.

Under the current order, rural areas would be subject to the same restrictions as the large cities until the large cities get their virus cases under control. That may not happen in 2021.

Government classifications cannot be arbitrary and must be rational. See e.g. Adams Outdoor Advert., LP v. Zoning Hearing Bd. of Smithfield Twp., 909 A.2d 469 (Pa. Commw. Ct. 2006). This order is arbitrary and irrational as it treats all of Pennsylvania the same regardless of an area's demographics.

Why didn't the Department of Health craft a "targeted" virus mitigation order as they have promised to do in the past?

III. The Lack of Consequences of Defying the Order

The Department of Health has threatened that the school district could receive citations as a result of violating the order (assuming the order is legally valid). The Department of health has neglected to mention that violations of the Virus and Disease Control Law and the Administrative Code of 1929 are punishable by filing summary citations. A summary citation is equally as serious as a traffic ticket. The Disease Prevention and Control Law of 1955 carries a maximum fine of $300. The Administrative Code carries a maximum fine of $50.

I have tried six of these citations based on this section of law. I assisted other attorneys with approximately six more. I am not aware of anyone being found guilty of these citations.

There are no other clear consequences. Earlier this year the Department of Health sought injunctions against 50 bars restaurants that had defied its orders. I represented these bars and restaurants through FreePA and filed preliminary objections. When the case was ready for argument, the Department of Health withdrew the case.

I represented two hair salons that had been making masks optional. The PA Department of State filed for enforcement of the prior Department of Health masking order. I challenged the order in court. When it came time for the court to decide the issue, the Department of State withdrew the enforcement actions.

I represented a day care that was making masks optional for parents entering the facility under the prior masking orders. The Department of Human Services filed a citation against them for not following the Department of Health masking order. We challenged the order. Just yesterday, the Department of Human Services withdrew the citation.

As far as I am aware the Department of Health has lost or withdrawn **every** attempt that they made to enforce orders issued under these sections of law.

Additionally, many district attorneys have refused to allow citations issued as a result of this order to be prosecuted. District Attorney David Sunday in York County and Pier Hess in Lebanon County have both issued explicit statements saying that no prosecution of the school mask orders will occur in their counties. I believe that many other District Attorneys feel the same but have yet to make public statements.

The Department of Health has threatened school board members with individual liability. This is nonsense.

Under Pennsylvania law, school districts and school board members have broad sovereign immunity, which means that schools and school board members generally cannot be sued. 42 Pa.C.S.A. § 8521

A school district or school board member only loses its sovereign immunity in 10 different situations:

(1) Vehicle liability.

(2) Medical-professional liability.
(3) Care, custody or control of personal property.
(4) Commonwealth real estate, highways and sidewalks.
(5) Potholes and other dangerous conditions.
(6) Care, custody or control of animals.
(7) Liquor store sales.
(8) National Guard activities.
(9) Toxoids and vaccines.
(10) Sexual abuse.

42 Pa.C.S.A. § 8522. None of those 10 apply to school board decisions on masking. In fact, I have been unable to find any situation in which a school board member was ever held liable for a policy decision. Policy decisions fall squarely within sovereign immunity.

It is also important to note that there is no exception for virus or diseases. The reference to loss of immunity to toxoids and vaccines refers to liability for governmental institutions that administer vaccines or medication.

Schools and School Boards are therefore protected from being sued in COVID cases by sovereign immunity. In decades past, there were disease outbreaks at schools. Measles, mumps and Chicken Pox were very common in schools and entire classes would come down with the disease. Yet, the schools were never sued. This is because the schools were protected by sovereign immunity. It is also likely due in part to the fact that it is impossible to trace the source of a viral outbreak and the fact that children almost never have compensable damages. Being sick in bed for a couple days is not compensable damages- attorneys wouldn't take that case.

If the potential to be sued is a real concern, I would think that the Department of Health would be able to cite some real life examples. They cannot because there are none.

There has also been a threat that administrators might lose their job or licenses if they do not comply with the order. This is also nonsense.

Pennsylvania law states:

> (a) District superintendents and assistant district superintendents may be removed from office and have their contracts terminated, after hearing, by a majority vote of the board of school directors of the district, for neglect of duty, incompetency, intemperance, or immorality, of which hearing notice of at least one week has been sent by mail to the accused, as well as to each member of the board of school directors.

24 Pa. Stat. Ann. § 10-1080 (West). No superintendent has ever lost his job for failing to follow a Department of Health Order.

In order to be a superintendent or teacher, the following requirements apply:

> In accordance with sections 1109, 1202 and 1209 of the act (24 P. S. §§ 11-1109, 12-1202 and 12-1209), every professional employe certified or permitted to serve in the schools of this Commonwealth shall:
>
> (1) Be of good moral character.
> (2) Provide a physician's certificate stating that the applicant, with or without reasonable accommodation, is able to perform successfully the essential functions and duties of an educator. A qualified applicant who has tuberculosis or another communicable disease or a mental disability, will not be deemed to pose a direct threat to the health or safety of others unless a threat to health or safety cannot be eliminated by a reasonable accommodation.
> (3) Be at least 18 years of age.
>
> (4) Except in the case of the Resource Specialist Permit, Vocational Instructional Intern Certificate, and Vocational Instructional Certificate, have earned minimally a baccalaureate degree as a general education requirement.

22 Pa. Code § 49.12. There has never been a determination that failing to follow a Department of Health order violates any of these provisions.

In addition to being charged with or convicted of a crime, an educator can face suspension or loss of certification for the following reasons:

> (1) Immorality.
> (2) Incompetency.
> (3) Intemperance.
> (4) Cruelty.
> (5) Negligence.
> (6) Sexual misconduct.
> (7) Sexual abuse or exploitation.
> (8) A violation of the code for professional practice and conduct adopted pursuant to section 5(a)(10).1
> (9) Illegal use of professional title as set forth in the act of May 29, 1931 (P.L. 210, No. 126),2 entitled "An act to regulate the certification and the registration of persons qualified to teach in accredited elementary and secondary schools in this State; imposing certain duties upon the Department of Public Instruction3 and the State Board of Education; defining violations; providing penalties, and for appeal to the court of common pleas of Dauphin County."
> (10) Failure to comply with duties under this act, including the mandatory reporting duties set forth in section 9.1.4
> (11) Actions taken by an educator to threaten, coerce or discriminate or otherwise retaliate against an individual who in good faith reports actual or suspected misconduct under this act or against complainants, victims, witnesses or other individuals participating or cooperating in proceedings under this act.

24 P.S. § 2070.9c. Once again, this section of law has never been used for failing to follow a Department of Health order.

In short, the threats to school board members and administrators are hollow. There is no precedent for any negative action being taken against board members or administrators for failing to follow a Department of Health Order. In fact there is only one recorded case of this law being used, which was a situation in which a teacher falsified a supervisor's signature on an IEP

report. Grimes v. Dep't of Educ., 216 A.3d 1152 (Pa. Commw. Ct. 2019), publication ordered (Aug. 19, 2019)

Administrators work for the school board. Administrators need to follow the instructions of the school board. There is not a real danger of professional consequences to administrators.

IV. Consequences of Not Recognizing Exceptions to the Order

The Department of Health Order has created something new. What the Department of Health order does not fall within the ADA, the PA school code or Federal School laws. There is not a previously existing system of exceptions like this anywhere under the law.

It is shocking that the Department of Health did not choose to blend this order into existing law. That is a large part of the order's problems. United States law is based on precedent. Courts are very reluctant to try something new. Judges are always asking me to point to past cases showing that what I am requesting has been done before. Rather than using existing legal mechanisms, the Department of Health has very unwisely created a new system.

However, that does not mean that the school district cannot face liability for failing to recognize valid exceptions of that system.

The Pennsylvania Courts have long recognized the necessity of a "plain meaning" of law, particularly penal law. This order is very arguably penal in nature as it creates punishable offenses.

> A statute's plain language generally provides the best indication of legislative intent. *See, e.g., McGrory v. Dep't of Transp.*, 591 Pa. 56, 915 A.2d 1155, 1158 (2007); *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 822 A.2d 676, 679 (2003); ***610** *Pa. Fin. Responsibility Assigned Claims Plan v. English*, 541 Pa. 424, 664 A.2d 84, 87 (1995) ("Where the words of a statute are clear and free from ambiguity the legislative intent is to be gleaned from those very words.").

Com. v. McCoy, 599 Pa. 599, 609–10, 962 A.2d 1160, 1166 (2009). In this case, the order DOES NOT require medical notes to gain an exception, nor does it imply the necessity of medical notes. Reading more into an order is contrary to the principles of interpretation used by the Court.

Wrongfully denying an exception can lead to actual liability. Individuals asserting a medical condition are protected under the Americans With Disabilities Act. If a public institution such as a school district fails to provide all Americans with Disabilities Act protections, the school district can face prosecution for unlawful discrimination by the Pennsylvania Human Relations Commission**.** 43 P.S. § 955

Unlike the very speculative claims threatened by the Department of Health, school districts regularly face legal actions for discrimination. See e.g. Neshaminy Sch. Dist. v. Pennsylvania Hum. Rels. Comm'n, No. 1765 C.D. 2019, 2021 WL 2307278 (Pa. Commw. Ct. June 7, 2021), Milton Hershey Sch. v. Pennsylvania Hum. Rels. Comm'n, 226 A.3d 117 (Pa. Commw. Ct. 2020), Pocono Mountain Sch. Dist. v. Pennsylvania Hum. Rels. Comm'n, No. 816 C.D. 2007, 2008 WL 9406071, at *1 (Pa. Commw. Ct. June 26, 2008), Sch. Dist. of Philadelphia v. Pennsylvania Hum. Rels. Comm'n, 6 Pa. Cmwlth. 281, 294 A.2d 410 (1972), aff'd and remanded sub nom. Pennsylvania Hum. Rels. Comm'n v. Uniontown Area Sch. Dist., 455 Pa. 52, 313 A.2d 156 (1973), and aff'd in part, vacated in part, 480 Pa. 398, 390 A.2d 1238 (1978)

Pennsylvania Hum. Rels. Comm'n v. Uniontown Area Sch. Dist., 455 Pa. 52, 313 A.2d 156 (1973)

In respect to the right to an education, the Commonwealth Court has stated:

> "[T]he *educational process* is ****674** a property right created by the state" and the property interest in education so created "is participation in the *entire process.* The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the [Federal] Constitution."

Lisa H. v. State Bd. of Educ., 67 Pa. Cmwlth. 350, 358, 447 A.2d 669, 673–74 (1982), aff'd, 502 Pa. 613, 467 A.2d 1127 (1983). So while a student is not necessarily entitled to an education tailored to their needs or wishes, they are entitled to an education- they literally own the right to be educated. There is a real and serious concern that denying non-masked students the opportunity to participate in all educational programs is an unlawful taking by the government which would subject the school to liability.

The school district should have real concerns about legal liability for denying exemptions and for not permitting non-masked students to participate in educational activities.

V. Questions for School Solicitors

I am recommending that school board members submit the following questions to your school solicitors and ask that they answer them. Request that the answers include legal authorities or examples:

1) Does the "plain meaning rule" apply to the Department of Health order? If not, why not? If so, how can the Department of Health order legally be read to require more than is actually stated in the order?

2) Has the Virus and Disease Control Law and/or the Administrative Code of 1929 ever been used to issue "control measures" directed at non-infected individuals prior to the current pandemic?

3) How many citations have been filed in Pennsylvania since the beginning of the pandemic for violation of the Virus and Disease Control Law and/or the Administrative Code of 1929? How many of those cases resulted in a guilty verdict after a trial?

4) What is the position of the local district attorney as to enforcement of the making order? Did you consider the published statements of DA David Sunday of York County and DA Pier Hess of Lebanon County stating that mask mandates would not be enforced in your advice to the board?

5) Have any Pennsylvania School board members ever been found to be individually liable for a policy decision?

6) Have any Pennsylvania school administrators (Superintendents, etc) ever faced administrative sanctions (suspension of certification or loss of certification) for carrying out school board policy decisions?

7) Has any school district in Pennsylvania faced legal action over COVID-19 exposure? Has any school district in Pennsylvania ever faced legal action over any kind of virus exposure?

8) Sovereign immunity provides very broad protection to schools, school board members and employees. Are there any exceptions to sovereign immunity that would allow a lawsuit to proceed over non-intentional virus exposure?

9) The online FAQ page for the order states that individuals may be held personally liable for violating the order pursuant to 42 Pa.C.S § 8550 . Has a school board member or administrator ever been found to be subject to liability under 42 Pa.C.S § 8550? Doesn't 42 Pa.C.S § 8550 only apply to intentional torts (i.e. intentionally causing injury to another person)?

10) Have school districts been sued (successfully or otherwise) in the past for failing to recognize medical exemptions or for not attempting to provide equal educational services to students?

Thank you for your consideration. Please consider the actual law and actual risks to the school and to students before making a decision as to how to approach the Department of Health Masking Order.

Respectfully Submitted

_____/s/Eric Winter_____
Eric Winter
Prince Law Offices
646 Lenape Road
Bechtelsville, PA 19505
610-845-3803
ID 84200
ewinter@princelaw.com