COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-J-599

CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS, INC. & another[1]

vs.

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION & others.[2]

MEMORANDUM AND ORDER

DITKOFF, J. The plaintiffs, two nonprofit corporations with members who have children in various public schools throughout the Commonwealth, seek review, pursuant to G. L. c. 231, § 118, of an order of the Superior Court denying their request for a preliminary injunction prohibiting the Department of Elementary and Secondary Education (department) and various public school districts from requiring most public school students to wear masks while attending public schools indoors. Living in a functioning democracy means that those who wish to

[1] Citizens for Medical Freedom, Inc.

[2] Andover School District, Attleboro School District, Bridgewater-Raynham Regional School District, Cambridge Public School District, Carver Public School District, City of Cambridge, Dover Public School District, Dover-Sherborn Regional School District, Easton Public School District, Franklin Public School District, Hingham Public School District, Northborough Public School District, Northborough-Southborough Regional Public School District, Sandwich Public School District, Sherborn Public School District, Southborough Public School District, Town of Dover, Tyngsborough Public School District, and West Bridgewater Public School District.

use public goods, such as public schools, must adhere to rules set by those entrusted by our Legislature to set them. Concluding that the Legislature granted the department broad authority to set policies and standards for the education of public school students in Massachusetts, including the wearing of masks to reduce the spread of COVID-19, I discern no abuse of discretion in the Superior Court judge's denial of a preliminary injunction.

1. Background. It is, presumably, unnecessary to describe the COVID-19 pandemic beyond recognizing that "the personal toll resulting from the virus and containment measures has been immeasurable." Desrosiers v. Governor, 486 Mass. 369, 371 (2020). Nonetheless, I must begin by acknowledging that the effect of COVID-19 on public schooling has been pronounced. Starting March 15, 2020, the Governor closed all public schools in the Commonwealth for the remainder of the school year. See id. at 370 (2020). Public schools used various combinations of remote, hybrid, and in-person learning during the 2020-2021 school year. The department required public schools to resume full-time in-person learning in April and May of 2021.

Even as COVID-19 cases surged in the late summer of 2021, the department remained committed to full-time in-person schooling. On August 24, 2021, the Board of Elementary and Secondary Education (board) declared "exigent circumstances"

under 603 Code Mass. Regs. § 27.08(1) (2021) and authorized the Commissioner of Elementary and Secondary Education (commissioner) to implement a mask-wearing mandate for Massachusetts public schools.[3] The next day, the commissioner did just that, requiring all public school students at least five years old and all staff "to wear masks indoors" that "cover an individual's nose and mouth." The mandate did not apply outdoors, or when persons were eating, drinking, or performing such tasks as using wind instruments. "Students and staff who cannot wear a mask for medical reasons, and students who cannot wear a mask for behavioral reasons, are exempted from the requirement." The commissioner also authorized "mask breaks" during the day, preferably outdoors or near open windows. Finally, the commissioner allowed schools to waive the mandate if they demonstrated that vaccination rates among students and staff reached eighty percent.

The commissioner also required individual school districts to create health and safety plans consistent with the mask mandate, and the school districts before me complied. The department's mask mandate originally lasted until October 1, 2021. It was later extended to November 1, 2021, and then to

[3] The department's policies and standards are set by the board, G. L. c. 69, § 1B, and the commissioner supervises and manages the department under the guidance of the board, G. L. c. 69, § 1A.

January 15, 2022. On January 10, 2022, it was extended to February 28, 2022. Although some public schools have demonstrated the requisite vaccination levels to the department, the mandate remains in effect in the vast majority of public schools in Massachusetts.

Between September 20 and 22 of 2021, the plaintiffs, two other organizations, and several individuals filed six separate civil complaints in the Superior Court in five different counties, all challenging the legality of the mask mandate. On October 12, 2021, all of the cases were consolidated. The various plaintiffs moved for a preliminary injunction against the enforcement of the mask mandate. On November 16, 2021, a Superior Court judge issued a lengthy and thoughtful decision denying a preliminary injunction.

The People's Freedom Endeavor, a plaintiff in the Superior Court but not a petitioner before me, filed a notice of appeal to a panel of this court pursuant to G. L. c. 231, § 118, par. 2. The two petitioners before me filed both a joint notice of appeal to a panel of this court and a petition for review by a single justice pursuant to G. L. c. 231, § 118, par. 1, as is permitted by Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 614 (1980). The panel appeals have not been assembled yet.

2. Standard of review. "Appellate review of a trial court order disposing of a preliminary injunction application, either

by a panel of this court or by a single justice acting on a petition under the first paragraph of G.L. c. 231, § 118, focuses on 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." Nabhan v. Board of Selectmen of Salisbury, 12 Mass. App. Ct. 264, 270 (1981), quoting Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25 (1981). Accord Manfrates v. Lawrence Plaza Ltd. Partnership, 41 Mass. App. Ct. 409, 412 (1996). My authority is "exercised in a stinting manner with suitable respect for the principle that the exercise of judicial discretion circumscribes the scope of available relief." Edwin R. Sage Co., supra.

A "party seeking a preliminary injunction must show '(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003). "When a party seeks to enjoin governmental action, the judge is 'required to determine

that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.'" Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350, 357 (2006), quoting Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). "A preliminary injunction will not be granted if the moving party cannot demonstrate a likelihood of success on the merits." Lieber v. President & Fellows of Harvard College, 488 Mass. 816, 821-822 (2022). As did the Superior Court judge, I focus on the plaintiffs' likelihood of success on the merits.

3. The department's authority. The crux of the plaintiffs' main argument is that the absence of an express statutory authorization for a mask mandate means that the department lacks the authority to issue such a mandate. Broad grants of authority, however, cover any issue within that broad grant of authority. For example, nothing in the Civil Defense Act, St. 1950, c. 639, explicitly authorized prohibiting large gatherings, closing public schools, or suspending in-person service at restaurants and bars. Nonetheless, the Supreme Judicial Court concluded that the Governor's power to exercise "authority over persons and property, necessary and expedient for meeting [the] state of emergency," was broad enough to authorize these measures. Desrosiers, 486 Mass. at 377, quoting St. 1950, c. 639, § 7. Similarly, although Congressionally-

provided authority to prescribe occupational safety standards does not extend to requiring vaccinations, National Fed'n of Indep. Businesses v. Department of Labor, 2022 U.S. LEXIS 496, at *7-8 (U.S. Jan. 13, 2022), a vaccination mandate for health care workers "fits neatly" within Congressionally-provided authority to issue "requirements . . . in the interest of the health and safety of individuals who are furnished services in the [health care] institution." Biden v. Missouri, 2022 U.S. LEXIS 495, at *2, *6 (U.S. Jan. 13, 2022), quoting 42 U.S.C. § 1395x(e)(9).

The Legislature has granted the board, in its role superintending the department, the authority to "establish policies relative to the education of students in public early childhood, elementary, secondary and vocational-technical schools." G. L. c. 69, § 1B, par. 1. Moreover, the Legislature has specifically granted the board the authority to "establish standards to ensure that every student shall attend classes in a safe environment." G. L. c. 69, § 1B, par. 16. The Supreme Judicial Court has described this power as a "broad legislative grant of authority," Holden v. Wachusett Regional Sch. Dist., 445 Mass. 656, 667 (2005), and stated that the statute "granted extensive authority to the board," Student No. 9 v. Board of Educ., 440 Mass. 752, 758 (2004), and "gave the board broad

authority," Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 774 (2002).

The mask mandate is unquestionably a "polic[y] relative to the education of students in public early childhood, elementary, secondary and vocational-technical schools" and is explicitly aimed at being a "measure to keep students safe in school at this time." As such, it fits comfortably within the "broad discretion [given] to the board to carry out its responsibilities." Student No. 9, 440 Mass. at 765. Accordingly, the plaintiffs have not demonstrated a likelihood of success of showing that the department lacked the authority to issue the mask mandate.

4. Exigent circumstances. Title 603 Code Mass. Regs. § 27.08(1) (2021) provides that, "upon a determination by the Board that exigent circumstances exist that adversely affect the ability of students to attend classes in a safe environment, unless additional health and safety measures are put in place, the Commissioner, in consultation with medical experts and state health officials, shall issue health and safety requirements and related guidance for districts." The plaintiffs challenge the board's determination that the COVID-19 pandemic presents such exigent circumstances.

It is questionable whether the plaintiffs can challenge this determination, as the regulations specifically state that

"[t]he requirements set forth in 603 CMR 27.00 are not intended to confer privately enforceable legal rights upon individual students, or persons acting on their behalf." 603 Code Mass. Regs. § 27.01(3) (2021). Putting that issue aside, the plaintiffs assert that "COVID-19 has had no impact on children in this state." This is not so. Children in Massachusetts have lost months of in-person learning, struggled through months of remote learning, and lost the opportunity to participate in countless activities. This assertion reflects the plaintiffs' myopic view that death is the only sort of impact that the pandemic has had.

The interests of the department extend well beyond simply avoiding the deaths of the public school children entrusted to it. Rather, the department's interests are to educate public school children, specifically by preserving the "ability of students to attend classes in a safe environment" (emphasis added). 603 Code Mass. Regs. § 27.08(1) (2021). Accord G. L. c. 69, § 1B, par. 16. Even if we could be assured that an outbreak of COVID-19 among students would not result in long-term health consequences -- and we cannot, because the incidence and severity of so-called "long COVID" is not well understood -- such outbreaks have immediate detrimental consequences to in-person schooling. By law, a student infected with COVID-19 cannot attend school, G. L. c. 71, §§ 55, 55A, and in-person

education quickly becomes impossible if enough adult teachers and staff become infected and need to stay home.

The scientific record before me strongly supports the proposition that school masking reduces the likelihood of COVID-19 outbreaks in schools. University of Massachusetts Medical School Professor and Medical Director of the Massachusetts Department of Public Health's Bureau of Infectious Disease and Laboratory Sciences Dr. Lawrence Madoff averred that "[m]ask requirements have been shown to reduce the risk of school-associated COVID-19 outbreaks." He cited a study of 999 schools in Arizona that concluded that schools without a mask requirement were 3.5 times more likely to have a COVID-19 outbreak than schools that had a mask requirement at the time the school year began (apparently much earlier in Arizona than in Massachusetts).

Furthermore, the record reflects that the department was informed by a letter from more than 300 Massachusetts public health experts and physicians supporting masking as one of several steps that make in-person learning safer. Some of the school districts, as well, were separately informed by expert medical advice. For example, the Northborough-Southborough Regional School District Medical Advisory Team, consisting of seven physicians and one registered nurse "fully endorsed the implementation of a face covering policy."

The plaintiffs, by contrast, relied upon Dr. John Diggs, who opposes masking "without robust evidence of decreased hospitalization and death" (in addition to opposing "[m]assive vaccine programs" in favor of simply allowing the pandemic to "burn [itself] out"). He provided no opinion about whether mask wearing would reduce the spread of COVID-19 or permit in-person schooling to continue.[4]

The plaintiffs also relied upon Tammy Blakeslee, a certified industrial hygienist with no discernable knowledge or training in medicine or public health.[5] She, in turn, relied upon a "guidance document" from the American Industrial Hygiene Association that concluded that "engineered solutions to reduce exposure to hazardous agents offer much greater protection than PPE [personal protective equipment] or administrative controls

[4] Dr. Diggs also opined that "there are acknowledged risks of wearing masks," such as "dry mouth," "[i]ncreased mouth breathing," and educational challenges. I see no indication that the department disagrees with the proposition that there are negatives to mask use; rather, the department believes that these negatives are outweighed by the benefits of ensuring that in-person schooling continues uninterrupted.

[5] Blakeslee posited severe medical consequences from mask wearing but has no expertise to support her opinions in this regard. As mentioned, the plaintiffs' medical expert listed mild negative effects, and Dr. Madoff opined that "[m]asks have not been shown to cause harm to individuals wearing them. Masks are routinely worn, without evidence of harm to the wearer, in many settings including healthcare and industrial workplaces." Dr. Assaad Sayah, a former emergency department physician, opined that "[m]asks have been shown to be safe and effective and do not lower oxygen levels or increase carbon dioxide levels."

in most workplace settings" and specifically warned that the document "is not intended to suggest that face coverings and masks not be used."[6] On this record, there is simply no basis for concluding that the board's conclusions were unreasonable or unsupported. The plaintiffs have not demonstrated a likelihood of success on the merits of showing that the board's exigent circumstances finding was in error.

5. Preemption. The plaintiffs argue that the Public Health Act (PHA) occupies the field of combatting infectious diseases and thus the mask mandate is preempted. Putting aside the fact that the Department of Public Health advised the department to impose the mask mandate, the Supreme Judicial Court has already rejected this proposition. As the Court held, "the Legislature could not have intended the PHA, and therefore primarily local boards of health, to be exclusively responsible for addressing a public health crisis such as COVID-19."

[6] This guidance document estimated "5-10% relative risk reduction for face masks and cloth face coverings," but only after applying arbitrary "modifying factors" of twenty-five percent and fifty percent to reduce the experimental penetration levels. Blakeslee also cited a study for the proposition that "respondents who reported to have used cloth face coverings 14 days before illness were more likely to present to a hospital." The study in question, however, says nothing of the sort. Rather, it compared COVID-19-positive outpatients to the general population and discovered that the percentage of COVID-19-positive outpatients reporting consistent use of face masks was lower than the percentage of the general population reporting consistent use of face masks.

Desrosiers, 486 Mass. at 379. Accordingly, there is no basis for concluding that the PHA preempts the authority of the department or the school districts in responding to the pandemic. The plaintiffs have not demonstrated a likelihood of success of showing that the mask mandate is preempted by the PHA.

6. Constitutionality. There is no doubt that there is a "constitutional right of a custodial parent to make certain basic determinations for the child's welfare." Blixt v. Blixt, 437 Mass. 649, 666 (2002). This right, however, "is not absolute but must be reconciled with the substantial State interest in the education of its citizenry." Care & Protection of Charles, 399 Mass. 324, 334 (1987). "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." Id. at 336, quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). "Due process does not give parents the right to interfere with a public school's operations because issues such as school discipline, the content of examinations, and dress code are 'issues of public education generally "committed to the control of state and local authorities."'" McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 711 (9th Cir. 2019), quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005).

The plaintiffs' calling mask wearing a "healthcare decision[]" does not make it so. That the department expects masks to reduce the risk of illness does not make them medical devices any more than snow pants become medical devices because schools mandating their use expect them to reduce frostbite. Cf. Custody of a Minor, 375 Mass. 733, 748 (1978) (chemotherapy is medical treatment invoking parents' constitutional rights). Parents who choose to send their children to public schools do not thereby gain the constitutional right to exempt their children from the school's dress requirements.

Even if I accepted that mask wearing was a healthcare decision, the result would be the same. The United States Supreme Court long ago upheld the constitutional authority of school districts to require that students be vaccinated before being allowed to attend public schools. See Zucht v. King, 260 U.S. 174, 176-177 (1922). This remains true to this day. See B.W.C. v. Williams, 990 F.3d 614, 622 (8th Cir. 2021); Nikolao v. Lyon, 875 F.3d 310, 318 (6th Cir. 2017); Phillips v. New York, 775 F.3d 538, 543 (2d Cir. 2015). All school students in Massachusetts must comply with vaccination requirements. See 105 Code Mass. Regs. § 220.500(A) (2021). Parents who do not want to comply with a public school's plans to prevent the spread of infectious disease must do so by choosing private schooling or home schooling; they do not have a constitutional

right to ignore a rule designed to protect the safety of their children's classmates. Accordingly, the plaintiffs have not demonstrated a likelihood of success on the merits of showing that the mask mandate is unconstitutional.

7. Reliance on hearsay. There is nothing improper in deciding a motion for a preliminary injunction on the basis of affidavits. See, e.g., Lieber, 488 Mass. at 821; Doe v. Worcester Pub. Schs., 484 Mass. 598, 599, 604 (2020); Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 735 n.5 (2008). Indeed, a "preliminary injunction is usually based upon affidavits." Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 493 (1986).

Similarly, there was no reason why the experts who submitted affidavits (for both sides) could not rely upon studies they had not conducted or other scientific literature. See Commonwealth v. Durand, 475 Mass. 657, 669-670 (2016); Commonwealth v. Ortiz, 93 Mass. App. Ct. 381, 386 n.5 (2018). In any event, "a motion for [a] preliminary injunction is not a trial on the merits, and . . . we have allowed evidence to be considered in such a hearing even though it might later prove inadmissible at trial." Planned Parenthood of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 711 n.9 (1990). I can discern no abuse of discretion in the motion judge's handling of hearsay.

8. Authority of the school districts. Having found no abuse of discretion in the Superior Court judge's determination that the department has the authority to impose a mask mandate, it is questionable whether I need to address whether the school districts have the independent authority to do so (in the absence of direction from the department). To the extent I must address that question, G. L. c. 71, § 37 (parallel to G. L. c. 69, § 1B, par. 1) provides school committees with the authority to "establish education goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education." "This section has always been broadly construed." Dowd v. Dover, 334 Mass. 23, 26 (1956). General Laws c. 71, § 37H, par. 2 (parallel to G. L. c. 69, § 1B, par. 16) provides school committees with the specific authority to promulgate "standards and procedures to assure school building security and safety of students and school personnel." "[S]chool officials' duty to provide children an adequate public education includes the duty to provide a safe and secure environment in which all children can learn." Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 131 (1995). These statutes provide the school districts with the authority to set policies and standards such as mask wearing, at least to the extent such policies and standards are consistent with the department's

directives. The plaintiffs have failed to demonstrate a likelihood of success on the merits of showing that the school districts lack the authority to impose mask mandates.

9. Conclusion. In the absence of a showing of a likelihood of success on the merits, the plaintiffs are not entitled to a preliminary injunction. See Lieber, 488 Mass. at 821-822. Accordingly, the plaintiffs' petition for interlocutory relief from the Superior Court judge's denial of a preliminary injunction is denied. Nothing in this decision should be construed as limiting the authority of the Superior Court judge in any way in deciding the case at the trial stage.