

745 Fifth Ave, Suite 500, New York, NY 10151

sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

VIA FAX

September 6, 2022

Brenda C. Liss, Esq., General Counsel
Office of the Superintendent
Newark Board of Education
765 Broad Street
Newark, NJ 07102
Fax -973-733-8771

Re: Newark Board of Education Mask Requirement

Dear Attorney Liss:

We represent [REDACTED] and [REDACTED], parents of a child who attends school in the Newark school district and other parents who are similarly situated. We demand that the Newark Board of Education remove its universal mask mandate for the reasons listed herein.

I. THE NEWARK BOARD OF EDUCATION CANNOT JUSTIFY THE NEED FOR A MASK MANDATE

A mandatory mask mandate for the Newark school district is unreasonable because Governor Murphy lifted the universal mask mandate for public schools, New Jersey is no longer in a state of public emergency, and COVID-19 metrics are “low” in Essex County¹ and trending down across the country.² Additionally, the U.S. Centers for Disease Control and Prevention (“CDC”) states that “[m]any people in the United States have some protection, or immunity, against COVID-19 due to vaccination, previous infection, or both. This immunity, combined with the availability of tests and treatments, has greatly reduced the risk of severe illness, hospitalization, and death from COVID-19 for many people.”³

¹ We note that the World Health Organization’s position is that “[n]o child should be denied access to school or activities because of lack of a mask.” Coronavirus disease (COVID-19): Children and masks, World Health Organization (March 7, 2022) available at <https://www.who.int/news-room/questions-and-answers/item/q-a-children-and-masks-related-to-covid-19>.

² COVID Data Tracker, CDC, available at <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Sept. 9, 2022).

³ COVID-19 by County, CDC available at https://www.cdc.gov/coronavirus/2019-ncov/your-health/covid-by-county.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fcommunity-levels.html (last visited Sept. 2, 2022).

Governor Murphy ended the state mask requirement in New Jersey public schools on March 7, 2022, due to “the significant decline of statewide COVID-19 metrics.”⁴ Governor Murphy stated in support of removing the mask mandate “that we have reached a point where we feel confident that we can take another step toward normalcy for our kids” and “[g]iven the continued drop in new cases and hospitalizations, projections indicating a continued decline over the coming weeks, and the continued growth of vaccinations for our school-aged population, we believe that we can responsibly end the universal mask mandate.”⁵ Additionally, Governor Murphy signed legislation and Executive Order ending COVID-19 Public Health Emergency on June 4, 2021.⁶

As of September 2, 2022, the current COVID-19 alert level in Essex County, New Jersey, was “Low” and all COVID-19 metrics are trending down for the county.⁷ The total percentage of the population in Essex County who have received one dose of the COVID-19 vaccine is 92.4%, and the number who are fully vaccinated against COVID-19 is 74.5%. The CDC’s position is that these metrics, including the community level, “can inform decisions about COVID-19 prevention strategies, including vaccinations, wearing masks, and avoiding crowded settings.”⁸ The CDC only recommends masking when communities are at a “High” level,⁹ and it takes the position that “[a]t low COVID-19 Community Levels, individual decisions to wear a mask should be informed by individual risk.”¹⁰ According to the CDC, “[h]igh levels of immunity and availability of effective COVID-19 prevention and management tools have reduced the risk for medically significant illness and death,”¹¹ thus defeating the Newark Board of Education’s position that the mandate is necessary.

The Newark school district is the only district in New Jersey with a mask mandate for the

⁴ Governor Murphy Announces That Universal School Mask Mandate Will Be Lifted Effective March 7 (Feb. 7, 2022) available at <https://www.nj.gov/governor/news/news/562022/20220207a.shtml#:~:text=TRENTON%20%E2%80%93%20Noting%20the%20significant%20decline,centers%20effective%20March%207%2C%202022> (last visited Sept. 2, 2022).

⁵ *Id.*

⁶ Governor Murphy Signs Legislation and Executive Order Ending COVID-19 Public Health Emergency (June 4, 2021) available at <https://www.nj.gov/governor/news/news/562021/20210604b.shtml> (last visited Sept. 2, 2022).

⁷ CDC COVID Data Tracker, Essex County, New Jersey, available at https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=New+Jersey&data-type=CommunityLevels&list_select_county=34013&null=CommunityLevels (last visited Sept. 2, 2022).

⁸ Science Brief: Indicators for Monitoring COVID-19 Community Levels and Making Public Health Recommendations, CDC (Aug. 12, 2022) available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/indicators-monitoring-community-levels.html#anchor_1646357123906 (last visited Sept. 2, 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States (Aug. 2022) available at <https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm> (last visited Sept. 2, 2022).

2022-2023 school year,¹² and as of June 2022 only 15% of public schools across the country require staff and students to wear masks inside the school.¹³ Based on a lack of public health emergency, CDC guidance, low case rates, milder variants, and downward trending metrics across all COVID-19 categories, the Newark Board of Education cannot justify forcing students and staff to mask.

II. MASKS ARE INEFFECTIVE IN REDUCING THE SPREAD OF SARS-COV-2

Masks are ineffective in reducing the spread of SARS-CoV-2, evidenced by the following:

- A study released May 25, 2021, by the University of Louisville found state mask mandates were poor predictors of COVID-19 transmission and that case growth was independent of mandates at low and high rates of community spread.¹⁴
- The FDA issued the following guidance to manufacturers of face masks covered under Emergency Use Authorization (“EUA”):
 1. The product is labeled accurately to describe the product as a face mask and includes a list of the body contacting materials (which does not include any drugs or biologics);
 2. The product is labeled accurately so that it **does not claim to be intended for use as a surgical mask or to provide liquid barrier protection;**
 3. The product labeling includes recommendations against use in a clinical setting where the infection risk level through inhalation exposure is high;
 4. The product is not labeled in such a manner that would misrepresent the product’s intended use; for example, **the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction;**
 5. The product is **not labeled as a respiratory protective device, and therefore should not be used for particulate filtration;** and

¹² Burbio’s School Mask Policy Tracker, available at <https://about.burbio.com/school-mask-policy-tracker> (last visited Sept. 2, 2022).

¹³ Institute of Education Sciences, 2022 School Pulse Panel available at <https://ies.ed.gov/schoolsurvey/spp/> (last visited Sept. 2, 2022).

¹⁴ Guerra, Damian, et al., *Mask mandate and use efficacy in state-level COVID-19 containment*, MedRxiv (May 25, 2021), available at <https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v2> (last visited Sept. 2, 2022).

6. The product is **not labeled for use in high risk aerosol generating procedures.**¹⁵

- Surgical and cloth masks are ineffective at filtering out particles the size of SARS-CoV-2 (the average size of SARS-CoV-2 particles is 125 nanometer (“**nm**”)).¹⁶ Surgical masks prevent entry by large droplets (5,000nm).¹⁷ Cloth masks are capable of filtering large dust-type particles (100,000nm).¹⁸
- One of the first real-world studies to conclude that face masks don’t reduce COVID-19 infections was published in November 2020 by Danish scientists. The study divided thousands of Danish into groups of mask-wearers and non-mask-wearers. “4,862 completed the study. Infection with SARS-CoV-2 occurred in 42 participants [wearing] masks (1.8%) and 53 control participants [who did not cover their faces] (2.1%). The between-group difference was 0.3 percentage point . . . the difference observed was not statistically significant”¹⁹
- “Upon our critical review of the available literature, we found only weak evidence for wearing a face mask as an efficient hygienic tool to prevent the spread of a viral infection,” according to a study published in the European Journal of Medical Research.²⁰
- Research done by the CDC in May 2020 and published in Emerging Infectious Diseases (EID) examined personal protective measures and environmental hygiene measures for the effectiveness of such measures in reducing transmission of laboratory-confirmed influenza in the community. Researchers identified 7 studies involving influenza and influenza-like illness and reported that there was in fact, no significant reduction in the transmission of influenza when face masks were used. Overall, the CDC reported that there is no significant effect of face masks in the transmission of laboratory-confirmed influenza, findings that can be extrapolated to SARS-CoV-2.²¹

¹⁵ Letter to Manufacturers of Face Masks, U.S. Food and Drug Administration (April 24, 2020), available at <https://www.fda.gov/media/137121/download> (last visited Sept. 2, 2022) (Emphasis added).

¹⁶ Rachid, Taslim *et al.*, *Effectiveness of N95 Masks against SARS-CoV-2: Performance Efficiency, Concerns, and Future Directions*, J. Chem Health Saf. (January 10, 2022), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8768005/> (last visited Sept. 2, 2022).

¹⁷ *Id.*

¹⁸ *Id.*; see also, *The size of dust particles, pollen, bacteria, virus and many more*, The Engineering Toolbox, available at https://www.engineeringtoolbox.com/particle-sizes-d_934.html (last visited Sept. 2, 2022).

¹⁹ Bundgaard, Henning, *et al.*, *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers: A Randomized Controlled Trial*, Ann Intern Med. (November 18, 2020), available at <https://pubmed.ncbi.nlm.nih.gov/33205991/> (last visited Sept. 2, 2022).

²⁰ Matuschek, Christiane, *et al.*, *Face masks : benefits and risks during the COVID-19 crisis*, Eur J Med Res (August 12, 2020), available at <https://pubmed.ncbi.nlm.nih.gov/32787926/> (last visited Sept. 2, 2022).

²¹ Xiao, Jingyi, *et al.*, *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*, CDC (May 2020), available at https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article (last visited Sept. 2, 2022).

III. NEWARK BOARD OF EDUCATION'S SOLE FOCUS ON VACCINATION RATES IS UNSCIENTIFIC AND CONTRADICTS CDC GUIDANCE REGARDING NATURAL IMMUNITY

On September 1, 2022, John Abeigon, the Newark teacher's union president, stated, "if you are upset that your child has to wear a mask in the classroom, get them vaccinated. The sooner we have a higher number of kids vaccinated, the sooner those masks can come down."²² Unfortunately, the district's sole focus on vaccination rates ignores natural immunity. An April 2022 study showed 75.2% of children 0-11 had seroprevalence to SARS-CoV-2 as of February 2022.²³ More recent National Institute of Health ("NIH") data shows the percentage is even higher at 89.4% of children aged 0-17 as of February 2022.²⁴ By now, the rate is almost certainly closer to 100%, given the time passed. Yet, the Newark Board of Education mask mandate ignores that many unvaccinated children have natural immunity to the SARS-CoV-2 virus, which is more robust than vaccine-elicited immunity.²⁵ For example, in a ground-breaking study, NIH researchers confirmed vaccine-induced immunity is inferior to natural immunity.²⁶ Other studies have reached the same result.²⁷ The CDC now recognizes the benefit of natural immunity in its COVID-19 prevention recommendations, updated on August 19, 2022. In particular:

- The CDC's guidance "**no longer differentiate based on a person's vaccination status because breakthrough infections occur, though they are generally mild, and persons who have had COVID-19 but are not vaccinated have some degree of protection against severe illness from their previous infection.**"²⁸

²² Eyewitness News sits down with Newark superintendent ahead of new school year *available at* <https://abc7ny.com/12186853/?fbclid=IwAR3TwSdoq2IdlY8v0gBTFe3N3RjzCkptMTG0FSdKJ9hMGweejPxEhaMnBlo> at 1:11 (last visited Sept. 2, 2022).

²³ Clarke, Kristie, *et al.*, *Seroprevalence of Infection-Induced SARS-CoV-2 Antibodies* — United States, September 2021–February 2022, MMWR (Apr. 26, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7117e3.htm>.

²⁴ <https://covid19serohub.nih.gov/>.

²⁵ Gazit, Sivan, *et al.*, *The Incidence of SARS-CoV-2 Reinfection in Persons with Naturally Acquired Immunity with and without Subsequent Receipt of a Single Dose of BNT162b2 Vaccine: A Retrospective Cohort Study*, *Annals of Internal Medicine* (Feb. 15, 2022), <https://www.acpjournals.org/doi/10.7326/M21-4130> (last visited Sept. 2, 2022); Flacco, Maria E., *et al.*, *Risk of SARS-CoV-2 reinfection 18 months after primary infection: population-level observational study*, *MedRxiv* (Feb. 19, 2022), <https://www.medrxiv.org/content/10.1101/2022.02.19.22271221v1> (last visited Sept. 2, 2022); *see also* Alexander, Paul E., *How Likely Is Reinfection Following Covid Recovery?*, *Brownstone Institute* (Dec. 29, 2021), <https://brownstone.org/articles/how-likely-is-reinfection-following-covid-recovery/> (compiling studies) (last visited Sept. 2, 2022).

²⁶ Follman, Dean, *et al.*, *Anti-nucleocapsid antibodies following SARS-CoV-2 infection in the blinded phase of the mRNA-1273 Covid-19 vaccine efficacy clinical trial*, *MedRxiv* (Apr. 19, 2022), <https://www.medrxiv.org/content/10.1101/2022.04.18.22271936v1> (last visited Sept. 2, 2022).

²⁷ Roltgen, Katharina, *Immune imprinting, breadth of variant recognition, and germinal center response in human SARS-CoV-2 infection and vaccination*, *Cell* (Mar. 17, 2022), *available at* <https://www.cell.com/action/showPdf?pii=S0092-8674%2822%2900076-9> (last visited Sept. 2, 2022).

²⁸ *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems* — United States, August 2022 *available at* <https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm> (last visited Sept. 2, 2022)(emphasis added).

- The CDC now recognizes the immunity and protection provided to those who have previously recovered from a COVID-19 infection: “The risk for medically significant illness increases with age, disability status, and underlying medical conditions but is **considerably reduced by immunity derived from vaccination, previous infection**, or both, as well as timely access to effective biomedical prevention measures and treatments.”²⁹

IV. PROLONGED MASK WEARING LEADS TO “MASK FATIGUE” AND OTHER DETRIMENTAL HEALTH EFFECTS

Extended mask-wearing has led to the emergence of “mask fatigue,” which is defined as “the lack of energy that accompanies, and/or follows prolonged wearing of a mask.”³⁰ Aspects of mask fatigue include:

Pressure/pain over ears, cheeks, and nose; skin breakdown; aggravation of acne; itching; contact dermatitis; voice fatigue; laryngitis; sore throat; respiratory compromise; Hypoxia; Hypercapnia; increased work of breathing; dizziness; headache; irritability; physical exhaustion; **decreased concentration/work efficiency; confusion and disorientation**; breathlessness; reduced fluid and food intake; chronic health effects on renal and metabolic functions; **aggravation of anxiety, depression, and feeling of impending doom; claustrophobia; impaired social interaction/recognition**; and maskophobia.³¹

A study published by the International Journal of Environmental Research and Public Health discussed Mask-Induced Exhaustion Syndrome.³² The researchers in this study demonstrated a statistically significant correlation in the quantitative analysis between the negative side effects of blood-oxygen depletion and fatigue in mask-wearers.³³ Additionally, the study found increased carbon dioxide blood content, a drop in blood oxygen saturation, increased heart rate, increased respiratory rate, and increased pulse rate.³⁴ The study also notes that:

[t]he mask-induced adverse changes are **relatively minor at first**

²⁹ *Id.* (emphasis added).

³⁰ Kalra, Sanjay, *et al.*, *Mask Fatigue*, J Pak Med Assoc (December 2020), available at <https://pubmed.ncbi.nlm.nih.gov/33475571/> (last visited Sept. 2, 2022). See also, *After 2 years growing call to take masks off children in school*, NPR (Jan. 28, 2022) available at <https://www.npr.org/2022/01/28/1075842341/growing-calls-to-take-masks-off-children-in-school> (last visited Sept. 2, 2022).

³¹ *Id.* (emphasis added).

³² Kisielinski, Kai, *et al.*, *Is a Mask That Covers the Mouth and Nose Free from Undesirable Side Effects in Everyday Use and Free of Potential Hazards?* Int J. Environ Res Public Health (April 20, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072811/> (last visited Sept. 2, 2022).

³³ *Id.*

³⁴ *Id.*

glance, but repeated exposure over longer periods in accordance with the above-mentioned pathogenetic principle is relevant. Long-term disease-relevant consequences of masks are to be expected. Insofar, **the statistically significant results found in the studies with mathematically tangible differences between mask wearers and people without masks are clinically relevant.** They give an indication that **with correspondingly repeated and prolonged exposure to physical, chemical, biological, physiological and psychological conditions, some of which are subliminal, but which are significantly shifted towards pathological areas,** health-reducing changes and clinical pictures can develop such as high blood pressure and arteriosclerosis, including coronary heart disease (metabolic syndrome) as well as neurological diseases.³⁵

It is unreasonable for students and staff to experience these symptoms when the need for masking is nonexistent and the benefit of masking is minimal.

V. MASKS ARE ESPECIALLY DETRIMENTAL TO CHILDREN IN A LEARNING ENVIRONMENT

Masks are detrimental to students in a learning environment. A study conducted by Brown University scientists found that social distancing measures, including face masks, are suspected of causing young children's development to have dropped by up to 23% during the COVID pandemic, and adolescent mental health throughout the pandemic revealed increased stress, anxiety, and depression.³⁶ Moreover, studies showed reduced math and language arts academic growth in elementary and high school.³⁷ Additionally, regarding children and masks, the World Health Organization recommends that "mask use should be flexible so that children can continue play, education, and everyday activities. These activities are an important part of child development and health. No child should be denied access to school or activities because of lack of a mask."³⁸

VI. MASKS ARE OPTIONAL AS EUA MEDICAL PRODUCTS

Newark district students and employees have the right to refuse an investigational product that is ineffective at reducing the spread of SARS-CoV-2, is not recommended by the CDC, has detrimental health impacts, and interferes with the educational experience. Long-settled precedent establishes that it is not legal to coerce an individual to accept an unlicensed, and hence

³⁵ *Id.* (emphasis added).

³⁶ Deoni, Sean, *et al.*, *Impact of the COVID-19 Pandemic on Early Child Cognitive Development: Initial Findings in a Longitudinal Observational Study of Child Health*, medRxiv (August 11, 2021), available at <https://www.medrxiv.org/content/10.1101/2021.08.10.21261846v1.full.pdf> (last visited on Sept. 2, 2022).

³⁷ *Id.*

³⁸ *Coronavirus disease (COVID-19): Children and masks*, World Health Organization (March 7, 2022), available at <https://www.who.int/news-room/questions-and-answers/item/q-a-children-and-masks-related-to-covid-19> (last visited on Sept. 2, 2022).

experimental, medical product. An individual must voluntarily agree, free from any undue influence, to accept same. Masks are a medical device subject to Emergency Use Authorization (“EUA”) and, therefore, must be optional as “investigational products.”³⁹ The law provides that recipients of a product authorized for use under an EUA can refuse the product.⁴⁰ For an unlicensed medical product, the “basic elements of informed consent” include that “participation is voluntary”, “refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled,” and that “consent be obtained without “coercion or undue influence.”⁴¹

VII. CONCLUSION

[REDACTED] hereby demand that the Newark Board of Education follow the lead of the New Jersey Governor, other school districts in the state and country, and the CDC by immediately removing its universal mask mandate. [REDACTED] reserve all rights.

We request a response by **5 PM on Friday, September 9, 2022**. The Firm’s contact person for this matter is attorney Allison R. Lucas, reached at [REDACTED].

Sincerely,

Debra Gambella

Debra Gambella, Esq.
Allison R. Lucas, Esq.

cc: [REDACTED]

³⁹ *Personal Protective Equipment EUAs*, U.S. Food and Drug Administration (March 7, 2022), available at <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/personal-protective-equipment-euas#appendixasurgicalmasks> (last visited on Sept. 2, 2022).

⁴⁰ 21 U.S.C. § 360bbb-3.

⁴¹ 45 C.F.R § 46.116. *See also* 21 C.F.R § 50.20 (sets forth conditions for obtaining informed consent for use of an unlicensed medical product and reiterating that consent should be free from “coercion or undue influence”).