COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

HAMPDEN, ss. Docket No. _____
Superior Court Docket No. 2179CV00494

THE FAMILY FREEDOM ENDEAVOR, INC., et al.,
Plaintiffs-Petitioners,

v.

JEFFREY C. RILEY, as COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, et al.,
Defendants-Respondents

AND CONSOLIDATED CASES

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS AND CITIZENS FOR MEDICAL FREEDOM'S PETITION FOR INTERLOCUTORY RELIEF PURSUANT TO M.G.L. c. 231, § 118 (FIRST PARAGRAPH)

ROBERT M. FOJO (BBO No. 568786)
FOJO LAW, P.L.L.C.
264 SOUTH RIVER ROAD
SUITE 464
(603) 473-4694
rfojo@fojolaw.com
Counsel for Plaintiffs-Petitioners Children's Health Rights of Massachusetts, Inc., and Citizens for Medical Freedom, Inc.
Dated: December 16, 2021

INTRODUCTION

Several nonprofit entities and parents of school children challenged the authority of the Department of Elementary and Secondary Education ("DESE"), eighteen school districts, and two municipalities to implement mask mandates in schools and sought an injunction of those mandates. The Superior Court, in a November 16, 2021, Order, denied their requests for a preliminary injunction. The Plaintiffs-Petitioners seek interlocutory review of that Order and request that the Single Justice modify it and grant the Plaintiffs-Petitioners' request for a preliminary injunction: these mask mandates violate the Plaintiffs-Petitioners' Constitutional and statutory rights, and the record below demonstrates they will cause irreparable harm to children. Numerous decisions from other jurisdictions demonstrate that DESE and these municipalities lack the statutory and regulatory authority to issue these mandates. They also conflict with the Department of Public Health's ("DPH") statutory and regulatory scheme, which has never required masks in response to the Coronavirus. The Court's Order essentially permits non-health agencies and municipalities to practice medicine and make broad health recommendations for healthy individuals without the requisite expertise.

PROCEDURAL HISTORY AND FACTS

The Superior Court's Order notes that, "[i]n July 2021, the seven-day COVID-19 case average in Massachusetts was 223, but by August 18, that figure had climbed to 1,237." RA[1] 991-92. As of late September (when these cases were filed), however, the Commonwealth's own public health data demonstrated *hospitalizations* totaled 641, which represented just 7.29% of the 8,785 hospitalizations in the state and were a dramatic decrease from approximately 2,500 hospitalizations in January 2021 and 4,000 hospitalizations in late April and early May 2020. RA 14-15. That same data also demonstrated the seven-day average for new deaths per day was approximately 9.6 – also a steep drop from 100 deaths per day earlier this year and 150-200 deaths per day last year. RA 16. There had also just been one death in the 0-19 demographic in Massachusetts in the two-week period that preceded the filings, and only 15 cases in that demographic had been hospitalized. RA 16-17. Notably, of the 18,000 deaths the Court identified in its Order (RA 991), nearly 17,000 (or 91%) of those deaths occurred in nursing homes or long-term care facilities. RA 17,

[1] "RA" refers to the Record Appendix.

Despite the rapidly-declining rates of hospitalizations and deaths and the fact COVID-19 has had no real impact on children, DESE voted to authorize its Commissioner to issue a statewide mask mandate for all public school children ages five and up on August 24, 2021. RA 992. DESE directed school districts to devise similar mandates that complied with DESE's mandate and then enforce them. RA 993. At that time, some of the Defendant school districts already had compliant mask mandates in place; the remaining districts implemented similar mandates. RA 14. DESE extended its mandate until at last January 15, 2022. RA 993-94.

The Plaintiffs-Petitioners (non-profit entities whose members are parents who have children in public school districts affected by these mask mandates) filed Complaints to initiate these actions on September 21, 2021, and included Motions for a Temporary Restraining Order and/or Preliminary Injunction. RA 1, 46, 48, 86, 94, 96, 133, 141, 143. The Complaints asserted several claims: DESE and the municipalities lacked the authority to issue these mandates; even if DESE had the authority, it exceeded it; these mandates are preempted by DPH's statutory and regulatory scheme; and the mandates violated parents' Constitutional rights. *See id.*

These cases were consolidated in Hampden County on October 12, 2021. RA 145. The parties submitted additional briefing in late October, including two expert affidavits submitted by the Plaintiffs-Petitioners. RA 150, 164. The Superior Court held an injunction hearing on October 26, 2021.

The Court issued a Memorandum of Decision and Order on Plaintiffs' Motions for Preliminary Injunction ("Order") on November 16, 2021, denying the Plaintiffs-Petitioners' Motions. RA 990. The Court concluded DESE and the municipalities had broad authority to implement their mask mandates, and those mandates were not preempted by the Department of Public Health's statutory and regulatory scheme. RA 996-1001. The Court also concluded DESE did not exceed its authority in finding exigent circumstances existed to support the mandate. RA 998-99. The Court also concluded there was no support in the record for the notions that masks harmed children, COVID-19 poses no real risk to children, and masks have been ineffective at reducing the risk of COVID-19 transmission. RA 1003.

ARGUMENT

Standard of Review

This Court "review[s] the grant or denial of a preliminary injunction for abuse of discretion." *King v. Shank*, 92 Mass. App. Ct. 837, 838 (2018). "The

focus of appellate review of an interlocutory matter is 'whether the trial court abused its discretion — that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions.'" *Caffyn v. Caffyn*, 441 Mass. 487, 490 (2004) (quoting *Edwin R. Sage Co. v. Foley*, 12 Mass. App. Ct. 20, 25 (1981)); "The judge's 'conclusions of law are subject to broad review and will be reversed if incorrect.'" *Caffyn*, 441 Mass. at 490 (quoting *Edwin R. Sage*, 12 Mass. App. Ct. at 26). "If a preliminary injunction was issued solely on the basis of documentary evidence, '[the appellate court] may draw [its] own conclusions from the record." *King*, 92 Mass. App. Ct. at 839.

I. The Superior Court erred in concluding DESE had the authority to issue and implement its mask mandate.

"[A]n administrative agency . . . has only those powers , duties, and obligations ***expressly*** conferred on it by statute or reasonably necessary to carry out the purposes for which it was established." *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct. 152, 155 (2012). "[A]n administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such board or office was created." *Telles v. Comm'r of Ins.*, 410 Mass. 560, 564 (1991).

Analogous cases in other jurisdictions have concluded school districts and agencies that lack the express authority to issue broad health measures such as mask mandates (or vaccine mandates) may not do so. *Matt Sitton, et al. v. Bentonville Schools, et al.*, Case No. 4CV-21-2181 (Ark. Cir. Ct. Oct. 12, 2021) (temporary restraining order against school district mask mandate because district lacked the express authority to do so) (at RA 961-80); *Jacob Doyle Corman, III, et al. v. Acting Secretary of the Pennsylvania Department of Health*, 297 M.D. 2021 (Pa. Cmmw. Ct. Nov. 10, 2021) (declaring order by Acting Secretary of the Pennsylvania Department of Health directing all students, teachers, staff, and visitors in schools in the Commonwealth to wear face coverings, regardless of vaccination status, was void and unenforceable because Acting Secretary lacked the statutory and regulatory authority to issue the order);[2] *State v. Biden*, Case No. 1:21-cv-00163-RSB-BKE, at * (S.D. Ga. Dec. 7, 2021) (enjoining Executive Order 14042, which requires contractors and subcontractors performing work on certain federal contracts to ensure their employees and others working in connection with federal contracts are fully vaccinated against COVID-19, because, in part, the Order exceeds the authority Congress granted to the President to address

[2] The Pennsylvania Supreme Court affirmed this decision last Friday. *See* https://www.pacourts.us/assets/opinions/Supreme/out/j-86-2021pco%20-%20104981865154346467.pdf#search=%22corman%20%27Supreme%2bCourt%27%22

administrative and management issues in procurement and contracting); *Commonwealth v. Biden*, CIVIL 3:21-cv-00055-GFVT, at *13 (E.D. Ky. Nov. 30, 2021) (enjoining same mandate for federal contractors because President exceeded his authority; *State v. Becerra*, 3:21-CV-03970, at *18-*19 (W.D. La. Nov. 30, 2021) (enjoining mandate by Center for Medicare and Medicaid Services ("CMS") requiring staff of Medicare and Medicaid healthcare providers to receive the COVID-19 vaccine or else be penalized and terminated because the applicable statutes relied on by the government were mere general authorizations to prescribe rules and regulations or general authority to specify "standards" but did not "give the Government Defendants the 'superpowers' they claim," and the "principles of separation of powers weigh heavily against such powerful authority being transferred to a government agency by general authority"); *Missouri v. Biden*, 4:21-cv-01329-MTS, at *7 (E.D. Mo. Nov. 29, 2021) (enjoining CMS vaccine mandate because, in part, Congress did not provide CMS with clear authority to issue it); *BST Holdings, LLC. v. Occupational Safety & Health Admin.*, 21-60845, at *8 (5th Cir. Nov. 12, 2021) (enjoining OSHA mandate requiring employees of covered employers to undergo COVID-19 vaccination or take weekly COVID-19 tests and wear a mask because, in part, OSHA exceeded its statutory authority).

The Superior Court's Order cites no Massachusetts statute, rule, or regulation that expressly permits DESE to enact a face mask mandate. Rather, the Court reasons G. L. c. 69 § 1B "evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe educational environment," and "[t]he statute's intended applicability to any health risks, not just those posed by school building conditions, is common sense." RA 997. The decisions above ***expressly rejected***, however, similar reliance on "broad" grants of authority concerning the government obligation to ensure the "safety" of students or the population. There is no authority for DESE to issue a mask mandate.

II. Even if DESE had the authority, the Court erred in concluding it did not exceed that authority to issue and implement its mask mandate because there were and are no exigent circumstances concerning COVID-19 in Massachusetts.

There must be "exigent circumstances" to issue "health and safety requirements." 603 CMR 27.08(1). The record does not reasonably support any "exigent circumstances" concerning COVID-19 in Massachusetts, let alone among children, that necessitated invoking that provision. Rather, DESE's own announcement of this measure expressly states its purpose was to increase vaccination rates among children. In addition, COVID-19 has had no impact on

children in this state; instead, it has selectively (and almost exclusively) impacted the elderly population in nursing home and long-term care settings. RA 14-16.

III. The Court erred in concluding school districts and municipalities had the authority to issue and implement mask mandates.

The Court agrees that municipalities may "exercise any power or function conferrable on them by the Legislature, so long as exercise of that power is 'not inconsistent' with the Constitution or a general law enacted pursuant to the Legislature's retained powers." *Del Duca v. Town Administrator*, 368 Mass. 1, 10 (1975); RA 1000. The Court's reliance on the Home Rule Amendment to broaden the constraints of this principle is unavailing. *See* RA 1000. The Amendment concerns *procedural* freedom: consistent with the directive above in *Del Duca*, it does not provide a municipality any authority it would not otherwise have. *See Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 773 (1976) ("[T]he scope of the disability imposed on the Legislature by the [home rule] amendment is quite narrow."). Municipalities must, nevertheless, exercise only that authority "conferred" on them and not inconsistent with the Constitution or state law.

Here, a school district's authority is governed by M.G.L. chapter 71. Like DESE, nothing in Chapter 71 provides school committees with the authority to

pass broad health measures. Rather, school committees only have the authority to develop "a plan to address the general mental health needs of its students," M.G.L. c. 71, § 37Q, regulate specific safety concerns of students, including establishing "school safety patrols," M.G.L. c. 71, § 48A, and establishing "highway safety stations," M.G.L. c. 71, § 71A, and "internet safety measures." M.G.L. c. 71, § 93.

There is no Massachusetts statute, rule, or regulation that permits school districts to enact face mask mandates, and the mandates themselves – as explained below – conflict with DPH's scheme and the Constitution.

IV. The Superior Court erred in concluding the mask mandates are not preempted by the Department of Public Health's statutory and regulatory scheme.

The Court concluded the Plaintiffs-Petitioners "have not pointed to any conflict between the DPH's order, which did not bar mask mandates, and the mandates here," and there was no "evidence of an express legislative intent that municipalities not impose health related rules in their own schools." RA 1001. The standards concerning preemption are much broader: "A municipal regulation will be invalidated where "the local regulation ***would so frustrate the state statute as to warrant the conclusion that preemption was intended***." *LeClair v. Town of Norwell*, 430 Mass. 328, 337 n.11 (1999) (emphasis added). "[T]he legislative intent to supersede local enactments ***need not be expressly stated for the State law***

to be given preemptive effect. Where legislation deals with a subject comprehensively, it 'may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.'" *Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564 (1981).

DPH has a comprehensive statutory and regulatory scheme concerning infectious diseases that broadly requires it take various actions when a dangerous disease exists, including investigating the pandemic, the provision of certain healthcare services and resources, and quarantine measures. M.G.L. c. 111, §§ 7, 95, 96; 105 C.M.R. 300.200, 300.210. Nothing in Chapter 111 or in 105 C.M.R. 300.000 requires the use of masks to prevent the spread of the Coronavirus. *See id.* Rather, DPH's regulations specifically require the use of masks for certain types of outbreaks but not the Coronavirus. *See* 105 C.M.R. 300.200. Te DPH Order the Court references above required face masks in certain congregate settings, but not in schools.[3] Section 3 of the Order allows other government entities to issue other rules and guidance "***provided the terms are consistent with this Order***." (Emphasis added.).

[3] https://www.mass.gov/doc/dph-mask-order-may-28-2021/download

This comprehensive framework preempts any local measure that requires masks in schools because they conflict with DPH's scheme that does not require masks in schools or, at worst, would frustrate that scheme.

V. The Superior Court erred in relying on hearsay statements contained in public health pronouncements and other communications by public health officials concerning COVID-19.

Hearsay evidence is inadmissible. *Commonwealth v. Womack*, 457 Mass. 268, 272 (2010). Courts in Massachusetts also do not consider hearsay statements at injunction hearings. *See*, *e.g.*, *In the Matter of Cobb*, 445 Mass. 452, 475 (2005) (finding no abuse of discretion in single justice's rejection of claim premised, in part, on hearsay statement).

Although a "record of a primary fact, made by a public officer in the performance of an official duty" is considered an exception, *Commonwealth v. Shangkuan*, 78 Mass. App. Ct. 827, 830 (2011), "[s]tatements of opinion or judgment," however, "are not admissible under the exception." *Id.* at 831. Evaluative reports, opinions, and conclusions contained in a public report are not admissible. *Commonwealth v. Nardi*, 452 Mass. 379, 387-95 (Mass. 2008) (findings of a medical examiner concerning the nature and extent of the victim's injuries and his or her ultimate opinion as to the cause of death were evaluative statements that fell outside the public record exception to the hearsay rule); *Julian*

v. Randazzo, 380 Mass. 391, 393 (1980) (police report, comprising investigating officer's opinion and recommendation, not admissible); *see also Lithuanian Commerce Corp., Ltd. v. Hosiery*, 177 F.R.D. 245, 264 (D.N.J. 1997) (excluding report containing advisory, hearsay opinions of Lithuanian government officials); *Lee v. Department of Health Rehab. Serv.*, 698 So. 2d 1194, 1200-01 (Fla. 1997) (investigatory report of Department of Health and Rehabilitative Services employee containing statements of witnesses and employee's opinions and conclusions was not admissible because it was hearsay and did not fall within the public records exception).

The Superior Court relied on many out-of-court statements, opinions, and recommendations from public health officials to conclude COVID-19 justifies the Defendants' mask mandates or presents a compelling need for them. *See*, *e.g.*, RA 992 ("Both the CDC and the DPH have recommended mask wearing . . . ."); 994 (Cambridge relied on a COVID-19 "Working Group . . . comprised of scientists, doctors, educators, and families" that recommended that masks be required"); 1001 ("the mandates were guided by the DPH, other public health authorities, and medical experts"), 1003 ("the mandates were created, tailored, and implemented in consultation with medical experts and on the basis of widely accepted public health

recommendations"). These statements are hearsay and do not fall under any exception. The Court should have excluded them.

VI. The Superior Court erred in concluding the mask mandates do not violate Plaintiffs-Petitioners' Constitutional rights to direct the care and upbringing of their children.

The only case in the country to address the claim that a school district mask mandate violates parents' Constitutional right to direct the care and upbringing of their children concluded parents "have [a] constitutional interest" "in the care and custody of their children under the Arkansas Constitution," and the school district's mask mandate "infringed" on that right. *Sitton*, *supra* at 2. The Court ignored the *Sitton* case, reasoning that it "is not authoritative and is undercut by . . . a plethora of decisions from other jurisdictions." RA 1002 n.8. Those other decisions, however, do not concern school district mask mandates, and all of them concern *different* Constitutional challenges (e.g., freedom of speech, freedom of assembly, due process, etc.), not the challenge asserted here and in *Sitton*: that such a mandate interferes with a ***parent's*** right to make healthcare decisions for his/her child.

The Court's reliance on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and *Desrosiers v. Governor*, 486 Mass. 369 (2020)), is misplaced. *Desrosiers* acknowledged the District Court's rejection of *Jacobson* in *County of Butler v.*

Wolf, 486 F. Supp. 3d 883 (W.D. Pa. 2020), for its far too deferential standard applied to a constitutional challenge to an (unrelated) state health measure (a vaccine mandate *with an opt-out provision to pay a small criminal fine*), and agreed *Jacobson* would "not lead us to disregard constitutional scrutiny and defer completely to the executive's orders." *Desrosiers*, 486 Mass. at 387 n.25. *Desrosiers* also does not apply because it does not address a challenge to a school mask mandate and whether it infringes on parents' Constitutional rights.

Jacobson is equally inapplicable. In his concurrence in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), Justice Gorsuch explained *Jacobson* "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction. *Id.* at 70. The "Court essentially applied rational basis review to . . . Jacobson's challenge to a state law." 141 S. Ct. at 70. "*Jacobson* claimed that he possessed an implied 'substantive due process' right to 'bodily integrity' that emanated from the Fourteenth Amendment." *Id.* Given "the different nature of the restriction in *Jacobson*," where "individuals could accept the vaccine, pay the fine, or identify a basis for exemption," "[t]he imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest," and could have "easily survived rational basis review, and might even have survived strict scrutiny." *Id.* at 71.

Here, under strict scrutiny, the mask mandates should fail: they do not serve a compelling government interest because there was no evidence in the record that COVID-19 poses any threat to the health of children, or that face masks have curbed the spread of COVID-19; and two experts opined that face masks harm children, and the Defendants presented no evidence to refute that information.

VII. The Superior Court erred in concluding Plaintiffs-Petitioners could not establish irreparable harm.

The Court's passing reference to whether the Plaintiffs-Petitioners could establish irreparable harm is incorrect. RA 1003.

The Plaintiffs-Petitioners, at a minimum, established the *presumption* of irreparable harm where, as here, they alleged the violation of their constitutional rights and statutory rights. *See* RA 41-42.

Apart from the presumption of harm, the only evidence in the record on this issue demonstrated the prolonged use of masks can and would harm children. There was also no support in the record for the Defendants' contention that enjoining mask mandates would expose children to the risk of contracting COVID-19:[4] one of the very authorities on which the Defendants and the Court relied – the CDC – published a large-scale study in May 2021 demonstrating the

[4] Indeed, if there *was* a deadly pandemic raging throughout the population, children would not be allowed in school.

use of masks in schools showed no "statistically significant benefit" in preventing COVID-19 transmission. *See* RA 1. There was also no evidence in the record that Massachusetts' state-wide mask mandate curbed the spread of COVID-19 last year. RA 22-24. There was also substantial evidence in the record that COVID-19 has had virtually no impact on children in Massachusetts. RA 14-16. Thus, the interest in not having children wear masks is not outweighed by any need to use masks to control the spread of COVID-19.

CONCLUSION

For the foregoing reasons, the Single Justice should:

1. Modify the Superior Court's Order by granting the Plaintiffs-Petitioners' Motions for Preliminary Injunction.

2. Grant such other relief as is just and appropriate.

3. Hold a hearing on this Petition.

Respectfully submitted,

Plaintiffs-Petitioners Children's Health Rights of Massachusetts and Citizens for Medical Freedom,

By their attorneys,

/s/*Robert M. Fojo*_____
ROBERT M. FOJO (BBO No. 568786)
FOJO LAW, P.L.L.C.

264 SOUTH RIVER ROAD
SUITE 464
(603) 473-4694
rfojo@fojolaw.com

Dated: December 16, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this Supporting Memorandum of Law complies with the length limit for proportionally spaced font under the Appeals Court Standing Order Concerning Petitions to the Single Justice Pursuant to G.L. c. 231, sec. 118 (First Paragraph) or Rule 12(a) of the Uniform Rules on Impoundment Procedure because it is produced in Times New Roman at size 14 and contains 3,425 non-excluded words as counted using the word count feature of Microsoft Word.

/s/*Robert M. Fojo*_____
Robert M. Fojo

Dated: December 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2021, I served this Supporting Memorandum of Law by email on the following counsel for the parties:

Amy.Spector@mass.gov
Richard.Weitzel@mass.gov
Michael.A.LeFleur@mass.gov
Btoner@mlmlawfirm.com
Jcoleman@mlmlawfirm.com
Mbayer@cambridgema.gov
Lwm@snclegal.com
kmp@snclegal.com
rdipietro@long-law.com
kgonzalez@long-law.com
khodge@scmllp.com
jsimon@scmllp.com
sgrammel@andersonkreiger.com
mmakarious@andersonkreiger.com
npickeringcook@andersonkreiger.com
joeemerson@earthlink.net
pmello@mhtl.com
John.Foskett@VDHBoston.com
Robert.Hillman@VDHBoston.com
ryan@mclanelaw.com
justin@jrmccarthy.com
laurenbradfordesq@gmail.com

/s/*Robert M. Fojo*_____
Robert M. Fojo