

Commonwealth Court Voids Health Department's School Masking Order, But Appeal Keeps Mandate in Place

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On November 10, 2021, the Pennsylvania Commonwealth Court struck down the Acting Secretary of the Department of Health's Order Directing Face Coverings in School Entities ("Masking Order") in *Corman, et al. v. Acting Secretary of the Pennsylvania Department of Health*. The case concerned the Acting Secretary's August 31, 2021 Order which imposed what the Commonwealth Court called "an open-ended general masking requirement effective September 7, 2021 on all teachers, students, school staff, and visitors within Pennsylvania's schools, regardless of vaccination status, with certain exceptions." *Corman* at 2.

Petitioners in the case was a group of parents, private schools and school districts petitioning the Court to declare the Masking Order void *ab initio* (meaning that the Masking Order was void since the date the it was issued). The issue of masking students, teachers, school staff, and visitors is of political interest to many. However, the Masking Order was struck down on procedural grounds.

State agencies, like the Pennsylvania Department of Health, are able to issue under their enabling statutes. An agency's regulations are valid if they are: (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable. See *Germantown Cab Co. v. Phila. Parking Auth.*, 993 A.2d 933, 937 (Pa. Cmwlth. 2020), *aff'd*, 36 A.3d 105 (Pa. 2012). Regulations must also comply with the Commonwealth Documents Law, an act designed to "promote public participation in the promulgation of a regulation" by requiring an agency to "invite, accept, review and consider written comments from the public regarding the proposed regulation" *Corman* at 2.

In addition to the Commonwealth Documents Law, the Regulatory Review Act also establishes a "mandatory rulemaking procedure that is, with rare exceptions, required for the promulgation of [agency] regulations. *Id.* at 14 (*citing Naylor .v Dep't of Pub. Welfare*, 54 A.3d 429, 433 (Pa. Cmwlth. 2012), *aff'd*, 76 A.3d 536 (Pa. 2013)). The Regulatory Review Act was enacted to establish procedures "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 authority to regulate." *Id.* at 14 (*citing* 71 P.S. Sec. 745.5).

Emergency Powers

However, there is an exception to this requirement. The Governor can "suspend the otherwise mandatory rulemaking procedures of the Regulatory Review Act upon the declaration or proclamation of a disaster emergency pursuant to the Emergency Code." *Id.* at 16 (*citing Wolf v. Scarnati*, 233 A.3d 679, 705 (Pa. 2020), *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 887-88, 892-93 (Pa. 2020), cert. denied, 141 S. Ct. 239 (2020)).

At the beginning of the COVID-19 pandemic, the Governor issued a Proclamation of Disaster Emergency Pursuant to Section 7301(c) of the Emergency Management Services Code, 35 Pa.C.S. Sec. 7301(c) on March 6, 2020. *Id.* at 4. On May 18, 2021, however, Pennsylvania voters approved two amendments to the Pennsylvania Constitution, limiting the Governor's power under the Emergency Code. *Id.* at 5. One amendment empowered the General Assembly to extend or terminate a governor's declaration of disaster emergency, or a portion of the declaration. *Id.* at 5 (*citing* Pa. Const. Art. III,

Sec. 9). The other amendment limited a governor's disaster emergency declaration to 21 days absent extension by the General Assembly. *Id.* at 5-6 (*citing* Pa. Const. Art. IV, Sec. 20).

After these amendments were adopted, the General Assembly terminated the May 6, 2020 Emergency Declaration on June 10, 2021. *Id.* at 6. The Governor has not issued another proclamation of disaster emergency since. *Id.*

There were two central questions to the case:

- Does the Masking Order constitute a rule or regulation subject to the provision of the Regulatory Review Act?
- Does the Masking Order violate the principles governing the delegation of legislative authority?

Id. at 10.

Did the Masking Order Have to Go Through the Formal Regulatory Rulemaking Procedure?

The Court first considered whether the Masking Order “represent[ed] a rule or regulation subject to the formal requirements for regulatory rulemaking.” *Id.* at 16. This question is significant because, while substantive rules require the procedures of the Commonwealth Documents Law and the Regulatory Review Act, simple “statements of policy,” statements which merely “announce ... to the public of the policy which the agency hopes to implement in future rulemakings or adjudications,” do not require the procedures. *Id.* at 17 (*citing* Pa. Hum. Res. Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671, 679 (Pa. 1977)).

The “critical distinction” between substantive rules and “statements of policy” is the “different practical effect that these two types of pronouncements have in subsequent administrative proceedings.” *Id.* The Court found that the language of the Masking Order “clearly mandate[d]” students, teachers, staff, and visitors to wear masks, rather than merely express the Department’s policy. *Id.* at 18. Specifically, the Court noted the Masking Order’s plain language which reads that “[e]ach teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status.” *Id.* at 18 (*citing* Masking Order at 4) (emphasis added). Because the Masking Order sought to create a new “binding norm” with legal effect, the regulation must go through the proper processes unless it was already authorized by statute or regulation. *Id.* at 20. The dissent, on the other hand, disagreed on this point, arguing that the Masking Order was an “interpretive rule.” Dissent at MHW-11.

Did the Acting Secretary of Health Have Express Statutory Authority to Implement the Masking Order?

The Acting Secretary argued that she enacted the Making Order through authority granted to the Secretary by Section 5 of the Disease Control Law, 35 P.S. Sec. 521.5, Section 2102(a) of the Administrative Code, 71 P.S. Sec. 532(a), Section 8 of the Act of April 27 1905, P.L. 312, 71 P.S. Sec. 1403(a) and the Department of Health’s regulation at 28 Pa. Code Sec. 27.60. *Id.* at 21. The Masking Order itself stated that these statutory authorities “allow the Department to implement any disease control measure appropriate to protect the public from the spread of infectious disease. *Id.* at 21 (*citing* Masking Order at 3).

The Court disagreed. It noted that Section 5 of the Disease Control Law provides that “[u]pon the receipt ... of a report of a disease which is subject to isolation, quarantine, or any other control measure, [the Department of Health] shall carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.” *Id.* at 22 (citing 35 P.S. Sec. 521.5). The Court determined that since the Masking Order did not require isolation or quarantine, the Acting Secretary relied on the “any other control measure” portion of the section. *Id.* The Court determined that the language of the statute “contemplates existing control measures for diseases already subject to those existing control measures” and does not “provide the Acting Secretary with the blanket authority to create new rules and regulations out of whole cloth, provided they are related in some way to the control of disease or can otherwise be characterized as disease control measures.” *Id.* at 23-24.

The Court also determined that the Acting Secretary could not rely on the provisions of the Administrative Code. *Id.* at 24. The Court determined that the two cited sections of the Administrative Code were “statements of general duties of the Department of Health” which neither authorized the specific means for the Department of Health nor provide specific authority for the Masking Order. *Id.*

Finally, the Court determined that Section 27.20 of the Department of Health Regulations, 28 Pa. Code Sec. 27.60 did not authorize the Masking Order. That Regulation provided that the Department of Health “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 [of Health] ... considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infection agents.” 28 Pa. Code Sec. 27.60(a). The Court determined that a Masking Order does not amount to isolation, surveillance, segregation, quarantine, or modified quarantine. *Id.* at 25-28. The Court paid special attention in its determination that the Masking Order did amount to a “modified quarantine,” finding that the term contemplated limitations of freedom of movement for people *already* exposed to the communicable disease. *Id.* at 28. The Masking Order could not be a “modified quarantine,” because it restricted the freedom of movement of individuals whose exposure status to COVID was unknown.

The dissent disagreed on this point, arguing that “the use of masks by all individuals in this setting during the ... pandemic is an appropriate and limited ‘isolation’ or ‘segregation’ measure to prevent the spread of an airborne virus causing, in some cases, an asymptomatic disease.” Dissent at MHW-13.

Thus, because there was no independent statutory authority for the Department of Health to issue the Masking Order, it must go through the ordinary procedures under the Commonwealth Documents Act and the Regulatory Review Act. Because the Order did not go through these procedures, it was void *ab initio*.

Upon the issuance of the Commonwealth Court’s Opinion, the Acting Secretary immediately appealed to the Pennsylvania Supreme Court. The Commonwealth Court’s decision is, therefore, automatically stayed under Pennsylvania Rule of Appellate Procedure 1736(b), which provides that when an officer of the Commonwealth, such as the Acting Secretary of Health, files an appeal, the Commonwealth Court’s decision is stayed in favor of the officer. This stay persists until the final decision. This does not, however, preclude the plaintiffs from asking the Supreme Court to vacate the stay and counsel for one of the plaintiffs has reportedly stated that they intend to do just that. More information to come. For more information on the Department of Health’s Masking Order and other COVID-19 topics, contact Aaron Walayat at awalayat@tuckerlaw.com. You can also access Tucker Arensberg’s recent articles regarding pandemic business solutions at <https://www.tuckerlaw.com/category/covid-19-answers-to-business-challenges>.