

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
Northern District

SUPERIOR COURT

216-2021-CV-00329
Docket No. _____

SEAN MONROE,
individually, and on behalf of
J.M. and W.M., his children,

ROBERT M. FOJO,
individually, and on behalf of
S.R.F., S.K.F., and N.F., his children,

Plaintiffs

v.

BEDFORD SCHOOL DISTRICT,
SCHOOL ADMINISTRATIVE UNIT #25

Defendants

**PLAINTIFFS' EMERGENCY EX PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs Sean Monroe, individually, and on behalf of J.M. and W.M., his children, and Robert M. Fojo, individually, and on behalf of S.R.F., S.K.F., and N.F., his children, pursuant to New Hampshire Superior Court Rules 48(a) and (b), move, on an *ex parte* basis, for a temporary restraining order or, in the alternative, for a preliminary injunction, enjoining Defendant Bedford School District, School Administrative Unit #25 ("Bedford"), from enforcing its policy requiring students to wear face masks or coverings while in school.

Plaintiffs request that the Court issue an emergency temporary restraining order, without notice, because the District's policy violates RSA 126-U:4, which prevents schools from placing any kind of restraint on a child that restricts their breathing or normal body functions; does not prevent the transmission of COVID-19; has caused the Plaintiffs' children to develop rashes and acne on their faces in the areas where they wear masks; has caused the Plaintiffs' children to

suffer from anxiety and emotional distress; and will likely cause numerous other physiological and psychological effects.

FACTUAL BACKGROUND

For purposes of brevity, Plaintiffs rely on the facts set forth in their Verified Complaint for Declaratory Judgment and Injunctive Relief filed contemporaneously with this Motion.

ARGUMENT

A. Standard of Review

“A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” *Binford et al. v. Governor Sununu*, Docket No. 217-2020-CV-00152, at *5 (Merrimack Super. Ct. Mar. 25, 2020). “It is the moving party’s burden to ‘show among other things that it would likely succeed on the merits.’” *Id.* (quoting *DuPont v. Nashua Police Dep’t*, 167 N.H. 429, 434 (2015)). “In addition to success on the merits, ‘[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, [and] there is no adequate remedy at law.’” *Binford, supra* (quoting *Pike v. Deutsche Bank Nat’l Trust Co.*, 168 N.H. 40, 45 (2015)).

B. The Court Should Issue a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction

1. Plaintiffs will likely succeed on the merits of their claims.

RSA 126-U:4 states:

No school or facility shall **use or threaten to use any of the following restraint and behavior control techniques:**

I. Any **physical restraint or containment technique** that:

(a) **Obstructs a child’s respiratory airway or impairs the child’s breathing or respiratory capacity or restricts the movement required for normal breathing;**

(b) Places pressure or weight on, or causes the compression of, the chest, lungs, sternum, diaphragm, back, or abdomen of a child;

(c) Obstructs the circulation of blood;

(d) Involves pushing on or into the child's mouth, nose, eyes, or any part of the face or **involves covering the face or body with anything**, including soft objects such as pillows, blankets, or washcloths; or

(e) Endangers a child's life or significantly exacerbates a child's medical condition.

(Emphasis added.)

“Restraint” is defined as “bodily physical restriction, mechanical devices, or any device that immobilizes a person or restricts the freedom of movement of the torso, head, arms, or legs. It includes mechanical restraint, physical restraint, and medication restraint used to control behavior in an emergency or any involuntary medication. RSA 126-U:1, IV. “Mechanical restraint” is defined as “when a physical device or devices are used to restrict the movement of a child or the movement or normal function of a portion of his or her body.” RSA 126-U:1, IV(b). “Physical restraint” is defined as “when a manual method is used to restrict a child's freedom of movement or normal access to his or her body.” RSA 126-U:1, IV(c).

There is no question requiring children to wear face masks or covering violates one or more of the prohibitions contained in RSA 126-U:4. Wearing a mask requires a child to cover his or her face with certain material (whether a surgical mask or a cloth mask). There is also no question that wearing a mask mechanically restricts a child's breathing by increasing the resistance of air movement during the child's inhalation and exhalation process, and restricts the normal function of their bodies (breathing). Accordingly, the District's policy violates RSA 126-U:4.

2. Plaintiffs will suffer irreparable harm.

As a result of the Defendants' conduct, Plaintiffs will continue to suffer irreparable harm. As described in the Complaint, Plaintiffs' children all attend school in the Bedford School District and, thus, are required to wear masks while riding the bus, attending school, or participating in any extra-curricular activities. Wearing a mask restricts the breathing of all of Plaintiffs' children: as described above, wearing masks makes it difficult for them to breathe because it restricts their oxygen levels and increases their carbon dioxide levels. Wearing a mask has also caused them, at times, to develop acne and rashes on their faces in the area where the masks are worn. These problems have caused them to be afraid, suffer anxiety, and experience headaches. These issues, in turn, make it difficult and uncomfortable for them to participate meaningfully in in-person instruction.

Plaintiffs have communicated their concerns and these issues to the District, but the District has refused to end its face mask requirement.

3. Plaintiffs have no adequate remedy at law.

If the Court declines to issue an order enjoining the Defendants' conduct above, Plaintiffs will not have an adequate remedy at law. Their only recourse would be to continue with this lawsuit and be forced to wait some undefined period of time for the District to rescind its policy. That may not happen until after the 2021-2022 school year. By the time the Court conducts a hearing on the merits in this case, Plaintiffs' children will have had to complete the 2020-2021 and 2021-2022 school years under the District's face mask requirement. Thus, a temporary restraining order or injunction is necessary in order to provide Plaintiffs with a complete remedy and to prevent the District's conduct from irreparably harming them. The only available remedy is an emergency order enjoining the District's policy.

4. The public interest favors enjoining the District’s policy.

The public interest will be advanced, not harmed, by granting the requested injunctive relief because the public favors the protection and safety of children. *See Heartland Academy Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) (holding there is “significant public interest in protecting . . . children”); *Reed v. Long*, 420 F. Supp. 3d 1365, 1379 (M.D. Ga. 2019); (holding children’s safety is in the public interest); *D.R. v. Mich. Dep’t of Educ.*, No. 16-13694, at *12 (E.D. Mich. Nov. 2, 2017) (“It is clear that ‘[t]he maintenance of appropriate education services to disabled children is in the public interest’”); *Newark Pre-School Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 201 F. Supp. 3d 72, 81 (D.D.C. 2016) (holding a program that provides “comprehensive educational, health, nutritional, and social services to children from low-income families[] reflects th[e] public interest”); *R.F. v. Delano Union Sch. Dist.*, 224 F. Supp. 3d 979, 991 (E.D. Cal. 2016) (acknowledging “the public’s interest in seeing that disabled children are educated”).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Enjoin the enforcement of the District’s face mask requirement;
- B. Enjoin the District from extending its face mask requirement for the 2021-2022 school year and beyond; and
- C. Award such other relief as is just and equitable.

Respectfully submitted,

SEAN MONROE,
individually, and on behalf of
J.M. and W.M., his children,

ROBERT M. FOJO,
individually, and on behalf of
S.R.F., S.K.F., and N.F., his children,

By Their Attorneys,

FOJO LAW, P.L.L.C.

Dated: May 25, 2021

/s/Robert M. Fojo
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