

No. 2022-P-0340

MASSACHUSETTS APPEALS COURT

THE PEOPLES' FREEDOM ENDEAVOR

Plaintiff–Appellee

v.

JEFFREY C. RILEY, ET AL.

Defendant–Appellant

On Appeal from the Hampden Superior Court,
Case No. 2179CV494 Before the Honorable David Hodge

PLAINTIFF-APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

- (1) Whether the Superior Court erred in finding that the defendants acted within statutory and regulatory authority in implementing a K-12 statewide school masking policy.
- (2) Whether the Superior Court erred in denying preliminary injunctive relief to plaintiffs.

INTRODUCTION

The Peoples' Freedom Endeavor¹ ("PFE") appeals the Hampden Superior Court's denial of their request for preliminary injunctive relief. At issue was that the Massachusetts Board of Elementary and Secondary Education ("BESE") and Jeffrey Riley, as the Commissioner of the Department of Elementary and Secondary Education ("DESE"), do not have authority under G.L. c. 69 § 1B and § 1G, and subsequently under 603 C.M.R 27.08 to issue statewide masking requirements (or other public health measures of the like) as a means of preventing infectious disease in schools. Plaintiffs sought declaratory judgment and

¹ The lead plaintiff, The Family Freedom Endeavor, Inc., has voluntarily withdrawn. The complaint was filed listing The Family Freedom Endeavor, which had organizational standing to bring the suit, as its secretary had a child eligible to attend Agawam schools, and the Peoples' Freedom Endeavor, and unincorporated association, with individual representatives of PFE listed. These plaintiffs had the same claim; however, the case was ultimately consolidated with several other cases throughout the state. PFE appeals only its claimed errors of law only as to its specific claims against the above-named defendants.

preliminary injunctive relief, specifically asking the Superior Court to enjoin the Defendants from enforcing the statewide mask mandate that was issued by BESE on August 24, 2021. Plaintiffs further requested a declaration that the Defendants had no authority to issue such a mandate under G.L. c. 69 § 1B and § 1G, or 603 C.M.R. 27.08.

STATEMENT OF THE CASE

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 (R.A. I at 58). The mandate also included public school faculty and staff. 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. The policy did not speak to religious accommodation. 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 for the use of wind instruments.

Guidance from the defendants provides that each individual district may implement enforcement and disciplinary procedures for those who do not comply

with the mandate. Schools who achieved a vaccination rate above 80% by October 1, 2021, were permitted to disregard the mask mandate for only those students and staff that were vaccinated. Thus, this mandate was about incentivizing vaccination. 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 towns.

II. MOOTNESS

Commissioner Riley extended the mandate on September 27, again on October 26, 2021, and then again on January 10, 2022, until February 28, 2022. On February 9, 2022, DESE released a Memorandum, the subject of which read "Update on DESE Mask Requirement." This Memorandum stated that the Commissioner would not renew the state mask requirement at its expiration on February 28, 2022. The Memorandum stated that "[t]he Commonwealth's high vaccination rates and widespread availability of COVID-19 testing for school personnel and students support this decision." Further down, it reads: "[t]he Commissioner will continue to monitor public health data, consult with medical

experts and state health officials, and issue further guidance and/or requirements as needed.”²

In light of the Supreme Judicial Court’s recent opinion in *City of Lynn v. Murrell*, 489 Mass. 579 (2022), plaintiffs address the issue of mootness and distinguish their present case from *Murrell*. In *Murrell*, the SJC addressed the issue of masking fines imposed by the Occupational Safety and Health Administration against the owner of a Liberty Tax Service, along with the City of Lynn seeking preliminary injunctive relief to prevent the business owner from being able to operate, as she would not adhere to masking policies. The Court took up the issues of both mootness and whether it had discretion to decide the issues despite them being moot.

First, the plaintiffs here still have a “personal stake in the outcome.” *Blake v. Massachusetts Parole Bd.*, 369 Mass. 701, 703 (1976). Their standing has not changed, and the most recent expiration of the policy does not prevent this Court from offering effective relief. See *Murrell*, quoting *Branch v. Commonwealth Employment Relations Bd.*, 481 Mass. 810, 817 (2019). In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020), the Supreme Court spoke to COVID-19 restrictions imposed by the party being sued (in that case, the Governor) leaving the plaintiffs “under a constant threat” that the restrictions could

² <https://www.doe.mass.edu/covid19/on-desktop/2022-0209mask-requirement-update.pdf>

be re-imposed (specifically reclassifications into color-coded “zones” which restricted certain types of businesses). They determined that not only was the issue not moot, but that injunctive relief was still called for. Incorporated in the determination that the policies could be subjectively imposed, the Court also took into account the practical aspect of attempting litigation every time one of these restrictions were to be imposed and then dropped: the time spent in litigation. Here, plaintiffs filed for injunctive relief on September 20, 2021. The Order from the Court was issued nearly two full months later, on November 16, 2021. Therefore, the plaintiffs’ claims are not moot.

Second, in light of *Murrell*, this case differs with respect to whether this Court should decide the issue(s) regardless of whether it deems them to be moot. The Court, citing *Ott v. Boston Edison Co.*, 413 Mass. 680, 683 (1992) provided a four-factor test in determining whether to exercise its discretion to decide upon issues that it determines are moot:

“(1) the issue was fully argued on both sides; (2) the question was certain, or at least very likely, to arise again in similar factual circumstances; (3) ... appellate review could not be obtained before the recurring question would again be moot; and (4) most importantly, the issue was of public importance.” *Id.*

Here, all four of the factors are met. With respect to the PFE plaintiffs, the issue was itself decided by the Trial Judge, as a matter of law. (R.A. V at 252) Second, this issue is certainly likely to arise again. The regulation itself allows for a

determination of exigent circumstances by BESE, which is undefined and up to the board itself. The last guidance issued on the mask mandate stated that the “Commissioner will continue to monitor public health data, consult with medical experts and state health officials, and issue further guidance and/or requirements as needed.” It has already been extended three times since its creation. This is not just a hypothetical dispute, but in fact a likelihood that this policy should return.

This differs from *Murrell*, which would have required the City of Lynn to come back and seek preliminary injunctive relief through the trial court, based on the re-issuance of the Governor’s emergency orders. The first difference is that in *Murrell*, this was speculation over whether the Governor was going to implement further COVID-19 policies that may or may not have affected the parties involved. Here, the policy has expired but is simply subject to a new determination of exigency at the whims of BESE (which they have already done three times). Second, it was the City who sought preliminary injunctive relief against *Murrell* and then argued that the issues were moot. In other words, *Murrell* was not at risk in the same way the plaintiffs here are at risk. Here, it is the plaintiffs who will have to re-litigate the issue through months of litigation when the policy can be switched on and off at any time (addressing the third prong in *Ott*), similar to those in *Roman Catholic Diocese*. Lastly, this is an issue of significant public importance, affecting public schools throughout the Commonwealth.

III. PROCEDURAL HISTORY.

Plaintiffs filed their Complaint for Declaratory and Injunctive Relief on September 20, 2021. The case was consolidated with five additional cases on October 12, 2021. The injunction hearing for all consolidated matters was heard on October 26, 2021, with the Court's Order issuing on November 16, 2021. Plaintiffs' Notice of Appeal was timely filed in accordance with Mass. R. App. P. 4 on December 8, 2021. Concurrently, the consolidated plaintiffs filed an appeal to the Single Justice, whose decision was entered on January 25, 2022.

ARGUMENT

I. 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.

II. THE SUPERIOR COURT ERRED IN FINDING THAT THE DEFENDANTS ACTED WITHIN STATUTORY AND REGULATORY AUTHORITY IN IMPLEMENTING A K-12 STATEWIDE SCHOOL MASKING POLICY.

The Superior Court, in its Memorandum and Order (R.A. V at 259), stated that “[t]he Plaintiffs simply ignore the rest of the statute which unambiguously evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe environment, which environment cannot be reasonably read to be limited to the condition of the buildings. The statute’s intended applicability to any health risks, not just those posed by the school building conditions, is common sense.” The word “health” does not appear in G.L. c. 69 § 1B nor § 1G, nor could a reasonable reading of the statute lead a reader to believe that it conveys BESE authority that has already vested in the local authorities, such as the school committees and boards of health.

The Superior Court cited no authority in its Memorandum that would convey to the Defendants the authority to make public health policy, as they are doing here. Defendants’ authority extends only so much as is “expressly conferred on [them] by statute or reasonably necessary to carry out the purposes for which [DESE] was established.” *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct.

152, 155 (2012). The Memorandum further reads, “[i]t is also clear from the broad language of § 1B which requires BESE to establish policies relative to school children’s education and to “establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters [15, 70, 71A, 71B, and 74]... so as to encourage innovation, flexibility, and accountability in schools and school districts.” The plaintiffs have not demonstrated that the State defendants lacked authority under this statute **during an unprecedented pandemic**³ to establish policies to ensure safe in-person learning in public schools.” (R.A. V at 259, emphasis added). DESE is not a public health agency, and even the broadest reading of its authority to “establish such other policies” to comply with chapters 15, 70, 71A, 71B, and 74, in an effort to encourage “innovation, flexibility, and accountability in schools and school districts” does not convey to Defendants the authority to implement public health measures. Such a reading provides nearly limitless authority onto the State defendants.

G.L. c. 69 § 1G reads: “[t]he board shall establish the minimum length for a school day and the minimum number of days in the school year.” Thus, § 1G has absolutely nothing to do with authorizing the BESE to issue statewide mask

³ This indicates that the Superior Court imposed a burden that Plaintiffs are not required to meet. Either the statute conveys authority to the Defendants, or it does not. Plaintiffs’ burdens of proof do not change because of a pandemic. The language of the statute does not change because of a pandemic. No language in G.L. c. 69 § 1B or § 1G conveys “emergency powers” to the Defendants such as are enjoyed by the Governor under G.L. c. 17 § 2A. Thus, Defendants’ authority “during an unprecedented pandemic” is no different than it was before the pandemic.

mandates for K-12 students. With respect to § 1B, the 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 is 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 remains clear when considering the second to last paragraph of the statute, referenced by the Superior Court, that BESE 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.” The enumerated chapters are all education statutes governing public and vocational schools and contain no sections that deal with public health measures like what Defendants have imposed. Thus, the BESE establishes policies to ensure that the local schools are adhering to the respective laws that govern public education and vocation. For example, G.L. c. 71 § 68 provides the specific requirements that towns 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 use its regulatory authority, within the boundaries of the statute, to require minimum standards for

these school buildings in conformity with the state sanitary code with respect to the towns' individual responsibilities under G.L. c. 71. In short: the statute does not authorize the BESE to enact public health mandates, requiring that students wear masks⁴.

The statutes that (remotely) relate to BESE and/or the Commissioner with respect to infectious disease are: G.L. c. 69 § 1C, requiring that BESE may require that public schools provide for immunizations against Hepatitis B for school employees working with developmentally disabled students, and G.L. c. 71 § 55, (falling under the umbrella of G.L. c. 69 § 1B), providing for the local boards of health to determine when a child must stay home if he/she is infected with a disease dangerous to public health. The statutes' language does not convey authority on BESE to issue a statewide mask requirement, but rather gives the local Board of Health the discretion as to when to keep an infected child home. In short: BESE's function is to ensure that the schools were acting in conformity with the requirements of their local Boards of Health, and "an 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

⁴ The State defendants made mention of the collaboration with the Department of Public Health in drafting this mandate, yet the DPH, who had the authority (the Commissioner is given power to even mandate vaccines under G.L. c. 76 §15), never implemented a mask mandate for schools such as this. (Tr. At 45:16-22)

board or office was created.” *Telles v. Comm’r of Ins.*, 410 Mass. 560, 564 (1991). This was precisely the PFE Plaintiffs’ argument to the trial judge: that the local Boards of Health and local School Committees’ authority to implement public health measures, based on the needs of their own communities, was usurped by BESE at the state level. Neither G.L. c. 69, 71, c. 71A, c. 71B nor c. 74 authorize BESE nor the Commissioner to implement mask mandates.

III. THE SUPERIOR COURT ERRED IN DENYING PRELIMINARY INJUNCTIVE RELIEF TO PLAINTIFFS.

Plaintiffs very clearly established that they would suffer irreparable harm, through physical, psychological and developmental traumas resulting from the prolonged use of facemasks. (See: Boston Dec. ¶ 19-26, R.A. I at 92-93, Pls. Compl., ¶ 48, R.A. I at 52, Pls. Mem., p. 6-7, R.A. I at 83-84). This leads Plaintiffs to a decision that forces them to choose between subjecting their children to the long-lasting harms caused by prolonged use of facemasks and removing their children from public schools, depriving them of their guaranteed education.

Further, Plaintiffs described in detail the effect that these masking requirements can have on certain communities, primarily communities with high populations of non-white students. (Pls. Mem. 7, R.A. I at 84, n.3) At the Preliminary Injunction Hearing, argument was presented referencing Plaintiff’s Memorandum stating the same:

“So, again, this isn’t an issue of whether or not public health measures are being taken into effect or if everybody in the state will no longer have to wear a mask. The towns have individually made that determination for themselves, Judge.

And on the specifics of local needs, right. We already know and I cited references how, you know, specific to maybe even I’ll give an example of like a Springfield. We’re in Springfield right now where the school district, about half of the school district is white. There are significant amount, there is a significant amount of data submitted on articles that I’ve cited regarding the vaccination status and the vaccination percentages of the different demographics in minorities historically or not more historically, recently, are less vaccinated and they have a lower vaccination rate than those other than white. A school like Central High, a school like Holyoke where only 50 percent of the school is white, they will necessarily be wearing masks longer than, based on the data, they’ll be wearing them longer than towns and cities where there are predominantly white populations, so we’ll have a disproportionate effect on minority populations.” (Tr. 10/26/21 at: 12:14-25, 13:1-11)

Plaintiffs repeatedly stated that the local bodies were implementing safety measures commensurate with the needs of their own cities and towns. Thus, there was and is no risk that cities and towns were not implementing COVID-19 safety precautions in their buildings, including schools. This case is also not about whether masks prevent the spread of COVID-19, or whether prevention of the spread of the disease is a compelling endeavor (it is). This is a matter of whether the Defendants have authority to implement the K-12 masking requirements statewide, which they do not. The balance of harms therefore tips in the Plaintiffs’ favor, as the Defendants would suffer no harm: not only do cities and towns have the ability to implement masking

requirements should they decide to do so, many of them had already done so. (Pls. Mem. 8, R.A. I at 85, n. 4, 5). Also, because the issue is not about mask efficacy but rather authority of the Defendants under the aforementioned statutes, the harm they would suffer would be only that they would be prevented from exercising authority which they not only do not have but have never exercised before. Balanced with the physical, psychological and developmental harms suffered by Plaintiffs, the balance weighs in Plaintiffs' favor.

“Where a party seeks to enjoin government action, the judge must also “determine that the requested order promotes the 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). The public policy goal of fighting the spread of COVID-19 is already being achieved at the local level. Therefore, public policy favors preventing the overreach of the Defendants and injunctive relief in favor of the Plaintiffs.

CONCLUSION

The Superior Court erred in denying the Plaintiffs preliminary injunctive relief and in rendering an opinion that Defendants had authority to issue a statewide masking requirement. Plaintiffs request that this Court Modify the Superior Court’s

Order denying injunctive relief and award the Plaintiffs preliminary injunctive relief and any other relief this Court deems appropriate.

Respectfully submitted,

Dated: August 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's electronic filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record on August 4, 2022.

/s/ Ryan P. McLane

Ryan P. McLane

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Plaintiffs certify that their brief complies with the rules of the Court, namely Mass. R. App. P. 16(a)(6) (pertinent findings); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (production of relevant statute); Mass. R. App. P. 16(h) (length of brief); Mass. R. App. P. 18 (Appendix to Brief); and Mass. R. App. P. 20 (form of brief, appendices and other papers in that the brief used size 14 Times New Roman Font and contained 3,437 non-excluded words using Microsoft Word as a Word Processing Program).

Dated: August 4, 2022

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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN COUNTY, ss.
SUPERIOR COURT
FILED

SUPERIOR COURT
DOCKET NO. 2179CV00494

NOV 16 2021

THE FAMILY FREEDOM ENDEAVOR, INC. & others¹

vs.


CLERK OF COURTS

JEFFREY C. RILEY, as COMMISSIONER OF THE MASSACHUSETTS
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, & another²

AND CONSOLIDATED CASES³

MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

I. Introduction

This controversy arises out of health and safety measures imposed during the ongoing COVID-19 pandemic to reopen Massachusetts public K-12 schools for in-person learning. The plaintiffs in these six consolidated actions are nonprofit entities and parents of school children who challenge the authority of the Department of Elementary and Secondary Education (DESE), the Board of Elementary and Secondary Education (BESE), eighteen public school districts, and two municipalities, Cambridge and Dover, to issue and implement mask mandates for school children. The plaintiffs argue, *inter alia*, that the defendants lacked authority to issue and

¹ The People's Freedom Endeavor, by its individual representatives Justin McCarthy, Matthew Hall, Alecia DePesa, Joseph Boccelli, and Daniel Ashley-Silva.

² the Massachusetts Board of Elementary and Secondary Education.

³ The cases consolidated with this lead case are: *Children's Health Rights of Massachusetts v. DESE, Andover Pub. Sch. Dist., Attleboro Pub. Sch. Dist., Easton Pub. Sch. Dist., and Sandwich Pub. Sch. Dist.*, 2173CV00672; *Children's Health Rights of Massachusetts v. DESE, Cambridge Pub. Sch. Dist., City of Cambridge, Franklin Pub. Sch. Dist., Northborough Pub. Sch. Dist., Southborough Pub. Sch. Dist., Northborough-Southborough Reg. Pub. Sch. Dist., and Tyngsborough Pub. Sch. Dist.*, 2182CV00874; *Citizens for Medical Freedom, Inc. v. DESE, Dover Pub. Sch. Dist., Sherborn Pub. Sch. Dist., Dover-Sherborn Regional Sch. Dist., and the Town of Dover*, 2182CV00878, *Children's Health Rights of Massachusetts v. DESE, Bridgewater-Raynham Regional Sch. Dist., Carver Pub. Sch. Dist., Hingham Pub. Sch. Dist., and West Bridgewater Pub. Sch. Dist.*, 2183CV00766, and *Carlino, et als. v. DESE and Tewksbury Pub. Sch. Dist.*, 2181CV02076.

implement the mask mandates, that the mandates violate parents' constitutional rights to make decisions regarding their children's health, and that mask wearing is ineffective and harms children. The plaintiffs seek declaratory judgment and injunctive relief enjoining the defendants from enforcing and extending the mandates. These cases are before me on the plaintiffs' motions for a preliminary injunction. After a hearing and consideration of the parties' submissions, I *deny* the motions for preliminary injunction.

II. The Mask Mandates

On March 10, 2020, pursuant to the Civil Defense Act, Governor Charlie Baker declared a state of emergency in Massachusetts due to the spread of COVID-19. On March 15, 2020, Baker issued an order suspending in-person instruction at all elementary and secondary schools in Massachusetts. On May 28, 2021, Baker terminated the state of emergency but declared a public health emergency under G. L. c. 17, § 2A.

The Centers for Disease Control (CDC) has reported that over 720,000 persons in the United States have died from COVID-19. The Massachusetts Department of Public Health (DPH) has reported that over 18,000 people in Massachusetts had died of COVID-19 as of October 2021. The trajectory of the pandemic has been unpredictable. More transmissible variants of COVID-19 have been linked to surges in hospitalizations and deaths, and at the same time vaccinations which reduce the risk of serious illness from COVID-19 have been distributed to many persons, now even children.

In May of 2021, COVID-19 cases, hospitalizations and deaths fell as vaccination rates increased. DESE then announced that for the fall of 2021, all districts and schools would have to provide in-person, full-time learning and that all DESE health and safety requirements would be lifted. (Johnston Aff. par. 19). Over the course of the summer of 2021, however, the Delta

variant of COVID-19 arrived in Massachusetts and the number of COVID-19 cases began rising again. In July 2021, the seven-day COVID-19 case average in Massachusetts was 223, but by August 18, that figure had climbed to 1,237.

In August of 2021, BESE met to discuss the changed circumstances and the awareness that remote learning had harmed many school children. State and local education authorities considered ways to resume in-person learning but with health requirements which would allow students and staff to return to schools safely. Both the CDC and the DPH have recommended mask wearing and other measures to reduce the risk of COVID-19 transmission. The American Academy of Pediatrics supports mask wearing in schools for children who are two years and older. See also *Derosiersv. Governor*, 486 Mass. 369, 372 (2020) ("Medical experts have identified ways in which the spread of the virus can be curtailed, which include wearing a cloth face mask, social distancing, quarantining when infected or exposed to the virus, hand washing, and cleaning frequently touched surfaces").

On August 24, 2021, BESE voted to authorize the Commissioner of DESE to issue a statewide mask mandate for all public school children aged five and up, along with faculty and staff, with exceptions. The same day, BESE voted to declare "exigent circumstances" pursuant to 603 Code Mass. Regs. § 27.08, which provides in relevant part:

"(1) [U]pon a determination by [BESE] 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.

.....
"(7) The authorities granted in 603 Code Mass. Regs. § 27.08 shall remain in effect until [BESE] determines that students can attend classes in a safe environment without additional health and safety measures."

The mandate authorized by BESE and DESE (also referred to as the State defendants)

exempts students and staff who are unable to wear a mask for medical or behavioral reasons and permits the removal of masks for eating, drinking, outdoor time, taking mask breaks, and indoors during elective classes such as while playing wind instruments. Pursuant to the mandate,

"[s]tudents 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. Face shields may be an option for students with medical or behavioral needs who are unable to wear masks or face coverings. Transparent masks may be the best option for both teachers and students in classes for deaf and hard of hearing students."

DESE directed school districts to enforce the mandate and to provide disciplinary procedures for noncompliance, but cautioned that

"[w]hether and when a student should be disciplined for failure to wear a mask is a local decision, guided by the district's student discipline policy and the particular facts. . . . [S]ome students with disabilities may need additional supports to wear masks and may need to be accommodated. Districts are encouraged to consider and implement alternatives before resorting to disciplinary exclusion. Keeping students connected with school is especially important this year as students return to school after a challenging school year."

DESE has instructed that schools which achieved a vaccination rate above 80% by October 1, 2021, could disregard the mandate for students and staff who are vaccinated.

The mandate, by its terms, "is an exercise of [BESE's] authority to ensure students attend classes in a safe environment" and "to set policies relative to children's education, including ensuring that students receive the required amount of structured learning time through in-person education" pursuant to, *inter alia*, G. L. c. 69, §§ 1B, 1G; and 603 Code Mass. Regs. § 27.08.

The State defendants extended the mandate on September 27th and on October 26th, with the latter extension in effect until at least January 15, 2022. DESE explained in the mandate that the mask requirement "remains an important measure to keep students safe in school at this time," that it extended the mask requirement after consulting with medical experts and state

health officials, and that it would continue to work with those entities "to evaluate the mask requirement beyond January 15."

Among the defendants in these actions are eighteen public school districts which have implemented this mandate and two municipalities which have separately issued mask mandates. The record discloses that such local decisions to impose or comply with the mandates have been based upon guidance from public health authorities and other professionals.⁴

III. Alleged Harms from Mask Mandates

In support of their claim that the mask mandates harm children, the plaintiffs submit an affidavit (entitled a declaration, but signed under the pains and penalties of perjury on September 23, 2021) of Andrew Bostom, M.D., who has a master's degree in epidemiology. He is an associate professor at Brown University's School of Medicine.

Bostom opines that prolonged mask wearing by K-12 school children causes significant and irreparable harm physically and psychologically. According to Bostom, prolonged mask wearing causes headaches, visual disturbances, drowsiness, dizziness, reduced concentration, orofacial skin irritation, acne, and provokes an increase in stress hormones, which, in turn, negatively impacts the immune response. He adds that chronic mask wearing can potentially cause a significant increase in socio-psychological stress and mental harm that can escalate into

⁴ For example, Scott Kmief, the Superintendent of Schools for the Carver Public Schools, states in his affidavit that Carver, in following DESE's mask mandate, is acting in accordance with guidance from the CDC, the DPH, and the Town of Carver's Board of Health.

In Cambridge, the Chief Operating Officer of the Cambridge School Department explained that the school mask mandate was considered by its COVID-19 Safety, Health & Facilities Working Group, which is comprised of scientists, doctors, educators, and families appointed by the school superintendent. That group recommended that masks be required for the first semester of this academic year and cited among its reasons that some individuals, even if fully vaccinated, were at higher risk of serious illness if exposed to COVID-19, and that the American Academy of Pediatrics recommended universal masking in schools for everyone aged two and up. The school committee voted to approve of the group's recommendation and the superintendent recommended that masks be required inside all Cambridge public school buildings for the first semester.

behavioral problems and be difficult to reverse. Bostom does not cite any documented cases of that potential phenomenon. He also states that there are reports of claustrophobic experiences and difficulty getting sufficient oxygen, but he adds no additional information, such as the number of negative reports or whether any were substantiated. He does not specify the ages of the persons who reportedly experienced the negative effects of mask wearing, nor state how long the masks were used or the types of masks used. Bostom does not explain whether exemptions and accommodations were available nor does he state that these increased risks occur in school age children where there are provisions for breaks from mask wearing, exemptions from the mandate for medical and behavioral reasons, and accommodations. Bostom does not attempt to balance the risk of potential harms from masking against the risk of harms from COVID-19 infection or from remote learning.

The plaintiffs have also submitted affidavits from John Diggs, M.D., a physician who has treated hundreds of COVID-19 patients, and Tammy Blakeslee, an industrial hygienist. Diggs emphasizes that children are far less likely than older persons to require hospitalization or to die from COVID-19. Diggs states that there is no evidence that masking decreases the rates of hospitalizations and deaths from COVID-19. He sees mask wearing as causing a deterioration in dental health and in IQs. In his view, "uniform masking" should cease, respiratory pandemics tend to burn themselves out through herd immunity, and vaccinations prolong COVID-19 variants and drive variants.

Blakeslee devotes much of her affidavit to the different degrees of protection from N95 masks and other types of masks. She views typical cloth masks as unhelpful in protecting against infectious diseases and creating more health risks. She reasons that face coverings can be a breeding ground for bacteria and, by keeping germs within the mask, they place the wearer at

greater risk of becoming sick. Both Diggs and Blakeslee conclude that the masks are ineffective and do more harm than good to school children.

IV. Legal Analysis

When a private party seeks a preliminary injunction, the moving party is required to show that an irreparable injury would occur without immediate injunctive relief. *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999). In ruling upon a motion for a preliminary injunction, the court first

"evaluates in combination the moving party's claim of injury and chances of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between those risks cuts in favor of the moving party may a preliminary injunction properly issue."

Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980).

A. Statutory and Regulatory Grounds for the State Defendants' Mask Mandate

General Laws c. 69, § 1B, generally provides that BESE "shall establish policies relative to the education of students in public early childhood, elementary, secondary, and vocational-technical schools." Other provisions of § 1B address specific aspects of education, including but not limited to curricula, teachers' qualifications, standards for under-performing schools, personnel evaluation guidelines, and equitable distribution of financial resources. The plaintiffs highlight one provision in particular as evidence that the State defendants only can impose school health related restrictions if the school buildings pose health risks. The provision of § 1B they highlight states that BESE

"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."

Section 1B further states that BESE

"shall establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters [15, 70, 71A, 71B, and 74]. In accordance with the provisions of [c. 30A, BESE] may promulgate regulations as necessary to fulfill said purposes. Said regulations shall be promulgated so as to encourage innovation, flexibility, and accountability in schools and school districts."

G. L. c. 69, § 1B.

The plaintiffs primarily argue that the State defendants lacked authority to issue and implement their mask mandate because the Legislature did not expressly grant them such authority. The plaintiffs narrowly interpret § 1B as authorizing BESE to impose health related restrictions only when school buildings pose health risks, due to the provision in § 1B that BESE "shall establish minimum standards for all public . . . school buildings, subject to the provisions of the state building code." The plaintiffs simply ignore the rest of the statute which unambiguously evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe educational environment, which environment cannot be reasonably read to be limited to the condition of the buildings. The statute's intended applicability to any health risks, not just those posed by school building conditions, is common sense. It is also clear from the broad language of § 1B which requires BESE to establish policies relative to school children's education and to "establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters [15, 70, 71A, 71B, and 74] . . . so as to encourage innovation, flexibility, and accountability in schools and school districts." The plaintiffs have not demonstrated that the State defendants lacked authority under this statute during an unprecedented pandemic to establish policies to ensure safe in-person learning in public schools.

The directive of § 1B that BESE establish policies relative to school children's education authorized the promulgation and use of 603 Code Mass. Regs. § 27.08. "An agency's powers to promulgate regulations are 'shaped by its organic statute taken as a whole and need not necessarily be traced to specific words.'" *Massachusetts Federation of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 773 (2002), quoting *Purity Supreme, Inc. v. Atty. Gen.*, 380 Mass. 762, 770 (1980). See *Grocery Manufacturers of Amer., Inc. v. Dept. of Pub. Health*, 379 Mass. 70, 75 (1979) (regulation may be authorized even where it cannot be traced to specific statutory language).

Upon BESE's determination under § 27.08 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, was required to "issue health and safety requirements and related guidance for districts." That is exactly what occurred here. The plaintiffs have not shown that the State defendants lacked authority to issue and implement their mask mandate pursuant to G. L. c. 69, § 1B, and 603 Code Mass. Regs. § 27.08.⁵ The plaintiffs are unlikely to succeed on the merits of their core claim challenging the legality of the State defendants' mask mandate.

B. The Exigent Circumstances Determination

The plaintiffs maintain that even if the State defendants had authority under G. L. c. 69, § 1B, and 603 Code Mass. Regs. § 27.08, they nonetheless exceeded their authority because there

⁵ The plaintiffs filed a Notice of Supplemental Authority citing a decision recently issued by a Pennsylvania court in *Corman v. Acting Sec'y of Health*, No. 294 M.D. 2021 (Nov. 10, 2021) (slip op.). In that case, parents as well as private schools and some public school districts challenged the validity of an order by a state agency requiring masks in all schools. The court ruled that the order was invalid because (1) it was not issued in compliance with mandatory rule making procedures, and (2) the health regulation relied upon for the order only authorized actions where the persons affected were known to have or been exposed to persons with communicable diseases, which was not the case in the schools. *Corman* does not aid the plaintiffs in these consolidated actions. The regulation relied upon here, 603 Code Mass. Regs. § 27.08, was properly promulgated and the State defendants' application of it did not exceed their authority as explained above.

were and are no exigent circumstances concerning COVID-19 in Massachusetts, let alone concerning children, to justify invoking § 27.08. This argument merits no more than cursory attention. The governor declared a public health emergency. The Delta variant-related surge in COVID-19 infections in Massachusetts prompted school officials to reevaluate how to provide safe in-person learning. The State defendants relied upon the guidance of medical experts and public health authorities in crafting the mask requirements with exemptions, after taking into account the many concerns in this fluid and perilous situation. Nothing in the record suggests that such reliance was unreasonable or that the State defendants' determination of exigent circumstances lacked a substantial basis or relation to the protection of public health. See *Derosiers*, 486 Mass. at 385-386.

On the other hand, the plaintiffs' blanket denial of exigent circumstances and of the need for masks in schools contradicts the guidance issued by the CDC, the DPH, and the American Academy of Pediatrics. On these facts, this court will not second guess the State defendants' determination that exigent circumstances existed to invoke § 27.08. See *Kain v. Dept. of Envir. Protection*, 474 Mass. 278, 293 (2016) (where board balanced public policy concerns, it was not for court to second guess board's course of action). The plaintiffs have not established that the State defendants exceeded their authority in determining that exigent circumstances existed to impose the mask mandate.

C. Municipal Mask Mandates

Some of the plaintiffs further contend that the public school districts and two municipalities which are defendants in these actions lacked authority to issue and impose their mask mandates because the Legislature did not authorize them to do so.⁶ For this argument, they

⁶ The Family Freedom Endeavor, Inc. argues that any school mask mandates should only be issued by local school districts rather than the State defendants and that local school boards should be free to do what they deem

misplace reliance upon *Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 10 (1975), for the proposition that municipalities' authorities are limited to powers expressly stated in governing statutes. *Del Duca* does not aid the plaintiffs, but only clarifies that the Home Rule Amendment and the Home Rule Procedures Act permit municipalities to exercise any power conferred upon them by the Legislature so long as their exercise of that power is not inconsistent with the Constitution or a general law enacted pursuant to the Legislature's retained powers. *Id.* Whether the mask mandate is preempted by DPH's regulatory scheme or conflicts with parents' constitutional rights, as alleged by the plaintiffs, is addressed below.

D. Whether Mask Mandates are Preempted by DPH Regulatory Scheme

The plaintiffs maintain that the defendants cannot mandate or implement mask wearing because that subject matter is preempted by the DPH.⁷ The plaintiffs see the DPH's statutory and regulatory scheme concerning infectious diseases as so comprehensive that it compels the conclusion that it preempts all actions by other public entities with respect to infectious diseases. Specifically, the plaintiffs argue that because the DPH regulates this field and has not imposed a mask mandate through the Commissioner of Public Health's order dated May 28, 2021, the defendants' mask mandates exceed their authority.

appropriate. Other plaintiffs, including Children's Health Rights of Massachusetts, Citizens for Medical Freedom, Inc., and individual parents, take the contrary position that even local authorities lack power to impose mask mandates, and that parents rather than governmental entities should determine whether their children wear masks in order to attend school in person.

⁷ Some of the plaintiffs also complain that two municipalities, Cambridge and Dover, have issued mask mandates without authority. Defense counsel for one of the municipalities argued in the motion hearing that the plaintiffs lack standing on these claims because the municipalities' mandates are not applicable to schools and the plaintiffs have not alleged that they have been impacted by those mask orders. The plaintiffs responded by stating that Dover's ordinance does not exempt, and therefore applies, to its schools, and thus confers standing upon the plaintiffs. This debate does not change the focus of this litigation and the motions for a preliminary injunction with respect to the mask mandate in public schools.

The plaintiffs rely upon *LeClair v. Town of Norwell*, 430 Mass. at 337 n.11, which reads in part: "A municipal regulation will be invalidated only (1) if there is an express legislative intent that there be no municipal regulation, or (2) the local regulation would so frustrate the state statute as to warrant the conclusion that preemption was intended." A legislative intent to preempt a local regulation cannot be inferred absent a conflict between the State statute and a municipal regulation. Cf. *id.*

The plaintiffs' preemption argument fails. They have not pointed to any conflict between the DPH's order, which did not bar mask mandates, and the mandates here. Instead, the mandates were guided by the DPH, other public health authorities, and medical experts. Nor is there any evidence of an express legislative intent that municipalities not impose health related rules in their own schools.

E. Constitutional Claims

The plaintiffs also challenge the mask mandates on constitutional grounds, claiming that they infringe upon parents' constitutional right to make fundamental decisions about their children's care, upbringing and education, and therefore that this court must review the challenge under a standard of strict scrutiny. See *Langone v. Sec'y of the Commonwealth*, 388 Mass. 185, 196 (1983) ("Strict scrutiny is required if the interests asserted by the plaintiffs are fundamental and the infringement of them is substantial"). From that basis, the plaintiffs argue that there is no compelling government interest in the mask mandates because COVID-19 poses no risk to children, and that masks are not effective but rather harm children.

Strict scrutiny is an inappropriate standard of review here because the plaintiffs have not demonstrated that they have a fundamental interest in not having their children masked at school or that their interest has been substantially impaired. The parents who are plaintiffs in these

actions do not have limitless authority in the school context.⁸ Their right to direct the care of their children is circumscribed when it jeopardizes the health or safety of children or has a "potential for significant social burdens." See *Matter of McCauley*, 409 Mass. 134, 137 (1991). Parental rights do not include the liberty to expose the community or a child to communicable diseases. See *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

Public school entities, at the State level, as explained above, and at the local level, have ample and well-established power to impose measures to protect the general welfare and best interests of their students. See, e.g., *Jacobson v. Comm. of Massachusetts*, 197 U.S. 11, 26-39 (1905) (rejecting claim that smallpox vaccination requirement was unconstitutional); *Nicholls v. Mayor and Sch. Comm'ee of Lynn*, 297 Mass. 65, 67 (1937) (school committee has power to enforce rules to promote health); *Doe v. Superintendent of Sch. of Worc.*, 421 Mass. 117, 131 (1995) (school officials' duty is to provide environment in which all children can learn). See also G. L. c. 76, § 15 (requiring vaccinations for students to attend schools). Therefore, the parent plaintiffs have not shown that they have a fundamental constitutional interest in not having their children be subject to the mask mandate.

Where, as here, the defendants' broad authority has not been exceeded, the court in considering a constitutional attack on the mandates assesses whether the challenged actions bear a real or substantial relation to the protection of the public health. See *Derosiers*, 486 Mass. at 386. The record compels the conclusion that the mask mandates in Massachusetts public schools bear a substantial relation to the protection of public health. At the State and local levels, the

⁸ For their argument that the mask mandates violate their constitutional rights as parents, the plaintiffs rely upon one ruling in Arkansas, in *Sitton v. Bentonville Schools*, Case No. 4CV-21-2181 (Ark. Cir. Ct. Oct. 12, 2021). The *Sitton* decision is not authoritative and is undercut by the reasoning of a plethora of decisions from other jurisdictions. Those decisions are cited by the defendants and need not be repeated here. They are persuasive and overwhelmingly support the conclusion that no such fundamental right exists.

mandates were created, tailored, and implemented in consultation with medical experts and on the basis of widely accepted public health recommendations. They serve the legitimate State interest of slowing the spread of COVID-19. Accordingly, the mandates easily withstand rational basis review. See *id.* at 390 (upholding regulations under rational basis review because they "as a whole were informed by public health recommendations and serve the State interest of slowing the spread of COVID-19, which is a legitimate State interest").

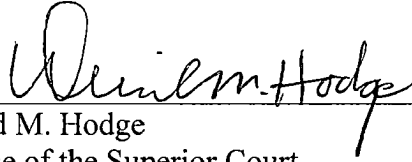
The plaintiffs' arguments are premised upon nonauthoritative cases as well as thin and heavily contradicted evidence. Boston's affidavit does not assess health risks under the mask mandates at issue, with exemptions, breaks, and variations depending on students' ages and the types of masks. The affidavits of Diggs and Blakeslee only confirm that not everyone agrees on whether the benefits of school mask mandates outweigh the risk of harm they may pose. The plaintiffs have not submitted any significant support for their claim that the mask mandates issued by the defendants harm school children's health, much less that COVID-19 poses no real risk to children or that masks are ineffective in reducing the risk of COVID-19 transmission.

F. Conclusion

The plaintiffs have not met their burden of demonstrating that they are likely to succeed on the merits of their claims or that they have or will suffer irreparable harm if they are not granted the injunctive relief they seek. Absent any factors weighing in their favor on this record, the plaintiffs' motions for a preliminary injunction must be denied. See *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. at 617.


ORDER

For all the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' Motions for a Preliminary Injunction are **DENIED**.



David M. Hodge
Justice of the Superior Court

Dated: November 16, 2021

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 69. Powers and Duties of the Department of Elementary and Secondary Education (Refs & Annos)

M.G.L.A. 69 § 1B

§ 1B. Board of elementary and secondary education; duties

Effective: August 14, 2008

[Currentness](#)

Section 1B. BOARD OF ELEMENTARY AND SECONDARY EDUCATION; DUTIES

The board shall establish policies relative to the education of students in public early childhood, elementary, secondary and vocational-technical schools. The board shall be the state agency responsible for the administration of vocational education and the supervision of the administration thereof by local educational agencies.

For the purposes of this section the term “local educational agency” shall mean any agency which has administrative control and direction of a vocational education program funded in whole or in part by federal funds.

The board shall establish standards for certifying all teachers, principals, and administrators in public early childhood, elementary, secondary and vocational-technical schools, as provided in and subject to [section thirty-eight G of chapter seventy-one](#).

The board shall promote the implementation of participatory management systems involving school based personnel and school councils.

The board shall establish the process and standards for school and district audits and reviews conducted by the office of school and district accountability established by [section 55A of chapter 15](#). In establishing such process and standards, the board shall promote efficiency and coordination with other audit, evaluation and reporting requirements established by the board and department and shall also consider the findings and recommendations of the advisory council on school and district accountability and assistance, pursuant to [section 1G of chapter 15](#). The board shall review and approve the protocols for the audit of schools, charter schools and school districts, including regional school districts, pursuant to this chapter.

The board shall provide technical assistance, curriculum, materials, consultants, support services and other services to schools and school districts, to encourage programs for gifted and talented students.

The board shall publish profiles of each public elementary and secondary school and school district in the commonwealth, providing information concerning student achievement of performance goals, school spending, special programs, curriculum offerings, qualifications of teaching staff, and other information which may be pertinent to teachers, parents, students, and elected officials regarding the performance of said schools and school districts. These profiles shall be in a form readily comprehensible by the general public and shall permit meaningful comparisons among individual schools and school districts. The board also shall identify those schools and school districts that are particularly successful in improving the performance of the students whom they serve and shall undertake to analyze and publish the strategies employed by such schools and districts for the purpose of recognizing the efforts of the educators involved and of encouraging the replication, where appropriate, of their successful strategies. In producing said profiles and review of successful strategies, the board shall have access to all information gathered by the joint committee on education of the general court, which may be relevant to the production of said profiles and review. The board shall release its report annually on or before the thirtieth day of June, and shall make said report available to the public.

The board may withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the operation of the public schools or any regulation of said board authorized in this section.

The board shall see to it that all school committees comply with all laws relating to the operation of the public schools and in the event of noncompliance the commissioner of education shall refer all such cases to the attorney general for appropriate action to obtain compliance.

The board shall establish the standards for the recognition of high achievement by students and school districts.

The board shall establish the process and standards for declaring a school or school district to be “under-performing” or “chronically under-performing” in accordance with the provisions of this chapter.

The board shall review and approve federal grant applications for public elementary, secondary and vocational-technical schools and may develop guidelines as needed for the disbursement of such funds in accordance with law. The board shall be the approving authority for all federal educational grants and programs to be undertaken by public elementary, secondary and vocational-technical schools in the commonwealth. The board shall be the state education agency for purposes of federal law.

The board shall establish guidelines for establishing systems of personnel evaluation, including teacher performance standards. Public school districts in the commonwealth shall be encouraged to develop programs and standards which provide for a more rigorous and comprehensive evaluation process. Said guidelines shall be reviewed at least every other school year.

The board shall seek, accept, establish and administer grants, gifts, awards, and trusts for public elementary, secondary and vocational-technical education from foundations, corporations, individuals and federal agencies, and develop guidelines as needed for the disbursement of such funds in accordance with applicable law and pursuant to the terms of the grant, gift, award or trust and such guidelines shall, where appropriate, give preference to school districts and educational collaboratives, provided said school districts and educational collaboratives are developing programs to educate children with disabilities together with children without disabilities in programs located in regular education school buildings which are chronologically age-appropriate, as an incentive for the formation of inclusive educational programs.

The board shall establish the criteria to define areas with a high number of low-income children for purposes of the school breakfast program, the early childhood program and any other program focused on low-income children.

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.

The board shall, in coordination with local school districts, improve the management and efficiency of public early childhood, elementary, secondary and vocational-technical schools and school districts.

The board shall encourage the collaboration between local school districts, vocational-technical school districts, and regional employment boards to prepare students for the employment needs of the region.

The board shall establish a policy to ensure that, so far as practical, school districts distribute financial resources equitably among all schools in the district.

The board shall establish maximum pupil-teacher ratios for classes in public elementary and secondary schools.

The board shall establish the permissible and mandatory ages for school attendance and shall consider the advisability of raising the minimum age for attendance in the first grade to the national average age for such attendance.

The board shall carry out its responsibilities with a view toward increasing the accountability and effectiveness of public early childhood, elementary, secondary and vocational-technical schools and school districts for the performance of the students they serve.

The board shall provide information to schools concerning the titles and sources of Braille text books and technical assistance to schools to develop Braille translation of titles not presently available. The board shall ensure, through referral by the Massachusetts commission for the blind's children's services specialists or other appropriate persons for investigation of any alleged violations, that schools within its jurisdiction purchase or otherwise provide written material to meet the individual education needs of blind persons, either directly or through adaptation.

The board shall adopt a model policy concerning student travel sponsored by a school that is planned to occur between the hours of midnight and 6:00 a.m., or that will include an overnight stay away from a student's home. The model policy shall address, but not be limited to, such issues as safety of transportation and accommodations, cost, including expectations for fundraising by students, time away from school, appropriateness of the trip for the grade level, and the trip approval process. The model policy shall take into account the recommendations of the Federal Motor Carrier Safety Administration, including its student motorcoach travel safety guide, as well as relevant safety recommendations made by the National Transportation Safety Board and other agencies and organizations. The board shall review the model policy and modify it as appropriate at least every 10 years. The board shall communicate the model policy, and any subsequent revisions of it, to each school committee for use by the school committee in adoption of the policy required by [section 37N of chapter 71](#).

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. In accordance with the provisions of chapter thirty A, the board

may promulgate regulations as necessary to fulfill said purposes. Said regulations shall be promulgated so as to encourage innovation, flexibility and accountability in schools and school districts. Notwithstanding the provisions of any special or general law or executive order to the contrary, the board of education shall notify the joint committee on education of any amendments or revisions to regulations in effect on April first, nineteen hundred and ninety-six at least ninety days before the effective date of such amendments or revisions; provided, however, that if federal law should require that amendments to regulations be made in less than ninety days to ensure continued federal funding, notification to the committee shall be made as soon as possible, but failure to provide ninety days' notice shall in no manner affect the legality or validity of said regulations.

The board shall establish an executive committee and such other committees as it may from time to time deem necessary.

Credits

Added by St.1993, c. 71, § 29. Amended by St.1996, c. 151, §§ 212, 213; St.1996, c. 374, § 2; St.2000, c. 159, § 136; St.2002, c. 346, § 1; St.2008, c. 27, §§ 94, 95, eff. Mar. 10, 2008; St.2008, c. 215, § 51, eff. July 31, 2008; St.2008, c. 311, § 4, eff. Aug. 14, 2008.


Notes of Decisions (3)

M.G.L.A. 69 § 1B, MA ST 69 § 1B

Current through Chapter 107 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XII. Education (Ch. 69-78a)

Chapter 69. Powers and Duties of the Department of Elementary and Secondary Education (Refs & Annos)

M.G.L.A. 69 § 1C

§ 1C. Minimum nutritional standards for school food services; regulations; breakfast programs; guidelines for reimbursement of costs; Hepatitis B immunization

Effective: August 4, 2020

[Currentness](#)

(a) The board shall establish minimum nutritional standards for all school food services in all public elementary, secondary and vocational-technical schools. The board shall require all public schools to make lunches available to children. Standards and regulations of the board promulgated pursuant to this subsection shall be adopted in the following manner. A copy of such regulations and standards shall be filed by the board with the clerk of the house of representatives and of the senate who shall refer such regulations and standards to the joint committee on education for review. Within 30 days after such filing, said committee shall hold a public hearing on the regulations and standards, shall issue a report, and file a copy thereof with the board of education. The board shall adopt final regulations and standards making such revisions in the interim regulations and standards as it deems appropriate in view of such report and shall forthwith file a copy of the regulations and standards with the chairpersons of the joint committee on education and not earlier than 30 days after the date of such filing, the board shall file the final regulations and standards with the state secretary and the regulations shall thereupon take effect.

(b) The board shall further require all public schools that draw their attendance from areas with a high number of needy children, as defined by the board, to make school breakfast programs available to children, and to operate such programs in accordance with the federal laws and regulations pertaining to school breakfast programs. Such breakfast programs shall be made available to children who do not qualify for free or reduced-price breakfast under federal income eligibility guidelines at a price to each such child that is not less than the cost to the school of making such breakfast available to such child. The commonwealth shall reimburse each city or town required by this subsection to make school breakfast programs available to children who qualify for free or reduced-price meals pursuant to federal income eligibility guidelines, at a uniform rate determined pursuant to subsection (d), which rate shall provide for the payment by the commonwealth of the reasonable costs of making breakfast available to such children, reduced by the amount of revenue received by the city or town from federal reimbursements or any other source with respect to the provision of such breakfasts. The department shall make said reimbursements in accordance with the same schedule as federal reimbursements are made to the city or town with respect to such breakfast programs.

(c) All public schools required to serve breakfast under subsection (b) and where not less than 60 per cent of the students at the school are eligible for free or reduced-price meals under the National School Lunch Program, as determined by the department, shall offer all students a school breakfast after the beginning of the instructional day. A school subject to this

subsection may use the breakfast service model that best suits its students in accordance with this section and the department's guidelines or regulations, including, but not limited to: breakfast in the classroom, grab and go breakfast or second chance breakfast. The department shall issue guidelines or promulgate regulations to implement this subsection and may consult with nonprofit organizations with experience regarding equity, the opportunity gap, hunger and food security issues and best practices for improving student access to school breakfast. The department shall annually: (i) collect information about availability and participation rates of students who partake in a school breakfast after the beginning of the instructional day under this subsection at each school; and (ii) make the information publicly available on its website not later than July 1.

(d) The secretary for administration and finance shall convene a working committee made up of the secretary's designee, a designee of the Massachusetts Association of School Committees, Inc., a designee of the Massachusetts Association of School Business Managers, Inc., a designee of the commissioner of education and a designee of the local government advisory committee to establish guidelines for the purpose of reimbursing cities and towns for the reasonable costs associated with the implementation of school breakfast programs pursuant to subsection (b). Such guidelines shall be filed by the working committee with the clerk of the house of representatives and of the senate only upon approval of said committee. Reimbursements of costs made pursuant to such guidelines shall constitute complete satisfaction of the obligation of the commonwealth to assume such costs pursuant to any general or special law.


(e) The board may require that all public schools provide for immunization against Hepatitis B for any school employee who works with developmentally disabled students and requests such immunization; provided, however, that such employee is not covered for immunization against Hepatitis B by the employee's own health insurance. The commissioner shall establish guidelines for the purpose of reimbursing cities and towns for such immunization.

Credits

Added by [St.1993, c. 71, § 29](#). Amended by [St.1994, c. 60, § 87](#); [St.2008, c. 215, § 52, eff. July 31, 2008](#); [St.2020, c. 133, eff. Aug. 4, 2020](#).

M.G.L.A. 69 § 1C, MA ST 69 § 1C

Current through Chapter 107 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XII. Education (Ch. 69-78a)

Chapter 69. Powers and Duties of the Department of Elementary and Secondary Education (Refs & Annos)

M.G.L.A. 69 § 1G

§ 1G. Minimum length of school day and school year

Currentness

The board shall establish the minimum length for a school day and the minimum number of days in the school year.

Credits

Added by St.1993, c. 71, § 29.

M.G.L.A. 69 § 1G, MA ST 69 § 1G

Current through Chapter 107 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XII. Education (Ch. 69-78a)

Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 55

§ 55. Contagious diseases; regulations

Currentness

A child infected, or in a household where a person is infected, with a disease dangerous to the public health as defined in accordance with [section six of chapter one hundred and eleven](#), or in a household exposed to contagion from any such disease in another household, shall not attend any public school while he is so infected or remains in a household where such infection or exposure exists if the regulations of the board of health require such exclusion. A child returning to school after having been absent on account of such infection or exposure shall present a certificate from the board of health or its duly appointed agent that the danger of conveying such disease by such child has passed; provided, that if such a child returns to school without such a certificate, after having been absent on account of such infection or exposure, he shall immediately be referred to a school physician for examination and, if it is found by such physician upon such examination that such danger has passed, he may remain at school.

Credits


Amended by St.1938, c. 265, § 2; St.1952, c. 89.

M.G.L.A. 71 § 55, MA ST 71 § 55

Current through Chapter 107 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XII. Education (Ch. 69-78a)

Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 68

§ 68. Duties of towns to maintain schools; transportation of children; school building committee representation

Effective: July 31, 2003

[Currentness](#)

Every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools. If the distance between a child's residence and the school he is entitled to attend exceeds two miles and the nearest school bus stop is more than one mile from such residence, and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child, may require the town to furnish transportation for children in grades kindergarten through six for a part or for all of the distance between said child's residence and the school. If said distance exceeds three miles, and the distance between the child's residence and a school in an adjoining town giving substantially equivalent instruction is less than three miles, and the school committee declines to pay for tuition in such nearer school, and for transportation in case the distance thereto exceeds two miles, the department, upon like appeal, may require the town of residence to pay for tuition in such nearer school for children in grades kindergarten through six, and if necessary provide for transportation for a part or for the whole of said distance to, such nearer school for children in said grades. Nothing contained in the preceding two sentences shall be construed to limit the obligation of regional school districts to provide transportation for all school children in grades kindergarten through twelve, pursuant to the provisions in [section sixteen C](#) of this chapter. No school committee shall be compelled to furnish transportation on a private way. In the case of transportation provided to students that is not required by this section or by any other general or special law, a school committee may assess fees to the transported student up to an amount sufficient to cover the costs incurred by the district; provided, however, that no student eligible for free or reduced lunch, under the federal school lunch program, shall be required to pay the fee; and provided further, that a school committee may choose to exempt families at other income levels as it may determine. The school committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils. Each school shall comply with the requirements regarding pesticide applications as set forth in [sections 6C to 6I, inclusive, of chapter 132B](#). Whenever a town shall undertake to provide a schoolhouse, the town shall appoint at least one member of the school committee, or its designee, to serve on the agency, board or committee to which the planning and construction or other acquisition of such schoolhouse is delegated.

Credits

Amended by St.1934, c. 97, § 1; St.1977, c. 158; [St.1991, c. 138, § 133](#); [St.2000, c. 85, § 3](#); [St.2003, c. 46, § 83](#), eff. July 31, 2003.

Notes of Decisions (33)

M.G.L.A. 71 § 68, MA ST 71 § 68

Current through Chapter 107 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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Code of Massachusetts Regulations

Title 603: Department of Elementary and Secondary Education

Chapter 27.00: Student Learning Time (Refs & Annos)

603 CMR 27.08

27.08: Health and Safety Standards during a State of Emergency or Other Exigent Circumstances

Currentness

(1) Upon a declaration by the Governor that an emergency exists which is detrimental to the public health, or 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.

(2) Upon such a declaration by the Governor or determination by the Board, the Commissioner shall require each district to develop and submit a plan that prioritizes providing in-person instruction to all students in a safe environment. The plan shall include:

(a) health and safety procedures that are consistent with the requirements issued by the Commissioner; and

(b) a description of the in-person learning model the district will use to provide instruction to students. The in-person learning model shall mean all students receive in-person instruction in school environments that have been appropriately modified to address health and safety requirements issued by the Commissioner.

(c) The Commissioner may require districts to include the alternative education models set forth in 603 CMR 27.08(3) in their plans, to address circumstances in which students cannot safely attend classes in an in-person setting.

(d) Where the Commissioner has required districts to include alternative education models in their plans, the Commissioner shall, from time to time, consult with medical experts and state health officials, to determine whether students can safely attend classes in an in-person setting with health and safety requirements. If the Commissioner concludes that students may safely attend classes in an in-person setting with health and safety requirements issued by the Commissioner pursuant to 603 CMR 27.08(2)(d), then he or she may, with prior written notice to the Board, notify districts that they may no longer use one or more of the alternative education models, in whole or in part, to meet the minimum school year and structured learning time requirements set forth in 603 CMR 27.03 and 27.04. Notwithstanding the foregoing, districts and schools may provide remote learning pursuant to a remote learning model for the remainder of the 2020 - 2021 school year to those students whose parent or guardian selects remote learning for their student.

(3) Alternative education models shall include the following:

(a) Hybrid Learning Model. Hybrid learning model means students alternate between in-person learning with safety requirements and remote learning. Hybrid learning models shall include the following requirements: Effective January 19, 2021, districts and schools operating a hybrid learning model shall provide at least 35 hours of live instruction over a ten-school day period, averaged across the grades in the hybrid learning model.

(b) Remote Learning Model. Remote learning model means students are educated remotely. Remote learning models shall include the following requirements:

1. procedures for all students to participate in remote learning, including a system for tracking attendance and participation;
2. remote academic work shall be aligned to state standards;
3. a policy for issuing grades for students' remote academic work;
4. teachers and administrators shall regularly communicate with students and their parents and guardians, including providing interpretation and translation services to limited English proficient parents and guardians;
5. effective January 19, 2021, districts and schools operating a remote learning model shall provide synchronous instruction each school day; and
6. effective January 19, 2021, districts and schools operating a remote learning model shall provide at least 40 hours of synchronous instruction over a ten-school day period, averaged across the grades in the remote learning model.

(c) District Approved Model. Means an education model submitted by a district and approved by the Commissioner.

(4) Upon such a declaration by the Governor or determination by the Board, the Commissioner shall direct each district providing in-person summer school programs to implement health and safety procedures that are consistent with requirements issued by the Commissioner.

(5) The Commissioner shall determine the form and manner for submission of district plans and may publish templates, guidance, and other resources.

(6) Each district shall post its plan on its website.

(7) The authorities granted in 603 CMR 27.08 shall remain in effect until the Board determines that students can attend classes in a safe environment without additional health and safety measures.

Credits

History: [1422 Mass. Reg. 97](#), (emergency) eff. Jul. 2, 2020; [1428 Mass. Reg. 53](#), eff. Oct. 16, 2020; [1434 Mass. Reg. 79](#), amended (emergency) eff. Dec. 16, 2020; [1439 Mass. Reg. 51](#), adopted as permanent by Notice of Compliance eff. Dec. 16, 2020; [1440 Mass. Reg. 31](#), amended (emergency) eff. Mar. 8, 2021; [1445 Mass. Reg. 77](#), adopted as permanent by Notice of Compliance eff. Mar. 8, 2021.

The Massachusetts Administrative Code titles are current through Register No. 1473, dated July 8, 2022. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 603, § 27.08, 603 MA ADC 27.08

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