STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
Northern District

Docket No. _____

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

MATT VANCE,
individually, and on behalf of
S.J.V., his child

KEVIN COVENTRY,
individually, and on behalf of
K.C. and B.C., his children,

KIMBERLY D'AGOSTINO,
individually, and on behalf of
M.D., her child,

HANAN WISEMAN,
individually, and on behalf of
L.W., his child,

Plaintiffs

vs.

BEDFORD SCHOOL DISTRICT,
SCHOOL ADMINISTRATIVE UNIT #25

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 emergency *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, from enforcing the District's recent implementation of a policy requiring students who

attend Bedford Memorial School to wear face masks or coverings while in school for the next 14 days.

Plaintiffs request that the Court issue an emergency temporary restraining order, without notice, because (1) the mandate violates their right to a public education under the New Hampshire Constitution; (2) the District unilaterally revised the criteria in its Reopening Plan for identifying "clusters" of COVID-19 cases without public notice or holding a public meeting, in violation of RSA 91-A, which enabled the District to implement this mandate in an arbitrary and capricious fashion; (3) the mandate violates Plaintiffs' 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; (4) the District lacks the statutory authority to pass the mandate in the first place; and (5) the mandate is preempted by the New Hampshire Department of Health and Human Services' comprehensive regulatory scheme concerning communicable diseases.

The District's arbitrary implementation of this mandate is most concerning: it failed to follow the District's Reopening Plan for 2021-2022, which dictates that an "outbreak" consists of *multiple* instances of three or more confirmed COVID-19 cases in a classroom. The school identified just 11 cases to support its decision, but it failed to explain how those 11 cases constituted an "outbreak" under the District's Reopening Plan. Rather, the school has conceded that it did not have an "outbreak" or "school transmission" of any kind, and it further conceded it *unilaterally* – without holding a public meeting – lowered the threshold for identification of an "outbreak" (multiple instances of three or more confirmed cases in a classroom) to multiple instances of just *two* or more confirmed cases in a classroom. Based on this arbitrary (and nonpublic) decision, school officials implemented this new mask mandate and, just this morning,

denied Plaintiffs' children entry to school because they refused to wear masks and communicated they would continue to deny them entry for the next 14 days unless and/or until they wear masks. The Court must enjoin this illegal mandate to preserve the status quo.

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 mandate violates Plaintiffs' Constitutional right to an education (Count I).

The New Hampshire Constitution provides every citizen with a right to an education. Part 2, Art. 83, N.H. Const. That provision broadly states, "Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country,

being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people." Part 2, Art. 83, N.H. Const. Based on this language, the New Hampshire Supreme Court has held "a constitutionally adequate public education is a fundamental right." *Claremont School Dist. v. Governor*, 142 N.H. 462, 473 (1997) ("*Claremont II*").

The Court has "not construe[d] the terms "shall be the duty . . . to cherish" in the New Hampshire Constitution "as merely a statement of aspiration. The language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools." *Claremont School Dist. v. Governor*, 138 N.H. 183, 187 (1993) (*"Claremont I*"); *see also Farnum's Petition*, 51 N.H. 376, 378-79 (1871) (constitution "enjoins the duty" to educate in "comprehensive terms . . . as one of paramount public importance"). "Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." *Claremont I*, 138 N.H. at 192-93.

The mandate has prevented Plaintiffs' children from obtaining even a basic education because it is denying them entry to Memorial School and has provided them with only a minimal set of assignments students may take home and complete but without any semblance of a plan for

remote instruction during that time, thus depriving them of guidance and instruction from teachers and counselors in a normal, physical school environment.

b. The District violated RSA 91-A.

RSA 91-A requires all meetings of public bodies to have proper notice and be open to the public, and minutes must be kept for such meetings. RSA 91-A:1-a, 91-A:2. The District violated RSA 91-A because it appears to have unilaterally modified its Reopening Plan, by lowering the threshold number of cases upon which it relies for the identification of a "cluster" of cases in Bedford schools, without holding a public meeting or providing notice of such a meeting. *See* RSA 91-A:2. None of the circumstances justifying a nonpublic session applies here. *See* RSA. 91-A:3.

c. The mandate violates Plaintiffs' rights to make medical decisions for their children and to raise and care for their children (Counts III and IV).

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 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 there was a compelling interest, the mandate is not narrowly tailored to achieve that end because it applies to all students, 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.

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

As demonstrated in the Complaint, the District lacks the authority to issue these mandates in the first place 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.

e. The 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 Envtl. 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 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 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 Memorial School and, thus, will be required to wear masks for the next 14 days or else be denied entry in school during that time. Plaintiffs have no intention of placing masks on their children and are fed up with these arbitrary mandates that have no basis in scientific reality.

Further, 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 Memorial School and to the District in the past, but the District and school have refused to end this mandate.

3. Plaintiffs have no adequate remedy at law.

If the Court declines to issue an order enjoining the 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 could happen after the 14-day period is over, but the mandate could also remain in place for the foreseeable future, particularly if the District continues to modify its own Reopening Plan to facilitate the implementation of these mandates. If this conduct continues, the rescission of this mandate may not happen until after the 2021-2022 school year. In that scenario, by the time the Court conducts a hearing on the merits, Plaintiffs' children will have had to complete the 2021-2022 school year under the District's 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 mandate.

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 enforcement of the 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 7, 2021

/s/Robert M. Fojo

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