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August 30, 2021

The Honorable Tom Wolf
Governor of Pennsylvania
225 Main Capitol Building
Harrisburg, PA 17120

Dr. Noe Ortega
Secretary, Pennsylvania Department of Education
333 Market Street
Harrisburg, PA 17126

Alison Beam
Acting Secretary of Health
Pennsylvania Department of Health
625 Forster St.
Harrisburg, PA 17120

RE: *Need for State Guidance Mandating Universal Masks in Schools to Support Safe In-Person Learning and Address Widening Educational Inequities*

Dear Governor Wolf, Secretary Ortega, and Acting Secretary Beam:

On behalf of the undersigned organizations, we write to thank you for your efforts to ensure that Pennsylvania’s schoolchildren can return to school in safe learning environments this Fall. We applaud Governor Wolf’s recent letter calling on the General Assembly to pass legislation mandating the use of masks in K-12 classrooms and child-care centers throughout Pennsylvania.¹ We also appreciate the public health initiatives of the Pennsylvania Department of Education and the Pennsylvania Department of Health to provide free, weekly COVID-19 testing in schools and to offer COVID-19 vaccine clinics to serve the needs of school staff, students, and families.² We appreciate these efforts and that you have advised K-12 school entities to follow current Centers for Disease Control and Prevention (CDC) guidance “to the greatest extent possible” when creating and implementing mitigation policies and practices.³

¹ See Letter from Governor Wolf to President Pro Tempore Jake Corman and Speaker Brian Cutler (August 25, 2021) available at <https://www.spotlightpa.org/news/2021/08/pa-school-mask-mandate-tom-wolf-republican-lawmakers/>.

² Wolf Administration Directs Vaccine Providers To Support COVID-19 Vaccination Clinics And Unveils Free COVID-19 Testing Program For Schools Across Pennsylvania, Aug. 16, 2021, available at <https://www.media.pa.gov/pages/health-details.aspx?newsid=1558>.

³ Wolf Administration Welcomes Pennsylvania Students Back To School, Aug. 23, 2021, available at <https://www.media.pa.gov/Pages/Education-Details.aspx?newsid=1182> and CDC Guidance for COVID-19 Prevention in K-12 Schools, last updated Aug. 13, 2021, available at <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/SchoolReopeningGuidance/ReopeningPreKto12/CDCGuidanceInformation/Pages/default.aspx>.

However, we write to urge you to take further action to ***issue a clear directive to mandate masking for students and school staff in all local educational agencies in Pennsylvania, with appropriate exceptions for students and school staff with qualifying disabilities.***

Masks have been proven to be very effective at reducing the spread of COVID-19 in general,⁴ and in schools in particular⁵ and the need for masking is well established. We believe that issuing an explicit directive requiring schools to mandate masks is essential to ensuring the health and safety of all our students, teachers, parents, school staff and communities. Such a directive is also vital to ensuring that widening disparities in educational opportunity suffered by Black and Brown students, students living in poverty, multilingual learners, and students with disabilities are not further exacerbated. Pennsylvania currently ranks second in the nation with regard to racial disparities in equitable access to full-time in-person learning. In the absence of new policies and targeted interventions, Pennsylvania's Black and Brown students will continue to suffer extraordinary harm and fall even further behind white peers.

Mandatory Universal Masking is Needed to Protect the Health of Children and School Staff

COVID-19 is a clear threat to the public's health, for which Pennsylvania's Secretary of Health may order control measures, including a mask mandate that can be fully implemented and enforced by the Governor and the Department of Education. Specifically, the Secretary of Health possesses emergency authority to undertake any disease control measure appropriate to protect the public from the spread of infectious disease.⁶ It is pursuant to this authority that the Secretary issued its previous orders requiring universal face coverings.⁷

On July 27, 2021, the CDC released updated guidance outlining the urgent need to increase measures to protect against the spread of COVID-19 in response to an alarming rise in COVID cases and hospitalization rates around the country. This directive included a specific recommendation that everyone in areas of substantial or high transmission wear a mask in public indoor places, even if they are fully vaccinated. We know that the Delta variant is more than twice as contagious as previous variants and the greatest risk of transmission is among unvaccinated individuals – including children -- who are far more likely to contract, and therefore transmit the virus. The CDC therefore concluded that “[g]iven what we know about the Delta variant, vaccine

⁴ “Experimental and epidemiological data support community masking to reduce the spread of SARS-CoV-2.” CDC, *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, May 7, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html>

⁵ See, e.g., *The ABC's of North Carolina's Plan A, Final Report*, The ABC Science Collaborative and Duke Clinical Research Institute, Jun. 30, 2021, (finding that NC schools were highly successful in preventing transmission of COVID-19 within school buildings by requiring masks and minimal physical distancing), available at <https://abcsciencecollaborative.org/wp-content/uploads/2021/06/ABCs-Final-Report-June-2021.06-esig-DB-KZ-6-29-21.pdf>

⁶ Disease Prevention and Control Law, 35 P.S. § 521.5; 71 P.S. §§ 532(a), and 1403(a); 28 Pa. Code § 27.60. See also 71 P.S. §§ 532(a), and 536; and Department of Health's regulations at 28 Pa. Code §§ 27.60-27.68.

⁷ See e.g., *Updated Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, November 18, 2020 available at <https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Updated%20Order%20of%20the%20Secretary%20Requiring%20Universal%20Face%20Coverings.pdf>.

effectiveness, and current vaccine coverage, layered prevention strategies, such as wearing masks, are needed to reduce the transmission of this variant.”⁸ As a fourth wave of the coronavirus surges, polls show that Americans overwhelmingly support protecting the common good by mandating that individuals wear protective masks as "a matter of health and safety" in schools.⁹

Legal Basis to Undertake Action

Against this backdrop, the [Education Law Center](#) has received multiple calls and inquiries from parents and community members across the state who are seeking to challenge policy decisions of their school boards and districts which have refused to establish universal mask requirements. In some cases, districts have also refused to require COVID-19 testing or quarantining in the event that students or staff test positive for COVID-19. Examples of such districts include: Avon Grove School District, Apollo Ridge SD, Delaware Valley SD, Erie City SD, Millcreek Township SD, Northern Bedford County SD, Northern York County SD, Penn Manor SD, Scranton SD, Souderton Area SD, Tamaqua Area School District, Wallenpaupack SD, Wilson Area School District. Notably, in one case, a federal court recently granted a restraining order against North Allegheny School District and ordered the District to reinstate a mandatory mask policy based in part on a finding of irreparable harm to the school staff, students, and visitors.¹⁰

We urge that the Department address the concerns raised by parents regarding the health, safety, and welfare of their children by issuing a clear directive that schools must require masks and address potential infections among school community members. The failure to require universal masking not only fails to qualify as a reasonable measure to ensure the health and safety of students but affirmatively places schoolchildren and school staff at significant risk of foreseeable, direct and substantial harm of infection by a known highly contagious and potentially deadly virus.¹¹

Policies which make masks optional or fail to address COVID-19 outbreaks also disproportionately impact students with disabilities in violation of federal disability laws, including Title II of the Americans with Disabilities Act, 42 USC § 12132; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; and the Individuals with Disabilities Education Act, 20 U.S. Code §

⁸ *Id.*

⁹ See e.g., *School mask, vaccine mandates supported in US: AP-NORC poll* (6 in 10 Americans say students and teachers should be required to wear face masks while in school, according to poll from The Associated Press-NORC Center for Public Affairs Research) (August 23, 2021) available at <https://apnews.com/article/lifestyle-health-education-coronavirus-pandemic-only-on-ap-0440d83602da918c571d506a3de9f44b>; *No vaccination? Americans back tough rules and mask mandates to protect the common good* (August 22, 2021) (An overwhelming 72% v. 28% of those surveyed by USA TODAY and Ipsos called mask mandates "a matter of health and safety") available at <https://www.usatoday.com/story/news/nation/2021/08/22/americans-back-mask-covid-vaccine-mandate-protect-common-good/8134392002/>.

¹⁰ *U.S. judge to North Allegheny School District: Everyone has to wear a mask*, Pittsburgh Post Gazette (April 23, 2021), <https://www.post-gazette.com/news/education/2021/08/23/North-Allegheny-School-District-na-mask-mandate-requirement-parents-students-restraining-order/stories/202108230063>

¹¹ While as a general rule, school entities are shielded from liability under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541, there are exceptions to the doctrine of qualified immunity, including claims of a “state created danger” whereby “the harm ultimately caused was foreseeable and fairly direct; a state actor acted with a degree of culpability that shocks the conscience; the plaintiff was a foreseeable victim or a “member of a discrete class of persons subjected to the potential harm brought about by the state’s actions”; and a state actor affirmatively used their authority in a way that created a danger to the citizen or rendered the citizen more vulnerable to danger.

1400 et seq. Children with disabilities are often more susceptible to infection and at higher risk for severe illness and therefore may not be able to attend public school in the absence of a mask mandate. Accordingly, optional masking policies operate to exclude students with disabilities from participating in public education, fail to make services, programs, and activities “readily accessible” to students with disabilities, and have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.¹² Importantly, pursuant to disability laws, including the Americans with Disabilities Act and Section 504, universal mask requirements must be subject to modification on a case-by-case basis as needed to accommodate students and school staff with qualifying disabilities.¹³

State Guidance Requiring Universal Masks Will Support Learning and Reduce Disparities

It is well documented that ***students benefit far more from in-person learning*** and therefore safely returning to in-person instruction in the fall of 2021 must be a priority. Studies show that while in school, students can concentrate better as there are fewer distractions and fewer opportunities to leave the class. In-person schooling results in more teacher to student time, helps students develop deeper understandings of the material, and gives teachers the tools and information they need to help their students. As a result, student completion rates of teacher-led classes are almost 5 times higher than online learning and students are less likely to disengage from school.¹⁴ Teachers in two separate surveys also estimated that only about 60% of their students were regularly participating or engaging in distance learning¹⁵ while two-thirds to three-quarters of teachers said their students were less engaged during remote instruction than before the pandemic, and that engagement declined even further over the course of the semester.¹⁶

Universal masking in schools is an important component of supporting such in-person learning, particularly as children under 12 cannot receive the vaccine, and masks now have a track record of effectiveness. A recent study conducted by Duke University analyzing data from 100 school districts and 14 charter schools in North Carolina from March through June 2021 (involving over 864,500 students and 160,549 staff) disclosed that **wearing masks is the most effective mitigation strategy to prevent in-school COVID-19 transmission.**¹⁷ Due to the circulating and highly contagious Delta variant, **the CDC expressly recommends universal indoor masking** by all

¹² See 42 U.S.C. § 12132; 28 C.F.R. § 35.130; 34 C.F.R. § 104.34(a); 28 C.F.R. § 35.150 and 34 C.F.R. § 104.34(a).

¹³ See e.g., 34 CFR §§ Part 104.

¹⁴ See *The Virtual Divide: Online vs. In-Person Learning in Fall 2020* available at <https://students4sc.org/2020/09/23/the-virtual-divide-online-vs-in-person-learning-in-fall-2020/>. In contrast, a 2019 study of cyber charter schools in Pennsylvania revealed that the average student at a cyber charter in Pennsylvania lost 106 days of learning in reading and 118 days in math compared to their traditional school counterpart. See *Charter School Performance in Pennsylvania*, Center for Research on Education Outcomes at Stanford University (2019) available at https://credo.stanford.edu/sites/g/files/sbiybj6481/f/2019_pa_state_report_final_06052019.pdf.

¹⁵ Kraft, Matthew A. & Nicole S. Simon, Teachers’ Experiences Working from Home During the COVID-19 Pandemic, Upbeat (Summer 2020), https://f.hubspotusercontent20.net/hubfs/2914128/Upbeat%20Memo_Teaching_From_Home_Survey_June_24_2020.pdf

¹⁶ Voices from the Virtual Classroom: A Survey of America’s Teachers on COVID-19 Related Education Issues, Educators for Excellence (2020), https://e4e.org/sites/default/files/voices_from_the_virtual_classroom_2020.pdf

¹⁷ *The ABC’s of North Carolina’s Plan A, Final Report*, The ABC Science Collaborative and Duke Clinical Research Institute, Jun. 30, 2021, <https://abcsciencecollaborative.org/wp-content/uploads/2021/06/ABCs-Final-Report-June-2021.06-esig-DB-KZ-6-29-21.pdf>

students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.¹⁸

It is also well documented that COVID-19 has significantly deepened educational inequities across the Commonwealth and across the country, and ***without mask mandates to ensure safe in-person learning these negative impacts will continue to be borne disproportionately by students living in poverty, students of color, and students with disabilities.***

Early studies show that educational gaps—in access, opportunities, achievement, and outcomes—widened greatly during the pandemic and students who are most underserved, particularly Black and Brown students, multilingual learners, and students with disabilities have suffered the most significant harm due to lack of access to in-person learning. In particular, in September 2020, 72% of Black students and 61% of Hispanic students attended all-virtual school compared to 24% of their white counterparts. By June of 2021, ***Pennsylvania ranked second highest in the nation for racial disparity*** as the proportion of white students with access to full time in-person learning was 21.5 percentage points greater than the proportion of non-white students for the entire 2020-2021 school year.¹⁹

Children living in poverty are less likely to access remote learning during school closures due to lack of high-speed internet at home, language barriers, and the absence of instructional support and access to educational opportunities that wealthier parents can provide. School closures also increase food insecurity, undermine social emotional learning, and create new needs for mental health supports.²⁰ During the pandemic, children living in the poorest 20% of U.S. neighborhoods were most negatively impacted and more likely to suffer long-lasting effects of school closures. One study estimates that one year of school closures will cost ninth graders in the poorest communities a 25% decrease in their post-educational earning potential, even if followed by three years of normal schooling. By contrast, research shows no substantial losses for students from the richest 20% of neighborhoods.²¹

Requiring universal masking is critical to ensuring that Black and Brown students, children living in poverty, multilingual learners, and students with disabilities are not left even further behind due to illness and school closures.

We know that the COVID-19 school closures present exceptional and daunting challenges for local school districts, administrators, teachers, staff, students and parents -- as well as the Governor and

¹⁸ CDC, COVID-19: K-12 Schools Guidance, Updated Aug. 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

¹⁹ *Inequity in Pennsylvania School District Reopening Decisions: How Districts' Mode of Delivery Varies*, Dulaney & Frankenberg, https://cecr.ed.psu.edu/sites/default/files/COVID_Fall_2020_plans_in_PA.pdf; *Disparities in Learning Mode Access Among K–12 Students During the COVID-19 Pandemic, by Race/Ethnicity, Geography, and Grade Level — United States*, September 2020–April 2021 *Weekly* / July 2, 2021 /70(26);953–958, at <https://www.cdc.gov/mmwr/volumes/70/wr/mm7026e2.htm>.

²⁰ *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*, June 2021 available at <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

²¹ *When the Great Equalizer Shuts Down: Schools, Peers, and Parents in Pandemic Times*, National Bureau of Economic Research, (Dec. 2020) available at <https://www.nber.org/papers/w28264>.

Departments of Health and Education. Issuing an order mandating universal masking in schools is essential to enabling our schools to meet these challenges, ensure the health and safety of our children and teachers, and ensure access to rigorous in-person instruction for all students. Our letter seeks to inform and support these efforts.

The absence of a mask mandate will impede the successful return to in-person learning. The evidence of the value of in-person learning is compelling, and parents, educators, and state lawmakers have made the reopening of schools a priority. This goal is unattainable without a mask mandate. The rapid spread of COVID among children has already resulted in new cases, will contribute to a renewal of instructional disruptions, or even school closures. A strong mask mandate will help allow schools to stay open and prevent additional, significant learning losses.

While we support your efforts to work with the General Assembly, we believe your Administration has the authority to impose this mandate and urge you to do so if the legislature fails to take action to protect our children. The time is now.

Thank you for considering this request so that all our schools can reopen and stay open as safe and healthy environments for our children.

Signed:

A+ Schools Pittsburgh

ACLAMO

AFT – Pennsylvania

Attic Youth Center

Black on Black Education

Black Women for a Better Education

Center City Pediatrics

Centro de Cultura, Arte, Trabajo y Educación (CCATE)

Children First

Chinatown Disability Advocacy Project

Disability Rights Pennsylvania

Education Law Center – PA

Education Law Partners, P.C.

Education Voters of PA

HIAS Pennsylvania

Homeless Children's Education Fund

HUNE Inc

Isaacs Bernstein, P.C.
Jewish Family and Children's Service of Greater Philadelphia
Juvenile Law Center
La Puerta Abierta
Law Office of Benjamin J Hinerfeld
Liberty Resources, Inc.
Lutheran Settlement House
NAACP - PA
PA Budget and Policy Center
PA Chapter, American Academy of Pediatrics
PA Education Scholars
PA Parent and Family Alliance
PARENT POWER
Pennsylvania American Academy of Pediatrics, Co-Chair, School Health Committee
Pennsylvania Association of School Nurses and Practitioners
Pennsylvania State Education Association
Philadelphia Family Voices
Public Interest Law Center
Raffaele & Associates, LLC
Support Center for Child Advocates
Swarthmore College Department of Educational Studies
Teach Plus
The Arc of Philadelphia
The Empowering Lives Foundation
The Field Center for Children's Policy, Practice & Research
The Law Offices of Caryl Andrea Oberman LLC
The Philadelphia School
The Village of Arts & Humanities
Uplift Center for Grieving Children
Vision for Equality
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