

MEMORANDUM

TO: JDS
FROM: SCH
DATE: 9/1/2021
RE: Mandatory indoor masking order

On August 31, 2021, the Acting Secretary of Health for Pennsylvania issued an order requiring teachers, students, staff, and visitors of school entities within the state to wear face coverings as a precaution against the spread of COVID-19 while indoors. You have asked me to conduct research on whether the Department of Health has the authority to create such an order and what consequences may arise should a school violate this order.

Beginning on the third page of the order itself, the Acting Secretary provides several state statutes under which they claim the Department has been granted the authority to create orders such as this one to control the spread of communicable diseases. The Acting Secretary lists six sources for this authority, however, several of them are, *verbatim*, restatements of one another.

For example, both section 5 of the Disease Prevention and Control Law and 35 P.S. § 521.5 state the following:

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.

Similarly, section 2102(a) of the Administrative Code of 1929, 71 P.S. §§ 532(a), and 1403(a) all state the following:

It shall be the duty of the Department of Health to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.

Section 27.60 of the Pennsylvania Code under “PART III Prevention of Diseases,” contains unique language from these passages above and provides the Department the ability to implement any disease control measure they consider 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.” See Pa. Code § 27.60(a).

The initial mask mandate in Pennsylvania was challenged in Cty. of Allegheny v. Cracked Egg, LLC, 2021 Pa. Commw. Unpub. LEXIS 401. In this unpublished opinion, a business owner who violated the Department’s COVID-19 Control Measure requiring mask wearing challenged a preliminary injunction against him and argued that the order was

unconstitutional. The trial court disagreed, and found that the Department's Control Measure Order requiring masking was "rationally related to a legitimate government interest" in protecting citizens from the spread of COVID-19, and appellant's challenge to the preliminary injunction failed. Id. at 9.

Regarding punishments or consequences stemming from violations of an order from the Department, there are three relevant statutes. 71 P.S. § 1409 provides that an individual who violates an order of the Department or interferes with an agent thereof shall be sentenced to pay a fine of no less than \$10 and no more than \$50 for each offense. Similarly, 35 P.S. § 521.20(a) also indicates that any individual found in violation of the preceding act shall be sentenced to pay a fine if no less than \$25 but not more than \$300. In default of being able to pay for violations under either act, the sentenced individual shall be imprisoned in the county jail of no more than thirty days. See 71 P.S. § 1409 and 35 P.S. § 521.20(a).

Beyond these statutes, the Pennsylvania Crimes Code outlines a potentially harsher penalty for violating a Department order, stating in relevant part, "A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, *breach of official duty*, or any other unlawful act..." See 18 Pa.C.S. § 5101 (emphasis added). Although my research did not reveal any substantive law related to school districts specifically violating a Department order, it is well established that school districts have a duty to protect the health and safety of their students. See 22 Pa. Code § 4.29 (curriculum covering HIV/AIDS and other life-threatening and communicable diseases), see also 28 Pa. Code § 23.83 (outlining immunization requirements). Uncertainty remains as to the consequences on a school district who chooses not to follow the Department order in question, however it appears that individuals put themselves at risk of severe punishment for each infraction.

The obvious fear is that some level of funding or aid could be revoked for violations of the Department's order, but I have found no substantive law that specifies this as a possibility. Pennsylvania has crafted a state plan for funds directed at K-12 education coming through The American Rescue Plan (ARP) in the fiscal year 2022. I would imagine school districts found in violation of the Department's order would put themselves at risk of not receiving grants such as this related to the COVID-19 pandemic.

In summary, it is my belief that the Department does indeed have the authority to create an order such as this one to prevent the spread of COVID-19 and other similar communicable diseases. With that authority, they also have the power to impose fines on individuals for violations thereof. Similarly, individuals who violate a Department order by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act may also be subject to criminal liability, however there is no statutory or case law specifically touching on when a school district violates a Department order.