

September 30, 2022

VIA EMAIL

Lynn R. Rauch, General Counsel
School District of Philadelphia
440 N Broad St, Suite 313
Philadelphia, PA 19130
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Re: *School District of Philadelphia 2022-2023 Mask Requirement Policy*

Dear Attorney Rauch:

We represent Ms. Priscilla Lo (“**Ms. Lo**”) and Ms. Ana Atach (“**Ms. Atach**”), both of whom are parents of children who attend schools in the School District of Philadelphia (“**SDP**”). We hereby demand that SDP rescind its masking requirements for the reasons listed herein.

I. BACKGROUND

On September 8, 2022, SDP announced its revised COVID-19 Protocol for the 2022-2023 School Year (the “**Protocol**”). The Protocol provides in relevant part as follows:

- Masking will be optional for students and staff except: **When the COVID-19 Community Level is high according to the CDC COVID-19 Community Level Indicators.** In this instance ... indoor universal masking will be required in schools, school buses and offices until the Community Level returns to medium. At a Community Level of medium, masking is strongly recommended.¹

II. THE CDC COVID-19 COMMUNITY LEVEL IS NOT AN ACCURATE INDICATOR OF RISK

The CDC relies on three indicators to determine the COVID-19 Community Level.² These

¹ General COVID-19 Protocol for the 2022-2023 School Year, School District of Philadelphia, *available at* <https://www.philasd.org/studenthealth/covid19protocols/> (revised Aug. 29, 2022) (emphasis added).

²Science Brief: Indicators for Monitoring COVID-19 Community Levels and Making Public Health Recommendations, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/indicators-monitoring-community-levels.html> (last visited Sept. 30, 2022).

indicators are (1) the total amount of new COVID-19 cases per 100,000 population in the past 7 days; (2) new COVID-19 hospital admissions per 100,000 population in the past 7 days; and (3) the 7-day average percent of staffed inpatient beds occupied by COVID-19 patients.³ The number of new COVID-19 hospital admissions and percent staffed inpatient beds are reported by hospitals in accordance with the Department of Health & Human Services (“HHS”) COVID-19 Guidance for Hospital Reporting. Under the HHS’s guidance, hospitals are required to report the number of new admissions of, as well as the staffed inpatient beds occupied by, patients *with* COVID-19.⁴

“Patients with COVID-19” includes two different types of patients: (i) patients who were admitted for other reasons and found to also have COVID-19 through routine testing (“**incidental COVID-19**”);⁵ and, in contrast, (ii) “patients hospitalized *for* COVID-19” are patients who were hospitalized *because of* COVID-19. There is a clear distinction between these two types of patients and thus, the failure to distinguish between the two types of COVID-19 patients greatly biases the hospitalization data reported to the CDC. As a result, what is provided is an inaccurate picture of the actual community level. For example, in January 2022, NYU Langone Health reported about 65% of its COVID-19 patients had incidental infections, meaning only about 35% of the patients listed as being hospitalized with COVID-19 were hospitalized because of their infection.⁶ In fact, the mischaracterization of COVID-19 hospitalizations was so pervasive, it prompted New York Governor Kathy Hochul to require hospitals in New York, when reporting hospitalizations, to begin distinguishing between patients admitted for COVID-19 as their primary condition from those who are hospitalized for other reasons and had incidental COVID-19.⁷

Equally significant is the fact that hospitals are not required to report the severity of the COVID-19 infections, which is an important metric when assessing actual risk. Given the reduced severity of the Omicron variant,⁸ the exclusion of severity data further biases the hospitalization data. Even the CDC currently recommends that data on disease severity and healthcare system strain be used in addition to community transmission rates, stating the following:

Despite high volume of hospitalizations due to high caseloads, **the emergence of Omicron as the dominant variant reflected lower virulence and disease severity.** These changes make it more

³ *Id.*

⁴ *COVID-19 Guidance for Hospital Reporting and FAQs For Hospitals, Hospital Laboratory, and Acute Care Facility Data Reporting*, HHS, <https://www.hhs.gov/sites/default/files/covid-19-faqs-hospitals-hospital-laboratory-acute-care-facility-data-reporting.pdf> (last updated Aug. 10, 2022).

⁵ *Hospitals see more patients 'with COVID-19' vs. 'for COVID-19'*, Becker’s Hospital Review (Jan. 5, 2022), <https://www.beckershospitalreview.com/patient-safety-outcomes/hospitals-see-more-patients-with-covid-19-vs-for-covid-19.html>.

⁶ *In Omicron Hot Spots, Hospitals Fill Up, but I.C.U.s May Not*, New York Times (Jan. 4, 2022), <https://www.nytimes.com/2022/01/04/health/covid-omicron-hospitalizations.html>.

⁷ *Governor asks New York hospitals for greater detail in COVID-19 inpatient reports*, Beckers Hospital Review (Jan. 4, 2022), <https://www.beckershospitalreview.com/public-health/governor-asks-new-york-hospitals-for-greater-detail-in-covid-19-inpatient-reports.html>.

⁸ *Variants of the Virus*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/variants/index.html> (last updated Aug. 11, 2022).

feasible to minimize medically significant disease and prevent excessive strain on the healthcare sector, even in the occurrence of SARS-CoV-2 transmission. ... Accordingly, at this stage of the pandemic, **data on disease severity and healthcare system strain to complement case rates are more informative for public health recommendations** for individual, organizational, and jurisdictional decisions than data on community transmission rates alone.⁹

Because of these important shortcomings in two of the three measurements used to determine the COVID-19 Community Level, reliance on this is not justified.

III. MASKS ARE INEFFECTIVE AT REDUCING THE SPREAD OF SARS-COV-2

Even if the CDC COVID-19 Community Level provided an accurate indicator of risk, which they do not, masks are ineffective in reducing the spread of SARS-CoV-2, as 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.¹⁰
- The FDA guidance issued to manufacturers of face masks covered under Emergency Use Authorization (“EUA”) requires, *inter alia*, that manufacturers ensure that:
 1. 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**;
 2. 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**;
 3. The product is **not labeled as a respiratory protective device, and therefore should not be used for particulate filtration**.¹¹

⁹ *Science Brief: Indicators for Monitoring COVID-19 Community Levels and Making Public Health Recommendations*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/indicators-monitoring-community-levels.html#anchor_1646354066920 (last updated Aug. 12, 2022).

¹⁰ Guerra, Damian, *et al.*, *Mask mandate and use efficacy in state-level COVID-19 containment*, MedRxiv (May 25, 2021), <https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v2>.

¹¹ *Letter to Manufacturers of Face Masks*, U.S. Food and Drug Administration (Apr. 24, 2020), <https://www.fda.gov/media/137121/download> (emphasis added).

- 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**”).¹² Surgical masks prevent entry by large droplets (5,000nm).¹³ Cloth masks are capable of filtering large dust-type particles (100,000nm).¹⁴
- One of the first real-world studies to conclude that face masks do not 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”¹⁵
- “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 in the European Journal of Medical Research.¹⁶
- 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-2.¹⁷
- A preprint study comparing two adjacent K-12 school districts in Fargo, North Dakota, one which had a mask mandate and one which did not in the fall of the 2021-2022 academic year found “no significant difference between student case rates while the districts had differing masking policies.”¹⁸

¹² Rachid, Taslim *et al.*, *Effectiveness of N95 Masks against SARS-CoV-2: Performance Efficiency, Concerns, and Future Directions*, J. Chem. Health Saf. (Jan. 10, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8768005/>.

¹³ *Id.*

¹⁴ *Id.*; see also *The size of dust particles, pollen, bacteria, virus and many more*, The Engineering Toolbox, https://www.engineeringtoolbox.com/particle-sizes-d_934.html (last visited Sept. 2, 2022).

¹⁵ 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. (Nov. 18, 2020), <https://pubmed.ncbi.nlm.nih.gov/33205991/>.

¹⁶ Matuschek, Christiane, *et al.*, *Face masks : benefits and risks during the COVID-19 crisis*, Eur. J. Med. Res. (Aug. 12, 2020), <https://pubmed.ncbi.nlm.nih.gov/32787926/>.

¹⁷ Xiao, Jingyi, *et al.*, *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*, CDC (May 2020), https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article.

¹⁸ Sood, Neeraj, *et al.*, *Association between School Mask Mandates and SARS-CoV-2 Student Infections: Evidence from a Natural Experiment of Neighboring K-12 Districts in North Dakota*, Research Square (July 1, 2022), <https://www.researchsquare.com/article/rs-1773983/v1>.

- A retrospective population-based study conducted in Catalonia, Spain assessed the effectiveness of mandatory use of face masks in schools during the first term of the 2021–2022 academic year and found there were no significant differences in SARS-CoV-2 transmission when mandatory face masks were required.¹⁹

In fact, SPD’s Protocol is out of synch with federal policies as well as other school districts. On September 16, 2022, the Office of Head Start, the federal program that provides grants for preschool and child care services, announced that it would be dropping its universal masking rule for its grant recipients.²⁰ On September 9, 2022, the last school in New Jersey with a mask mandate, Newark School District, which coincidentally sits just mere minutes from Philadelphia, announced it was dropping its mask mandate in light of “multiple indicators,” and masks were now optional.²¹

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.”²² 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.²³

A study published by the International Journal of Environmental Research and Public Health

¹⁹ Coma, Ermengol, *et al.*, *Unravelling the role of the mandatory use of face covering masks for the control of SARS-CoV-2 in schools: a quasi-experimental study nested in a population-based cohort in Catalonia (Spain)* (Aug. 23, 2022), <https://adc.bmj.com/content/early/2022/08/23/archdischild-2022-324172>.

²⁰ Choi, Joseph, *HHS to Drop Universal Masking Requirements for Head Start Grantees*, The Hill (Sept. 16, 2022), <https://thehill.com/policy/healthcare/3646518-hhs-to-drop-universal-masking-requirements-for-head-start-grantees/>.

²¹ <https://www.facebook.com/NewarkPublicSchools/photos/a.941625609312507/2532077243600661/>.

²² Kalra, Sanjay, *et al.*, *Mask Fatigue*, J. Pak. Med. Assoc. (Dec. 2020), <https://pubmed.ncbi.nlm.nih.gov/33475571/>. See also *After 2 years growing call to take masks off children in school*, NPR (Jan. 28, 2022), <https://www.npr.org/2022/01/28/1075842341/growing-calls-to-take-masks-off-children-in-school>.

²³ *Id.* (emphasis added).

discussed Mask-Induced Exhaustion Syndrome.²⁴ The researchers in this study demonstrated a statistically significant correlation in the analysis between the negative side effects of blood-oxygen depletion and fatigue in mask-wearers.²⁵ 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.²⁶ The study also notes:

[t]he mask-induced adverse changes are **relatively minor at first 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.²⁷

It is unreasonable for students and staff to experience these symptoms when the need for masking is non-existent and the benefit of masking is minimal at best.

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.²⁸ Moreover, studies showed reduced math, language arts and academic growth in elementary and high school.²⁹ Additionally, regarding children and masks, the World Health Organization recommends that "mask use should be flexible so that children can continue play,

²⁴ 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. Pub. Health (Apr. 20, 2021), <https://pubmed.ncbi.nlm.nih.gov/33923935/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (emphasis added).

²⁸ 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 (Aug. 11, 2021), <https://www.medrxiv.org/content/10.1101/2021.08.10.21261846v1.full.pdf>.

²⁹ *Id.*

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.”³⁰

VI. MASKS ARE OPTIONAL AS EUA MEDICAL PRODUCTS

SDP 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 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.”³¹ The law provides that recipients of a product authorized for use under an EUA can refuse the product.³² 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.”³³

VII. CONCLUSION

Ms. Lo and Ms. Atach hereby request that SDP immediately rescind its masking policy for the reasons listed herein. We request a response by **5 PM on Thursday, October 6, 2022.**

Very truly yours,



Elizabeth A. Brehm, Esq.
Catherine Cline, Esq.

cc: Ms. Priscilla Lo
Ms. Ana Atach

³⁰ *Coronavirus disease (COVID-19): Children and masks*, World Health Organization (Mar. 7, 2022), <https://www.who.int/news-room/questions-and-answers/item/q-a-children-and-masks-related-to-covid-19>.

³¹ *Personal Protective Equipment EUAs*, U.S. Food and Drug Administration (Mar. 7, 2022), <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/personal-protective-equipment-euas#appendixasurgicalmasks>.

³² 21 U.S.C. § 360bbb-3.

³³ 45 C.F.R § 46.116. *See also* 21 C.F.R § 50.20 (setting 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”).