

STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

SUPERIOR COURT

Docket No. 217-2021-CV-00462

ERIC and AMY CORLISS,
individually, and on behalf of
G.M.C., G.L.C., A.J.C., and B.T.C., their children

JEN and GERRY LACASSE,
individually, and on behalf of
A.G.L. and O.C.L., their children

JONATHAN and SAMMANTHA ROSE,
individually, and on behalf of
A.K.R., C.D.R., M.D.R., and P.K.R., their children

JAMIE TURGEON,
individually, and on behalf of
A.G.T. and B.A.T., their children

ALICHA and MICHAEL KINGSBURY,
individually, and on behalf of
M.T.K. and H.M.K., their children

TERESE GRINELL
individually, and on behalf of
B.C.G. and M.C.G., her children

MICHAEL and KRISTINE LONGVER,
individually, and on behalf of
A.L. and N.L., their children

DAVE and ERIN FORTIER,
individually, and on behalf of
A.L.F. and C.D.F., their children

JOSEPH and JENNIFER JACKSON
individually, and on behalf of
I.L.J. and E.R.J., their children

JOEL EUGNIDES
individually, and on behalf of
L.E. and J.E., his children

Plaintiffs

vs.

MERRIMACK VALLEY SCHOOL DISTRICT,
SCHOOL ADMINISTRATIVE UNIT #46

Defendant

**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 Defendant Merrimack Valley School District, School Administrative Unit #46, from enforcing a policy or mandate 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 (1) this mask mandate violates parents' right to due process and their natural rights under the New Hampshire Constitution because it violates their rights to make healthcare and medical decisions for their children and otherwise direct the care and upbringing of their children; (2) this mask mandate is an illegal restraint under RSA 126-U:4; (3) the District lacked the authority to pass this mandate; and (4) the mandate is preempted by the New Hampshire Department of Health and Human Services' comprehensive regulatory scheme concerning communicable diseases. These mandates do not prevent the transmission of COVID-19, and they harm children: they restrict their breathing, have caused these children to develop rashes and acne on their faces in the areas where they wear masks; have caused these 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.

a. The District’s mandate violates Plaintiffs’ Constitutional rights

Plaintiffs have a fundamental right to make medical and healthcare decisions for their children. Part 1, Art. 15, N.H. Const. *In the Matter of R.A. J.M.*, 153 N.H. at 90. Plaintiffs have a fundamental right to raise and care for their children. Part 1, Art. 2, N.H. Const.; *In the Matter of R.A. J.M.*, 153 N.H. at 90.

Plaintiffs have alleged the District’s mask mandate violates these fundamental rights. The Court must, therefore, review such a challenge under strict scrutiny. *See Bleiler v. Chief*, 155 N.H. 693, 697 (N.H. 2007) (“[G]enerally, when governmental action impinges upon

a fundamental right, such matters are entitled to review under strict judicial scrutiny.”); *In the Matter of R.A. J.M.*, 153 N.H. at 95 (“Strict scrutiny is the correct standard to apply when determining the constitutionality of a statute that touches upon a fundamental right.”).

The mandate does not serve a compelling government interest because there is no state of emergency; COVID-19 does not pose any threat to the health of Plaintiffs’ children; there is no evidence face masks have done anything to curb the spread of COVID-19; and face masks are harmful for children.

Even if the District had a compelling interest, its mask mandate is not narrowly tailored to achieve that end because it applies to all students, has no end date, has no exceptions or exemptions, and can be accomplished by other means. Indeed, given the demonstrated ineffectiveness of masks in preventing the spread of COVID-19, the mandate is *completely* unrelated to any interest in protecting children from contracting the virus.

The District acted without regard for – and completely ignored – Plaintiffs’ fundamental right in the care, upbringing, and education of their children, including the right to make healthcare and medical decisions for their children.

b. RSA 126-U:4 prohibits the use of face masks in schools

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 District’s mask mandate violates RSA 126-U:4.

c. The District lacks the authority to issue face mask mandates.

As demonstrated in the Complaint, the District lacks the authority to issue these mandates because the state legislature did not expressly grant it any authority to enact mandates requiring students to wear face masks or coverings. *Girard*, 121 N.H. at 270-71. The authority of a school board is limited to those powers expressly stated in its governing statutes. *See, e.g., Spencer v.*

Laconia School District, 107 N.H. 125, 128 (1966); *see also* RSA 194:3. There is no New Hampshire statute, rule, or regulation that permits school districts to enact face mask mandates. Thus, the District lacked the authority to mandate masks.

d. The District’s face mask mandate is preempted by DHHS’s regulatory scheme concerning communicable diseases.

As demonstrated in the Complaint, a city “cannot regulate a field that has been preempted by the State.” *Town of Rye Bd. Of Selectmen v. Town of Rye Zoning Bd. of Adjustment*, 155 N.H. 622, 624 (2007); *Casico v. City of Manchester*, 142 N.H. 312, 315 (1997). “The enactment of a detailed and comprehensive State regulatory scheme governing a particular field often demonstrates the State’s intent to preempt that field by placing exclusive control in the State’s hands.” *Casico*, 142 N.H. at 315; *see also N. Country Env’tl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 611 (2004) (“Implied preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local regulation.”). “In such circumstances, municipal legislation dealing with that field ‘runs counter’ to the State statutory scheme.” *Casico*, 142 N.H. at 315.

The District’s face mask mandate conflicts with DHHS’s scheme. DHHS’s scheme addresses all aspects of communicable diseases and the various measures the state has determined are appropriate for dealing with outbreaks and highly-contagious diseases. Its statutes and rules in this area are extensive and comprehensive and, thus, have preempted this entire regulatory field. Any local law or policy in this area – such as the District’s mask mandate – is preempted.

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. These issues, in turn, make it difficult and uncomfortable for them to participate meaningfully in in-person instruction.

In addition, there is a presumption of irreparable harm where, as here, there is an alleged violation of a constitutional right. *See Deere and Co. v. New Hampshire*, 2013 WL 9889004 (Merrimack County Super. Ct. 2013); *see also Univ. of Hawaii Prof'l Assembly v. Cayetano*, 16 F. Supp. 2d 1242, 1247 (D. Haw. 1998) (“[a]n alleged constitutional infringement will often alone constitute irreparable harm”); *Donohue v. Mangano*, 886 F. Supp. 2d 126 (E.D.N.Y. 2012) (granting injunction and “a finding of irreparable harm is warranted” because “the constitutional deprivation is convincingly shown and that violation carries noncompensable damages”).

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

3. Plaintiffs have no adequate remedy at law.

If the Court declines to issue an order enjoining the District's 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 mask mandate. 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 2021-2022 school year under the District's face mask mandate. 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 mandate.

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 District's face mask mandate;
- B. Enjoin the District from extending its mandate for any portion of 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: September 2, 2021

/s/Robert M. Fojo

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