

## VIA EMAIL

January 9, 2023

Jeanice Kerr Swift  
Superintendent  
Ann Arbor Public Schools  
2555 South State St.  
Ann Arbor, MI 48104  
[swift@a2schools.org](mailto:swift@a2schools.org)

Re: Ann Arbor Public Schools Mask Mandate: January 9-20<sup>th</sup>

Dear Superintendent Swift:

On behalf of our client, Informed Consent Action Network (“**ICAN**”) and its supporters who live in Michigan, we write regarding the Ann Arbor Public School (“**AAPS**”) mask mandate for indoor spaces effective January 9, 2023, through January 20, 2023, which provides that AAPS “will require well-fitting masks to be worn by students, staff and visitors while indoors in AAPS schools, beginning on January 9th and during the first two weeks following the winter break.”<sup>1</sup> For the following reasons, we request this mandate be rescinded immediately.

### **I. THE CURRENT DATA ON COVID AND OTHER RESPIRATORY ILLNESSES CANNOT JUSTIFY THE MASK MANDATE**

Governor Gretchen Whitmer lifted the statewide mask mandate in June 2021,<sup>2</sup> in response to rapidly declining COVID-19 prevalence and severity. Since that time, Governor Whitmer has not reinstated a statewide mask mandate, evidence of the fact that conditions are not sufficiently concerning to impose such a measure. Notably, at the beginning of this school year, you stated in a message to Ann Arbor Public Schools, masks will be “welcomed indoors” when Washtenaw County is rated low, “encouraged indoors” when the county is rated medium, and “strongly recommended” indoors when the county is rated high according to the CDC’s Community Level

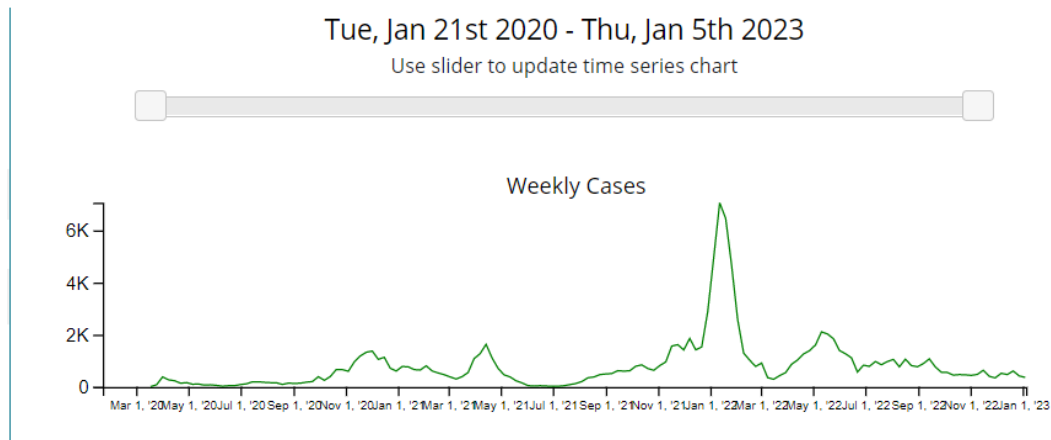
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<sup>1</sup> January 8, 2023 - Superintendent Health Update, Ann Arbor Public Schools (Jan. 8, 2023), <https://www.a2schools.org/site/default.aspx?PageType=3&ModuleInstanceID=17841&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=25106&PageID=11460>.

<sup>2</sup> Grace Tucker, *Where Michigan school districts stand on 2022-23 COVID protocols*, Chalkbeat – Detroit (Aug. 22, 2022), <https://detroit.chalkbeat.org/2022/8/24/23320161/michigan-districts-2022-covid-protocols-mask-requirement-testing-quarantine>.

Alerts.<sup>3</sup> Current CDC community level data indicates Washtenaw County, Michigan is in “medium” level,<sup>4</sup> which, according to your Fall 2022 guidance, indicates masks “encouraged indoors.” Given this, why are masks now being required instead of recommended?

Notably, the CDC’s COVID tracker indicates that there has been a 13.42% drop in cases over the past week (ending January 4, 2023).<sup>5</sup> In fact, **weekly COVID cases are lower right now than they were in the beginning of the school year in August-September 2022,**<sup>6</sup> when your guidance was issued. Accordingly, guidance for the “medium” COVID level should be equal to “masks recommended” or even less restrictive.



**Finally, RSV cases have steeply declined over the past few weeks and are lower now than they were in August-September 2022, at the beginning of the school year.<sup>7</sup> The same significant declining trends hold for influenza as well.<sup>8</sup>**

## 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

<sup>3</sup> August 19, 2022 - Fall 2022 COVID and Health Guidance, Ann Arbor Public Schools (Aug. 19, 2022), <https://www.a2schools.org/site/default.aspx?PageType=3&ModuleInstanceID=17841&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=23609&PageID=11460>

<sup>4</sup> COVID-19 Integrated County View, COVID Data Tracker – CDC (Jan. 9, 2023), [https://covid.cdc.gov/covid-data-tracker/#county-view?list\\_select\\_state=Michigan&data-type=Hospital&list\\_select\\_county=26161](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Michigan&data-type=Hospital&list_select_county=26161).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> RSV National Trends, CDC (Jan. 3, 2023), <https://www.cdc.gov/surveillance/nrevss/rsv/natl-trend.html>.

<sup>8</sup> Weekly U.S. Influenza Surveillance Report, CDC (Jan. 6, 2023), <https://www.cdc.gov/flu/weekly/index.htm>.

was independent of mandates at low and high rates of community spread.<sup>9</sup>

- 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
  6. The product is **not labeled for use in high risk aerosol generating procedures**.<sup>10</sup>
- 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**”)).<sup>11</sup> Surgical masks prevent entry by large droplets (5,000nm).<sup>12</sup> Cloth masks are capable of filtering large dust-type particles (100,000nm).<sup>13</sup>

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<sup>9</sup> 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).

<sup>10</sup> *Letter to Manufacturers of Face Masks*, U.S. Food and Drug Administration (April 24, 2020), available at <https://www.fda.gov/media/137121/download> (emphasis added).

<sup>11</sup> 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).

<sup>12</sup> *Id.*

<sup>13</sup> *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](https://www.engineeringtoolbox.com/particle-sizes-d_934.html) (last visited Sept. 2, 2022).

- 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 citizens 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 . . . .”<sup>14</sup>
- A study published in the European Journal of Medical Research concluded as follows: “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.”<sup>15</sup>
- 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 seven 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.<sup>16</sup>

### III. 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.”<sup>17</sup> Aspects of mask fatigue include:

Pressure/pain over ears, cheeks, and nose; skin breakdown;  
aggravation of acne; itching; contact dermatitis; voice fatigue;

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<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> 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](https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article) (last visited Sept. 2, 2022).

<sup>17</sup> 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).

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.<sup>18</sup>

A study published by the International Journal of Environmental Research and Public Health discussed Mask-Induced Exhaustion Syndrome.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> The study also notes that:

[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.<sup>22</sup>

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.

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<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> 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).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (emphasis added).

#### **IV. 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 a drop in young children’s development by up to 23% during the COVID pandemic, as well as increased stress, anxiety, and depression among adolescents.<sup>23</sup> Moreover, studies showed reduced math and language arts academic growth in elementary and high school.<sup>24</sup> 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.”<sup>25</sup>

#### **V. MASKS ARE OPTIONAL AS EUA MEDICAL PRODUCTS**

AAPS 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.”<sup>26</sup> The law provides that recipients of a product authorized for use under an EUA can refuse the product.<sup>27</sup> 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.”<sup>28</sup>

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<sup>23</sup> 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).

<sup>24</sup> *Id.*

<sup>25</sup> *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).

<sup>26</sup> *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).

<sup>27</sup> 21 U.S.C. § 360bbb-3.

<sup>28</sup> 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”).

**VI. CONCLUSION**

Due to the above stated reasons, we respectfully request that you rescind the mask mandate for AAPS.

We request a response by **5 PM on Thursday, January 12, 2023.**

Very truly yours,

A handwritten signature in black ink, appearing to read "E. Brehm".

Elizabeth A. Brehm, Esq.  
Thomas Stavola, Esq.