

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY  
*Southern District*

SUPERIOR COURT

Docket No. 226-2021-CV-00277

MARIA NARDI HUBERT,  
individually, and on behalf of  
K.H., her child,

PAUL and LISA BRESCIANO,  
individually, and on behalf of  
P.B., their child,

JASON and LINDSAY MACHADO,  
individually, and on behalf of  
A.G. and T.M., their children,

WERNER and HEATHER NIEBEL,  
individually, and on behalf of  
A.N., E.N., and S.N., their children,

*Plaintiffs*

v.

HOLLIS/BROOKLINE SCHOOL DISTRICT,  
SCHOOL ADMINISTRATIVE UNIT #41

*Defendants*

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

Plaintiffs Maria Hubert, individually, and on behalf of K.H., her child; Paul and Lisa Bresciano, individually, and on behalf of P.B., their child; Jason and Lindsay Machado, individually and on behalf of A.G. and T.M., their children; and Werner and Heather Niebel, individually, and on behalf of A.N., E.N., and S.N., their 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 Hollis/Brookline School

District, School Administrative Unit #41 (“Hollis/Brookline”), 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 some of 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 Hollis-Brookline 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 generally restricts Plaintiffs' children's breathing: as described above, it restricts their oxygen levels and increases their carbon dioxide levels. This problem has 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.

For example, Ms. Hubert's son, K.H., has not performed well in school this year because of the District's mask requirement: He often cannot participate in in-person instruction in his classmates' traditional classroom because he has troubling breathing while wearing a mask; when this occurs, he participates via Zoom in a separate para-educator's classroom that does not require masks. These complications have left K.H. demoralized and lacking interest in school.

K.H. also wanted to play volleyball this spring, but he decided against it because the school required its athletes to wear face masks while playing sports. He also plans not to play next year because of the requirement that he wear a mask.

The Machados' children have learning- and focus-related issues, experience anxiety on a normal basis, and have difficulty breathing *without* a face mask. Being forced to wear a face mask while in school further complicates these issues: it distracts them because they must constantly fix or adjust their masks while in class, and it poses additional challenges for their breathing.

When the Niebels' children returned to school, the District did not allow them to randomly sip on water or eat snacks because they had to remove their masks in order to do so. They were allowed to drink water or eat snacks only during "mask breaks." While the District has appeared to relax this practice (depending on the teacher), it is still in place and remains a problem for the children. The Niebels' children find it difficult to breathe while wearing face masks, particularly now that the weather has become warmer. They frequently go home from school at the end of the day with headaches due to their difficulty breathing while wearing masks. The Niebels' oldest two children, A.N. and E.N., have had breakouts of acne on their face in the area where they wear face masks while in school. The Niebels' youngest child, S.N., has developed a bright red rash on his face in the area where he wears a face mask while in school.

S.N. has also reported that Hollis Upper Elementary School requires students to wear face masks outside even when students are socially-distanced from one another. To complicate matters, S.N. has chronic asthma. Thus, wearing a mask makes it even more difficult for him to breathe, particularly now that the weather has become warmer. His breathing problems have

been further exacerbated by school teachers who *refuse* to use fans in the classrooms because they are afraid of spreading COVID-19 germs.

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,

MARIA NARDI HUBERT,  
individually, and on behalf of  
K.H., her child,

PAUL and LISA BRESCIANO,  
individually, and on behalf of  
P.B., their child,

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A.G. and T.M., their children,

WERNER and HEATHER NIEBEL,  
individually, and on behalf of  
A.N., E.N., and S.N., their children,

By Their Attorneys,

FOJO LAW, P.L.L.C.

Dated: May 25, 2021

*/s/Robert M. Fojo*

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