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Violations of the Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities – Updated Enforcement Guidance

On August 31, 2021, the Acting Secretary of the Pennsylvania Department of Health issued an Order “Directing Face Coverings in School Entities”. This Order is to take effect on September 7, 2021. After its issuance by the Acting Secretary, we received inquiries from law enforcement and members of the public regarding enforcement of this Order. This memorandum shall serve as the official instruction and guidance by this office concerning this Order.

Two methodologies exist by which criminal penalties may be used to enforce the Orders issued by the Secretary of the Department of Health: the Pennsylvania Disease Control and Prevention Act of 1955, 35 P.S. § 521.20 (a), and the Pennsylvania Administrative Code of 1929, 71 P.S. § 1409. These summary offenses provide for a penalty of a fine ranging from \$25.00 to \$300.00 under the Disease Control and Prevention Act, and a fine ranging from \$10.00 to \$50.00 under the Administrative Code, with up to 30 days imprisonment for willful non-payment of the fine and court costs under both Acts.

This office previously addressed the applicability of criminal enforcement and prosecution of violations of similar COVID-19 Orders issued by the Secretary of the Department of Health and/or Governor of Pennsylvania. For example, on May 8, 2020, we instructed law enforcement not to issue criminal citations for violations of Orders to close physical locations of all non-life sustaining businesses. In doing so, we provided the following analysis:

“The original March 19, 2020, and subsequent amended orders and regulations are penal in nature to the extent that they allow criminal citations and penalties. In order to properly enforce them, citizens must clearly be aware of the differentiation between criminal and non-criminal conduct. The language of such penal regulations can neither be vague nor overbroad.

Additionally, citizens cannot be subjected at risk of criminal penalty to restrictions whose terms continuously change. Rapid changes in the definition of what

constitutes criminal conduct renders the application of criminal law as arbitrary and impossible to follow or defend against.

In analyzing the ever changing scope and application of these orders, we find that their enforcement as **criminal** penalties is not possible on the consistent basis required of prosecutors and law enforcement.”

Memorandum of May 8, 2020.

We noted that our review was limited solely to the penal application of the Orders, and not any civil or administrative penalties that may be imposed. We also reasserted the nature of engagement and education to be performed by law enforcement:

“Concerning any potential calls to law enforcement regarding perceived violations of the aforementioned orders and regulations, this office stands by its recommendations to law enforcement concerning engagement and education with potential non-compliant individuals on the needs to ensure public safety. Law enforcement may file charges for other applicable criminal violations surrounding these callouts, such as those found in the Crimes Code, Vehicle Code, or drug laws.”

Memorandum of May 8, 2020.

This office also confronted these issues when the Secretary of the Department of Health issued the “Updated Order Requiring Universal Face Coverings” on November 17, 2020, and the Governor issued the Order for Mitigation, Enforcement, and Immunity Protections, which incorporated for enforcement the Order of the Secretary of the Department of Health, on November 23, 2020. In response, we reaffirmed our position articulated in its Memorandum of May 8, 2020, during consultations with law enforcement and members of the public.

In reviewing the current Orders at issue, we find the same analysis applies presently as it did regarding the prior Orders discussed in our Memorandum of May 8, 2020. We specifically note that the current Order of the Acting Secretary contains many exceptions to the general masking requirements that will necessitate subjective determinations by a School Entity concerning whether or not an individual meets these vaguely defined standards.

Additionally, Section 4.A.5. expressly restricts the ability of a School Entity to enforce the general masking requirements. These well-reasoned constraints on a School Entity in enforcing the general masking requirements should apply with equal weight against the issuance of criminal violations and criminal prosecutions for violations of this Order.

Accordingly, this office **will not** prosecute any criminal citations for alleged violations of the Order issued by the Acting Secretary of the Department of Health on August 31, 2021. We are also hereby directing law enforcement to **not** issue any such criminal citations.

We stress that this instruction solely applies to criminal citations. This does not apply to civil or administrative sanctions, or any other legal concerns surrounding the governance and policies of School Entities. As we noted in our May 8th Memorandum, such matters are beyond the scope of this office and it would be inappropriate for us to offer any legal opinions or guidance on those issues.

We also reaffirm our prior guidance that any calls to law enforcement for perceived violations of the Orders should solely focus on engagement and education with potential non-compliant individuals on the needs to ensure public safety. Based upon our experience, knowledge, and input with experts, we believe that the overwhelming majority of people will react positively under such circumstances. We specifically note that law enforcement should **not** participate in any conduct for which the Order in Section 4.A.5. prohibits a School Entity from engaging, including if such request comes from a School Entity.

Finally, we note that our instruction solely relates to the aforementioned summary offense criminal violations, and not any other penal statute. Law enforcement may file charges for other applicable criminal violations surrounding these callouts, such as those found in the Crimes Code, Vehicle Code, or drug laws. **Specifically, any harassing, threatening, or other violent behaviors in any form will not be tolerated at any time, and will be fully prosecuted by this office.**

We issue these instructions based upon the specific and unique role that penal statutes and our criminal justice system play in society. At no point should these instructions be interpreted in any fashion as detracting from the seriousness of COVID-19, downplaying the personal responsibility that we share towards each other in our community, or as providing any guidance regarding the applicability of the Order beyond the context expressly stated above. It is our sincere hope that this memorandum will provide clarity and transparency to all members of our community regarding the role of law enforcement and prosecutors as relates to the Order of the Acting Secretary.

We give our ongoing heartfelt appreciation to our partners in law enforcement, who supporting our community at all times no matter what difficulties we face. Additionally, we remain strong in our conviction that now, more than ever, our community must be able trust that it will receive the fair and just enforcement of the rule of law from its public servants. You have such a commitment from this office, and we look forward to our continued partnership with law enforcement and all agencies and individuals committed to justice, safety, and prosperity for our community.

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