

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT

Docket No. _____

LEIGH and JAMIE TUCCOLO,
individually, and on behalf of
A.T and N.T, their children

JAIME and ROSS CARTER,
individually, and on behalf of
C.C, their child

LAUREN ACEVEDO,
individually, and on behalf of
K.A. and I.A., her children

MELISSA and MATT RIVARD,
individually, and on behalf of
B.R., their child

DAN and MONICA PLOURDE,
individually, and on behalf of
A.P, C.P. and B.P., their children

AMY WHEELER,
individually, and on behalf of
K.W, E.W., and J.W., her children

BRITTANY CAVALLO and STEVE VARGUS,
individually, and on behalf of
I.C., and L.V., their children

KARA FOLSOM,
individually, and on behalf of
H.N, her child

MEGAN BORBA,
individually, and on behalf of
J.B., her child

CHRIS GROUT,
individually, and on behalf of
K.G., his child

STEPHEN TOOMEY,
individually, and on behalf of
P.T., his child

DAVID MICHEAL KILEY,
individually, and on behalf of
E.K., his child

JOSHUA and JILLIAN MANNING,
individually, and on behalf of
L.M. and N.M., their children

ROBERT HODGMAN,
individually, and on behalf of
Z.H., his child

MARIA BARUD,
individually, and on behalf of
V.B., L.B., and R.B., her children

PAUL LAMALFA,
individually, and on behalf of
L.L., his child

EMILY HANNAY,
individually, and on behalf of
M.M., her child

Plaintiffs

v.

LONDONDERRY SCHOOL DISTRICT,
SCHOOL ADMINISTRATIVE UNIT #12

EPPING SCHOOL DISTRICT,
SCHOOL ADMINISTRATIVE UNIT #16

TIMBERLANE REGIONAL SCHOOL DISTRICT,
SCHOOL ADMINISTRATIVE UNIT #55

Defendants

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

Plaintiffs, 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 Defendants Londonderry School District, School Administrative Unit #12, Timberlane Regional School District, School Administrative Unit #55, and Epping School District, School Administrative Unit #16, from enforcing their policies requiring students to wear face masks or coverings while in school or partaking in school-related activities.

Plaintiffs request that the Court issue an emergency temporary restraining order, without notice, because the Districts' policies violate RSA 126-U:4, which prevents schools from placing any kind of restraint on a child that restricts their breathing or normal body functions; do not prevent the transmission of COVID-19; have caused the Plaintiffs' children to develop rashes and acne on their faces in the areas where they wear masks; have 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 contradicts one or more of the prohibitions contained in RSA 126-U:4. The word “restraint” includes the use of face masks. “Restraint” means . . . [a]ny device that . . . restricts the freedom of movement of the torso, head, arms, or legs” and includes “[m]echanical restraint,” which “occurs 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). The Plaintiffs allege below that face masks obstruct their children’s breathing and respiratory airways, which constitutes the normal functioning of a portion of their bodies. *See id.* The statute then prohibits these “restraints” in several ways.

First, the statute prohibits “[a]ny physical restraint or containment technique that . . . involves covering the face or body with anything.” RSA 126-U:4, I(d). Even if the word “restraint” does not apply to the use of face masks (it applies), the phrase “containment technique” applies: while not defined in the statute, a face mask is certainly a “containment technique” because it allegedly helps contain a person’s respiratory droplets and/or prevent a person from spreading those droplets – by covering one’s face.

Second, the statute prohibits “[a]ny physical restraint or containment technique that . . . obstructs a child’s respiratory airway or impairs the child’s breathing or respiratory capacity or restricts the movement required for normal breathing.” RSA 126-U:4, I(a). The Plaintiffs allege below that face masks obstruct their children’s breathing and respiratory airways.

Third, the statute restricts “[a]ny physical restraint or containment technique that . . . endangers a child’s life or significantly exacerbates a child’s medical condition.” RSA 126-U:4, I(e). The Plaintiffs allege below that some of their children have asthma or asthma-related problems, and speech-related developmental disorders, and wearing a mask exacerbates their conditions.

The use of face masks on children can cause numerous physiological and psychological effects, as well as long-term health consequences.

Accordingly, the Districts’ policies violate 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 attend or will attend school in these Districts and, thus, will be 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 the 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. In addition, the Districts, at times, have failed to make reasonable accommodations to make “mask breaks” accessible to disabled students. These issues, in turn, make it difficult and uncomfortable for them to participate meaningfully in in-person instruction.

Plaintiffs have repeatedly communicated their concerns and these issues to the Districts at school board meetings and in separate telephone calls and emails, but the Districts have refused to end their face mask requirements.

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 Districts to rescind their policies. That may not happen until after the 2021-2022 school year – whether the Plaintiffs pursue this action or some administrative remedy. By the time the Court conducts a hearing on the merits in this case, Plaintiffs' children will have had to complete the 2021-2022 school year under the Districts' face mask requirements. Thus, a temporary restraining order or injunction is necessary in order to provide Plaintiffs with a complete remedy and to prevent the Districts' conduct from irreparably harming them. The only available remedy is an emergency order enjoining the Districts' policies.

4. The public interest favors enjoining the Districts' policies.

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 Districts’ face mask requirements;
- B. Enjoin the Districts 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,

PLAINTIFFS,

By Their Attorneys,

FOJO LAW, P.L.L.C.

Dated: June 30, 2021

/s/Robert M. Fojo

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