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*IN BRIEF*

## Private School Guidance

### Re: PA Dept. of Health Mask Order of 8/31/21

The [Secretary of Health's Order](#) requiring masks in public and private schools is set to go into effect on September 7, 2021. The Secretary issued a [FAQ responses](#) document as well, though there are certainly many questions that were left unanswered. However, at this stage, the Order requires private schools to require that each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status, subject to some exceptions listed in the Order.

For schools now determining how to comply, remember that because this is new, additional clarifications from the state may be forthcoming. We have done our best to answer common questions and provide the legal and textual support for our answers that the Health Secretary's Order and FAQs have left unasked and unanswered:

#### **1) How can private school administrators deal with medical exemptions from parents?**

The Order specifically requires schools to permit exemptions for medical reasons. However, neither the Order nor the FAQs state that medical exemption requests must come from a doctor.

In fact, section 4(A)(4) of the Order states, “A school Entity must 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.” (Emphasis added). As such, it appears that a school can accept requests from the individual’s parents and that a doctor’s note corroborating the medical exemption request is not required.

#### **2) How can private school administrators deal with religious exemption requests from parents?**

Neither the Order nor the FAQs directly mention how a school must respond to objections for religious grounds or on the basis of strong moral or ethical conviction similar to a religious belief. However, there are legal grounds for schools accepting these requests from parents.

Section 5 of the Order states that “a School Entity should not violate other laws, including state and federal anti-discrimination laws.” The Order also provides a number of exemptions, including “playing instruments” and “when a child/student is participating in a sports practice or event, whether indoors or outdoors.” Based on the above, it appears the Wolf administration has determined that its concern over COVID-19 is not outweighed by the need for kids to play sports and instruments indoors. It is reasonable to conclude the Wolf administration’s concern does not outweigh protections and

accommodations for religious beliefs as well. As such, a school's granting of such requests appears to be consistent with the Order.

This conclusion has some support from a very similar law in Pennsylvania that explains how schools must provide religious exemptions when dealing with identical concerns (spread of infectious disease) and targets identical entities (public and private schools). Pennsylvania law requires students in public and private schools to get certain vaccines (not COVID-19...yet), but it explicitly provides exemptions for medical and religious reasons as well.

28 Pa. Code § 23.84, Exemption from Immunization, states in relevant part:

(b) Religious exemption. Children need not be immunized if the parent, guardian or emancipated child objects in writing to the immunization on religious grounds or on the basis of a strong moral or ethical conviction similar to a religious belief.

Even though this applies to vaccines rather than masks, the governmental concern over infectious disease and regulation of schools is identical. As such, schools that utilize the process for vaccine exemptions that already exist in their school and extend that same process for requests for mask exemptions are likely on firm ground.

### **3) What are the potential penalties to schools or school personnel for not getting this right?**

There is some question as to whether there is authority to enforce or provide penalties under the Order. The Order purports to base its imposition of penalties on the Pa Disease Prevention and Control Act. In reading the underlying statute, a person could be subject to a summary offense if they violated the statute or a regulation pursuant to the statute, but it says nothing about an Order from the Secretary.

"Any person who violates any of the provisions of this act or any regulation shall, for each offense, upon conviction thereof in a summary proceeding before any magistrate, alderman or justice of the peace in the county wherein the offense was committed, be sentenced to pay a fine of not less than twenty-five dollars (\$25) and not more than three hundred dollars (\$300), together with costs, and in default of payment of the fine and costs, to be imprisoned in the county jail for a period not to exceed thirty (30) days." 35 Pa. Stat. Ann. § 521.20.

As such, the presumption would be that the administrative directive must be adopted as a formal regulation before it can be enforced through a summary offense mechanism. It does not appear now that there is some other general authority to impose administrative fines.

Instead, all that the FAQs point to in addition to the Pa. Disease Prevention and Control Act, discussed above, is that *government* officials could be sued in their personal capacity. See 42 Pa.C.S. § 8550. But this section does not affect liability of private schools or private school officials.

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