

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS

HAMPDEN SUPERIOR COURT

THE FAMILY FREEDOM ENDEAVOR, INC.)
and THE PEOPLE'S FREEDOM ENDEAVOR,)
by its individual representatives,)
JUSTIN McCARTHY, MATTHEW HALL,)
ALECIA DePESA, JOSEPH BOCCELLI, II,)
and DANIELLE ASHLEY-SILVA)
Plaintiffs)

v.)

CIVIL ACTION: 2179CV 494

JEFFREY C. RILEY, as)
COMMISSIONER OF THE)
MASSACHUSETTS DEPARTMENT)
OF ELEMENTARY AND)
SECONDARY EDUCATION)
Defendant)

and)

THE MASSACHUSETTS BOARD OF)
ELEMENTARY AND SECONDARY)
EDUCATION)
Defendant)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[Mass. R. Civ. P. 65]

[ORAL ARGUMENT REQUESTED]

Now come the plaintiffs and move that this Court issue preliminary injunctive relief against the defendants, preventing them from implementing a statewide mask mandate for school children. As grounds, plaintiffs have shown a likelihood of success on the merits in their pleadings and that irreparable harm will occur if the injunction is not granted, including physical and psychological harm to

the plaintiffs' children, and including loss of a public education. The basis for the Complaint and this Motion for Preliminary Injunction is that the defendants lack actual authority to implement a mandate of this kind and plaintiffs are therefore seeking that this Court issue an injunction in their favor and against the defendants, preventing them from implementing this mandate.

A party moving for a preliminary injunction is entitled to it upon a showing that:

1. There is a substantial risk of immediate and irreparable harm if preliminary injunctive relief is not granted;
2. He has a substantial likelihood of prevailing on the merits;
3. The risk of harm to the moving party is greater if the injunction is not granted than the harm to the opposing party if the injunction is granted; and
4. The public interest will not be adversely affected if the injunction is granted.

Commonwealth v. Mass. CRINC, 392 Mass. 79 (1984); *Packaging Industries Group v. Cheney*, 380 Mass. 609 (1980).

A memorandum in support of their motion accompanies this Motion.

Wherefore, Plaintiffs request that this Court enjoin defendant from implementing its statewide mask mandate and find that defendants lack statutory and subsequently regulatory authority to implement a mandate of this kind.

PLAINTIFFS, by:

DATED: September 16, 2021

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MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ATTORNEYS FOR PLAINTIFFS:

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Lauren Bradford, Esq. (Law Office of Lauren Bradford)

ORAL ARGUMENT REQUESTED

INTRODUCTION

The issue in this matter is crystal clear: **Do the specific defendants, namely the Massachusetts BESE and Commissioner of the Massachusetts DESE have authority under G.L. c. 69 § 1B and § 1G, and subsequently under 603 CMR 27.08 to issue mask mandates as a means of preventing infectious disease in schools? The answer is that they do not.** Plaintiffs are seeking a declaratory judgment and preliminary injunction awarded in their favor, enjoining the defendants from enforcing the statewide mask mandate issued by the defendants on August 24, 2021 and a declaration that the defendants had no legal authority to issue such a mandate.

I. FACTUAL BACKGROUND

On August 24, 2021, the defendant BESE held a special board meeting whereby they voted to authorize the Commissioner of Elementary and Secondary Education to institute a statewide mask mandate for all public-school children aged 5 and older (Exhibit A of Plaintiff's Complaint). The mandate also included public school faculty and staff. *Id.* Defendants relied upon their own declaration of "exigent circumstances" and the provisions of 603 CMR 27.08, in deciding that they had the authority to issue such a mandate, which allows for only two exceptions: students and staff who are unable to wear a mask for either medical or behavioral reasons. No option for religious exemption is offered. Students and staff are allowed to remove their masks for eating, drinking, outdoor time, and "mask breaks." Masks may also be removed when indoors for elective classes such as the

use of wind instruments. Guidance from the defendant states that it is up to each individual district to implement enforcement and disciplinary procedures for those who do not comply with the mandate. Schools who achieve a vaccination rate above 80% by October 1, 2021, will be permitted to disregard the mask mandate for only those students and staff that are vaccinated. This was the motive behind the mask mandate (Plaintiffs' Complaint, p. 3, ¶17). All students and staff who remain unvaccinated will be required to continue wearing masks indefinitely. Prior to the defendants' decision to issue a statewide mandate, many school boards were already implementing mask mandates while some were not, based on the specific needs and considerations of their own cities and towns¹.

II. LEGAL STANDARD

Winter v. NRDC, 555 U.S. 7 (2008) provides the four-part framework to determine whether to grant a moving party preliminary injunctive relief: “either show that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Further, “[w]here a party seeks to enjoin government action, the judge also must “determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public. *Garcia v. Dep't of Hous. & Cmty. Dev.*, 480 Mass. 736, 747 (2018).

¹ <https://www.masslive.com/coronavirus/2021/08/massachusetts-school-mask-mandates-these-districts-are-requiring-face-coverings-this-fall-as-covid-pandemic-continues.html>

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are incredibly likely to succeed on the merits, as this is the first time that the defendants, either acting as individuals in an official capacity, or as agencies themselves, have attempted to use the provisions of G.L. c. 69 § 1B and § 1G to implement mandates and restrictions to fight infectious disease, authority for which the statute does not allow.

A. Defendants' Authority Under G.L. c. 69 § 1B is Specific to Buildings and Structures and Not Disease Prevention Measures.

Defendants' reliance upon G.L. c. 69 § 1B and § 1G is misguided and wrong. First of all, § 1G states that "[t]he board shall establish the minimum length for a school day and the minimum number of days in the school year." Thus, it is easily established that § 1G has absolutely nothing to do with authorizing the BESE to issue statewide mask mandates.

With respect to § 1B, the particular section of the statute at issue specifically deals with school buildings and grounds. See *Randall and Franklin*, "Municipal Law and Practice," 18B Mass. Prac., § 22.49, June 2021. This based on the clear language of the statute, "The board shall establish minimum standards for all public early childhood, elementary, secondary and vocational-technical school buildings, subject to the provisions of the state building code. The board shall establish standards to ensure that every student shall attend classes in a safe environment." This especially makes sense when one takes into account the second to last paragraph of the statute, which states that the board shall "establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters fifteen, seventy,

seventy-one A, seventy-one B and seventy-four.” These statutes are all Education Statutes governing public and vocational schools. Thus, the BESE establishes policies to ensure that the local schools are adhering to the respective statutes that govern public education and vocation. For instance, G.L. c. 71 § 68 provides the specific duties of towns to maintain school buildings and grounds, including suitable buildings and adherence to sanitary code issues, such as application of pesticide treatments. Thus, it would make sense that under G.L. c. 69 § 1B that the BESE would provide minimum standards for these school buildings and sanitary code issues with respect to the towns’ individual responsibilities under G.L. c. 71. In other words, this has nothing to do with COVID-19 precautions and mandating that students wear masks.

The only statutes that even remotely involve the BESE and/or the Commissioner with respect to infectious disease are G.L. c. 69 § 1C, which states that the board may require public schools provide for immunizations against Hepatitis B for school employees working with developmentally disabled students, and G.L. c. 71 § 55, which falls under the BESE’s c. 69 § 1B umbrella, providing for the local boards of health to determine when a child must stay home if he or she is infected with a disease dangerous to public health. However, the wording of this statute does not allow for the mandating of masks or the like, as it gives the board of health the discretion as to when to keep an infected child home, *not* the authority for the board of health, nor BESE, to allow the Commissioner to mandate masks in schools.

Neither G.L. c. 71, c. 71A, c. 71B nor c. 74 authorize the BESE nor the Commissioner to implement mask mandates or anything of the sort.

B. 603 CMR 27.08 Therefore Cannot Provide Any Additional Authority that G.L. c. 69 § 1B Does Not Provide and Can Only Be Interpreted to Allow the BESE to Take Emergency Steps to Safeguard School Buildings and Grounds.

Put simply: because the BESE relied upon a regulation that derived its authority from G.L. c. 69 § 1B, and because § 1B does not provide authority for either of the defendants to implement a statewide mask mandate such as the one that they implemented, defendants therefore lack the authority to implement the mandate. What this means is that the language of 603 CMR 27.08 provides authorization for the BESE to act in a way similar to the way in which they handled the South Hadley High School mold issue, allowing for remote learning while the school took care of the mold (See: <https://www.gazettenet.com/South-Hadley-Select-Board-42475162>).

IV. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT AWARDED IN THEIR FAVOR

Plaintiffs will suffer irreparable harm, either through the physical and psychological² harm that comes from the wearing of the masks for long periods of time (Plaintiffs Complaint, p. 9 ¶48) or by choosing to remove their students from public school to avoid the harms caused by the masks themselves. Many students,

² <https://www.cugmhp.org/five-on-friday-posts/why-a-mask-is-not-just-a-mask/>, Kathleen Pike, PhD outlines that children are missing the ability to read facial expressions, stunting the development of their emotional intelligence and having further and more significant impacts on those students with certain conditions, such as autism or Asperger's syndrome, who generally have "particular difficulties reading non-verbal cues."

like MM (McCarthy's minor child), find it difficult to learn while wearing a mask, as it causes a significant distraction to her in class.

This mandate will also have a significant impact on those of different races and backgrounds, whether intended or unintended. Numerous news outlets have investigated the racial component to both vaccination and mask wearing and have determined a large divide between mask wearing and vaccination between communities of color and white communities³. Thus, this policy will have a disparate impact on minority communities in two ways: 1) It will impose a mask mandate on a community that already fears punishment from authority and masks will only exacerbate that fear, and 2) many schools with a small minority population will be able to forego masks in that they will likely hit the 80% vaccination rate before schools with a higher population of minority students and staff.

This harm is current and ongoing, and for plaintiffs' young children, who are and will not be vaccinated, will continue indefinitely.

V. BALANCE OF HARMS WEIGHS IN PLAINTIFFS' FAVOR

There will be a strong temptation to re-frame the issue of this matter from whether the defendants have the authority to implement this mandate at all with

³ <https://www.statnews.com/2020/06/03/which-deamany-black-men-fear-wearing-mask-more-than-coronavirus/>, <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html>, <https://www.cnn.com/2020/04/07/us/face-masks-ethnicity-coronavirus-cdc-trnd/index.html> and WebMD, which analyzed the deep roots of government mistrust in minority communities was likely driving the lower rates of vaccination: <https://www.webmd.com/vaccines/covid-19-vaccine/news/20210202/black-vaccine-hesitancy-rooted-in-mistrust-doubts>. This is for good reason: <https://www.npr.org/2021/02/16/967011614/in-tuskegee-painful-history-shadows-efforts-to-vaccinate-african-americans>

an attempt to frame the issue as one dealing with the harms of Coronavirus. That would be incorrect. First, local boards of health are already mandating masks if they feel it is necessary for their particular communities⁴. Second, local school committees are making the decision on masks for their particular school districts, if *they* feel that masks are necessary for the safety of their particular school district⁵. This makes sense, as 76% of Massachusetts has received at least one dose of a COVID-19 vaccine⁶, and each community can decide what measures that it needs to take to prevent the spread of the disease.

Thus, the **defendants will suffer no harm** if this injunction were allowed, as all they would be losing is the ability to issue mandates that they have no authority to issue. They lose no power or authority, rather they go back to the position they were always in. The spread of COVID-19 can still be mitigated at the local level (and already is, based on the local needs according to the boards of health and school committees, including many private institutions mandating mask usage and vaccination as conditions of employment and/or entrance into facilities). Painting the balance of harms issue as one in which the harm to a few school children balanced against curbing the spread of Coronavirus would be an incorrect analysis and would detract from the actual issue at hand. The correct balance of harms is test is this: school children facing the physical, psychological and emotional damage

⁴ As just one of *many* examples from as recent as 9/15/21: <https://www.wvlp.com/news/local-news/hampden-county/west-springfield-mask-mandate-discussed-by-board-of-health-two-days-before-the-big-e-opens/>

⁵ <https://www.masslive.com/coronavirus/2021/08/massachusetts-school-mask-mandates-these-districts-are-requiring-face-coverings-this-fall-as-covid-pandemic-continues.html>

⁶ <https://usafacts.org/visualizations/covid-vaccine-tracker-states/state/massachusetts>

from the wearing of masks balanced against a state agency's ability to exercise authority that it does not have. The defendants will certainly be able to carry on with business as usual if this injunction were allowed; the plaintiffs will not.

VI. PUBLIC POLICY SUPPORTS GRANTING THE INJUNCTION

For the same reason outlined in analysis of the "balance of harms," public policy would favor curbing the defendant's efforts to exceed their statutory authority. The issue being not whether curbing the spread of coronavirus is the primary public issue, but rather whether public policy would support a state agency acting outside the bounds of the law, public interest would not be adversely affected by the issuance of this injunction under the *Garcia* standard, *supra*. Indeed, the public's interest is already being met by those elected and appointed officials at the local level, namely the school committees and local boards of health. Thus, public interest is not only *not* being adversely affected, but issuing this injunction would be in the public's best interest.

CONCLUSION

For the aforementioned reasons, plaintiffs are requesting this Court issue an injunction in their favor, enjoining defendants from implementing this mandate, leaving the issue to the local school committees and boards of health, and for a declaratory judgment that the defendants do not have the authority to implement a mandate such as this statewide mask mandate.

DATED: September 16, 2021

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