COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket No. 2022-P-0340
Hampden Superior Court Docket No. 2179CV00494

THE PEOPLES' FREEDOM ENDEAVOR, *et al.*,
Appellants,

v.

ANDOVER PUBLIC SCHOOL DISTRICT, *et al.*,
Appellees

AND CONSOLIDATED CASES

BRIEF OF APPELLANT CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS, INC.

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Dated: August 1, 2022

CORPORATE DISCLOSURE STATEMENT

Under Massachusetts Rule of Appellate Procedure 16(a)(2) and Massachusetts Supreme Judicial Court Rule 1:21, Appellant Children's Health Rights of Massachusetts, Inc. states it has no parent corporations, and there are no publicly held corporations that own 10% or more of its stock.

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masks have been ineffective at reducing the risk of COVID-19 transmission, and the Appellees provided no evidence to contradict that information.

STATEMENT OF THE CASE

On September 21, 2021, CHRM (a non-profit entity whose members are parents who have children in public school districts affected by mask mandates) filed three Complaints and Motions for Temporary Restraining Orders and/or Preliminary Injunctions seeking to enjoin enforcement of DESE's mask mandates for school children. RA 294, 339, 341, 379, 387, 389, 426, 434, 436.[1] CHRM asserted several claims: DESE and the municipalities lacked the authority to issue these mandates; even if DESE had the authority, it exceeded it; these mandates are preempted by DPH's statutory and regulatory scheme; and the mandates violated parents' Constitutional rights. See Id.

On October 21, 2021 these cases were consolidated in Hampden County. RA 438. The parties submitted additional briefing in late October, including two expert affidavits submitted by CHRM. RA 443, 457. The Superior Court held an injunction hearing on October 26, 2021.

On November 16, 2021 the Superior Court issued a Memorandum of Decision and Order on Plaintiffs' Motions for Preliminary Injunction ("Order") denying CHRM's Motions. RA 1332. The Superior Court concluded DESE and the municipalities' authority includes the authority to implement mask mandates, and

[1] "RA" refers to the joint Record Appendix filed by Plaintiff-Appellant Peoples' Freedom Endeavor in this appeal.

the mandates were not preempted by DPH's statutory and regulatory scheme. RA 1338-1343. The Superior Court also concluded DESE did not exceed its authority in finding exigent circumstances existed to support the mandate. RA 1340-41. Further, the Superior Court concluded there was no significant support in the record showing that masks harmed children, that COVID-19 poses no real risk to children, or that masks have been ineffective at reducing the risk of COVID-19 transmission. RA 1345. The Superior Court did note, however, that "not everyone agrees on whether the benefits of school mask mandates outweigh the risk of harm they may pose." Id.

CHRM timely filed this appeal. CHRM also sought interlocutory review of the Superior Court's Order under G.L. c. 231, § 118. The Single Justice denied relief.

STATEMENT OF FACTS

The Commissioner of Public Health issued an Order on May 28, 2021, requiring masks to be worn in certain settings, including healthcare facilities, congregate care facilities, houses of correction, health care and day care service centers. This Order did not require any school districts to implement mask mandates in their schools. Section 3 of the Order states "[a]ll applicable statutes, regulations and guidance not inconsistent with this Order remain in effect. This Order does not alter the authority of any agency to make such rules or issue such

guidance as it may be authorized to do, provided the terms are consistent with this Order and any guidance issued to implement it."

Despite the rapidly declining rates of hospitalizations and deaths and the fact COVID-19 has had no real impact on children, on August 24, 2021 DESE voted to authorize its commissioner to issue a statewide mask mandate for all public school children ages five and up. RA 1334. DESE directed school districts to devise and enforce similar mandates that complied with DESE's mandate. RA 1335. At that time, some of the school districts already had mask mandates in place; the remaining districts implemented similar mandates. RA 307. DESE extended its mandate until January 15, 2022. RA 1335-36.

As stated above, CHRM challenged these mandates in three separate actions. On November 16, 2021 the Superior Court denied interlocutory relief in all three actions and three other consolidated actions. RA 1332.

The Superior Court noted, "[i]n July 2021, the seven-day COVID-19 case average in Massachusetts was 223, but by August 18, that figure had climbed to 1,237." RA 1334. As of late September 2021 when the cases were filed, however, the Commonwealth's public health data demonstrated *hospitalizations* totaled 641, which represented just 7.29% of the 8,785 hospitalizations in the state and a dramatic decrease from approximately 2,500 hospitalizations in January 2021 and 4,000 hospitalizations in late April and early May 2020. RA 307-8. That same data

also demonstrated the seven-day average for new deaths per day was approximately 9.6 – also a steep drop from 100 deaths per day earlier in 2021 and 150-200 deaths per day in 2020. RA 310. There had also just been one death in the 0-19 demographic in Massachusetts in the two-week period that preceded the filings, and only 15 cases in that demographic had been hospitalized. RA 309-10. Notably, of the 18,000 deaths the Court identified in its Order (RA 1333), nearly 17,000 (or 91%) of those deaths occurred in nursing homes or long-term care facilities. RA 310.

Before the Superior Court were the affidavits and declarations of three medical professionals, two of which were offered by Children's Health Rights of Massachusetts, opining as to the ineffectiveness of masking and the harm to children it causes. The Superior Court determined the affidavits offered insignificant support for the assertions that Covid poses no real threat to children and that masks harm school children's health. RA 1345. Though the Superior Court acknowledged the affidavits of John Diggs, M.D., and Tammy Blakeslee, an industrial hygienist, the court did not explain why these affidavits lacked muster. The court did, however, state of the affidavits of Diggs and Blakeslee that they both "conclude the masks are ineffective and do more harm than good to school children." RA 1337-8.

SUMMARY OF ARGUMENT

Administrative agencies are supposed to be composed of individuals considered experts in their field. DESE and its Commissioner, while exhibiting extensive experience in school administration, education, and finance, collectively have zero medical credentials. The Court's Order affirms the overreach of school administrators attempting to act as health experts when DPH has refused to enact a similar measure.

CHRM challenged the authority of DESE, eighteen school districts, and two municipalities to implement school mask mandates; CHRM sought to enjoin those mandates. On November 16, 2021, the Superior Court denied CHRM's request for a preliminary injunction. The mask mandates violate the Constitutional and statutory rights of CHRM's members, and the record demonstrates masking causes irreparable harm to children. Numerous decisions from other jurisdictions support the conclusion that DESE and these municipalities lack the statutory and regulatory authority to issue these mandates. The mandate also conflicts with DPH's statutory and regulatory scheme, which was comprehensive and did not require masks in response to novel or unusual coronaviruses.

This Court should reverse the Superior Court's order denying CHRM's request for a preliminary injunction.

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 concluding DESE had the authority to issue and implement its mask mandate.

An administrative agency "has only those powers, duties, and obligations expressly conferred on it by statute or reasonably necessary to carry out the purposes for which it was established." *Doe v. S.O.R.B.*, 82 Mass. App. Ct. 152, 155 (2012). 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 board or office was created." *Telles v. Comm'r of Ins.*, 410 Mass. 560, 564 (1991).

The Superior Court states that the authority granted under G.L. c. 69 § 1B encompasses the authority to promulgate 603 C.M.R. § 27.08 and thus to impose the mask mandate. The court points to no specific provision within G.L. c. 69 § 1B that grants this authority, however, and presumes that it can be inferred from all the other authority granted under the statute. For this contention the court states, "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." See RA 1340, citing *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 767 N.E.2d 549, 559–60 (Mass. 2002). At issue in *Massachusetts Fedn. of Teachers*, however, was a board of education rule requiring assessment of teacher competency in mathematics and remediation of identified weaknesses. *Id*., at 559-60. Thus, the Court found, the challenged regulations were "reasonably related to the purposes of the enabling legislation," which is "to reform public education in this Commonwealth by 'establishing and achieving specific educational performance goals for every child' and by 'holding educators accountable for their achievement.'" *Id*., citing G.L. c. 69, § 1. Forcing children to wear masks in response to a perceived public health lies well outside of the purposes of the enabling legislation, i.e., G.L. c. 69 § 1B.

In *Atwater v. Comm'r of Educ.*, 460 Mass. 844 (2011), the Supreme Judicial Court further described the goals of Education Reform Act of 1993: "(1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement." *Id*., at 846. Thus, any rules enacted by the DESE should "relate to" these goals. The DESE's authority is limited to those items enumerated under G.L. c. 69, § 1B, of which the only provision that *mentions* safety is found in the paragraph about setting standards for the safety of school buildings, and which is further limited by the state building code. The Superior Court contends G.L. c 69, § 1B "unambiguously evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe educational environment." RA 1339. The word "health" does not appear in G.L. c. 69, § 1B, and the word "safe" or "safety," other than in the paragraph regarding building standards, is found only in a section relating to student transportation. Thus, the Superior Court is incorrect in claiming G.L. c. 69, § 1B was intended to grant to DESE the authority to make rules to

combat perceived health risks. That goals of the Education Reform Act of 1993 were not to empower the DESE to act as a department of health.

Given the textual and historical authority granted to boards of education including the BESE and DESE, health policies, including the mask mandate, are not "relative to the education of students" under G.L. c. 69, § 1B. In *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), the Supreme Court opined that the term "relate to," if "taken to extend to the furthest stretch of its indeterminacy," would not have much limiting power because "really, universally, relations stop nowhere." *Id*., at 655. If a health-related requirement to wear a mask, imposed in order to combat an infectious disease, is found to "relate to" the education of students, then the DESE's authority has no limitation because anything in the abstract can relate to the education of students. This, of course, cannot be the case as the authority of administrative agencies is limited to what is expressly granted by the legislature, though minor related deviations may be tolerated where it is absolutely clear that the administrative agency would have a particular power. See *Doe v. S.O.R.B.,* 82 Mass. App. Ct. 152, *supra*.

"Administrative agencies possess expertise in their areas of specialization [...]." *Massachusetts Fedn. of Teachers*, AFT, AFL-CIO v. Bd. of Educ., 767 N.E.2d 549, 558 (Mass. 2002). The DESE is comprised of finance, administration,

and education professionals. Not one member of the DESE, including the Commissioner, has medical credentials. The DESE cannot make rules to combat infectious disease because they are not health experts and were not granted rulemaking authority in the area of public health. The text of 603 CMR 27.08 tacitly admits the authority claimed under it is improper because the Commissioner is required to consult with medical experts and state health officials before making any health-related rule. The administrative agency is supposed to be the body of expertise for the area in which they make rules. If the Commissioner is required to consult with medical experts and state health officials before enacting a rule then whatever rule follows is not based on the agency's or the Commissioner's expertise but the opinion of even further removed from the authority granted by the legislature to the DESE. The DESE cannot empower itself to regulate in an area outside of its expertise nor can it cure the defects in this self-granted power with a vague requirement to consult with experts. The DESE is an administrative agency with expertise in education – their authority does not extend to combatting infectious diseases, nor can that power inferred from G.L. c. 69, § 1B.

The DESE's authority is not without limit, and is confined to the grant of authority in its empowering statute. In *Bd. of Educ. v. Sch. Comm. of Quincy*, 415 Mass. 240 (Mass. 1993), for example, the Supreme Judicial Court ruled that the Board of Education exceeded its authority by requiring a school district to provide

alternative education to a properly expelled student, reasoning that the Board's powers were enumerated under G.L. c. 15, § 1G (in thirty-six paragraphs), which did not contain the power to require a school committee to provide an educational alternative for a properly expelled student. Similarly, G.L. c. 69 § 1B contains no provision that can reasonably be interpreted to permit the mask mandate.

Courts all over the country have similarly concluding that administrative agencies have unlawfully claimed power under the guise of responding to Covid, forgetting that they are bound by the limits of their empowering statutes.

In *National Federation of Independent Business, et al. v. Department of Labor*, 142 S. Ct. 661 (Jan. 13, 2022), the United States Supreme Court stayed a COVID-19 vaccine mandate imposed by the Secretary of Labor and the Occupational Safety and Health Administration ("OSHA") on employers with over 100 employees because the Secretary lacked the statutory authority to impose such a broad health measure. *Id.* at 662. In doing so, the Court held "[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Id.* at 665.

In *Health Freedom Defense Fund, Inc. v. Biden*, No. 8:21-cv-1693-KKM-AEP, 2022 U.S. Dist. LEXIS 71206 (M.D. Fla. Apr. 18, 2022), a the Middle District of Florida declared a regulation issued by the Centers for Disease Control and Prevention ("CDC") requiring masks in airports, train stations, and other

transportation hubs and public conveyances in the United States exceeded the CDC's statutory authority (as well as violated the procedures for agency rulemaking under the Administrative Procedures Act). *Id*. The court concluded the statute on which the CDC relied for issuing the mandate (section 264(a) of the Public Health Services Act) did not contain any provision authorizing the CDC to issue the mandate. *Id.* at *11-*35.

Analogous cases in other jurisdictions have concluded school districts and agencies that lack the express authority to issue broad health measures such as mask mandates (or vaccine mandates) may not do so. *Demetriou, et al. v. New York State Department of Health, et al.*, Index. No. 616124/2021 (N.Y. Jan. 24, 2022) (Rademaker, J.S.C.) (permanently enjoining state-wide mask mandate that applied to anyone over the age of 2 while in a public place, including schools and school children, issued by the New York Commissioner of Health because the Commissioner lacked the statutory authority to enact such an order); *Matt Sitton, et al. v. Bentonville Schools, et al.*, Case No. 4CV-21-2181 (Ark. Cir. Ct. Oct. 12, 2021) (temporary restraining order against school district mask mandate because district lacked the express authority to do so) (at RA 1254-73); *Corman v. Acting Sec'y of the Pa. Dep't of Health*, No. 83 MAP 2021, 2021 Pa. LEXIS 4348 (Dec. 10, 2021) (affirming appeals court decision declaring order by Acting Secretary of the Pennsylvania Department of Health directing all students, teachers, staff, and

visitors in schools in the Commonwealth to wear face coverings, regardless of vaccination status, was void and unenforceable because Acting Secretary lacked the statutory and regulatory authority to issue the order); *State v. Biden*, Case No. 1:21-cv-00163-RSB-BKE (S.D. Ga. Dec. 7, 2021) (enjoining Executive Order 14042, which requires contractors and subcontractors performing work on certain federal contracts to ensure their employees and others working in connection with federal contracts are fully vaccinated against COVID-19, because, in part, the Order exceeds the authority Congress granted to the President to address administrative and management issues in procurement and contracting); *Commonwealth v. Biden*, CIVIL 3:21-cv-00055-GFVT, at *13 (E.D. Ky. Nov. 30, 2021) (enjoining same mandate for federal contractors because President exceeded his authority).

The facts giving rise to this lawsuit are precisely the same: DESE – like the agencies and school districts referred to in the cases *supra* – is a creature of statute. Accordingly, it has only those powers delegated to it under its enabling legislation. The Superior Court's Order cites no Massachusetts statute, rule, or regulation that expressly permits DESE to enact a face mask mandate. Rather, the Court reasons G. L. c. 69, § 1B "evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe educational environment," and "[t]he statute's intended applicability to any health risks, not just those posed by school

building conditions, is common sense." RA 1339. The decisions above expressly rejected, however, similar reliance on "broad" grants of authority, including the government obligation to ensure the "safety" of students or the population. There is no authority for DESE to make medical rules in response to a perceived public health emergency, nor does DESE possess any medical expertise. DESE exceeded its authority in issuing the mask mandate.

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

Under 603 CMR 27.08(1) "exigent circumstances" must exist to issue "health and safety requirements." While the regulation is deficient in defining "exigent circumstances," based off of the commonly accepted definition of the term the record does not reasonably support any "exigent circumstances" concerning COVID-19 in Massachusetts, let alone among children, that necessitated invoking that provision. The Superior Court points to the fact that the Governor declared a public health emergency, but neither the Governor nor the DPH mandated that school children wear masks. RA 1341. DESE's own announcement of this measure expressly states its purpose was to increase vaccination rates among children.

The Superior Court cited DESE's reliance upon the guidance of medical experts in discussing the determination exigent circumstances existed. RA 1341.

Again, for the reasons stated above, administrative agencies such as DESE are supposed to be composed of experts in their field – education, in this case. If the DESE must consult with other experts before making a rule, and since that rule involves subject matter beyond the expertise of the DESE, i.e., infectious diseases, then the DESE is not empowered to make the rule, nor to determine exigent circumstances exist as that determination is also based on medical expertise that the DESE does not possess. Since the DESE's determination of exigent circumstances relies on the expertise of others outside of the DESE but does not rely in any way on the knowledge or expertise of the members of DESE, then DESE's determination of exigent circumstances is inappropriate.

Finally, COVID-19 has had negligible impact on children in this state; instead, it has almost exclusively impacted the elderly population in nursing home and long-term care settings. RA 307-10. Notwithstanding that the DESE exceeded its authority in implementing the mask mandate, DESE improperly determined "exigent circumstances" existed, and exceeded its authority in so determining.

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

In Massachusetts, a school district's authority is governed by G.L. chapter 71. A school committee's powers are limited. Generally, "[t]he school committee in each city and town and each regional school district shall have the power to select and to terminate the superintendent, shall review and approve budgets for public education in the district, and shall establish educational goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education. The school committee in each city, town and regional school district may select a superintendent jointly with other school committees and the superintendent shall serve as the superintendent of all of the districts that selected him." G.L. c. 71, § 37.

Other provisions in Chapter 71 address specific powers of school committees necessarily contained in the above provision. For example, "[t]he school committee may establish and maintain schools to be kept open for the whole or any part of the summer vacation." G.L. c. 71, § 28. School committees may assist in deciding whether to admit a student who resides outside the Commonwealth. G.L. c. 71, § 6A. They may "supervise and control all athletic and other organizations composed of public school pupils and bearing the school name or organized in connection therewith." G.L. c. 71, § 47. They may discipline

students. *Bd. of Educ. v. School Cmte. of Quincy*, 415 Mass. 240, 246 (1993) (citing G.L. c. 71, §§ 37, 37G, 37H).

The Superior Court agrees that municipalities may "exercise any power or function conferrable on them by the Legislature, so long as exercise of that power is 'not inconsistent' with the Constitution or a general law enacted pursuant to the Legislature's retained powers." *Del Duca v. Town Administrator*, 368 Mass. 1, 10 (1975); RA 1342. The Court's reliance on the Home Rule Amendment to broaden the constraints of this principle is unavailing. See RA 1342. The Amendment does not broaden these constraints; it concerns procedural freedom. Consistent with the directive above in *Del Duca*, the Home Rule Amendment does not provide a municipality any authority it would not otherwise have. See *Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 773 (1976) ("[T]he scope of the disability imposed on the Legislature by the [home rule] amendment is quite narrow."). Municipalities must, nevertheless, exercise only that authority "conferred" on them and not inconsistent with the Constitution or state law.

Much like Chapter 69 grants no authority to DESE to impose health related rules on students, nothing in Chapter 71 provides school committees with the authority to pass broad health measures, nor does the Superior Court point to any specific provision which might permit school committees to pass broad health measures. Rather, school committees only have the authority to develop "a plan to

address the general mental health needs of its students," G.L. c. 71, § 37Q, regulate specific safety concerns of students, including establishing "school safety patrols," G.L. c. 71, § 48A, and establishing "highway safety stations," G.L. c. 71, § 71A, and "internet safety measures." G.L. c. 71, § 93. Authority to implement health related measures, like mask mandates, cannot reasonably be read into any of these provisions.

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

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

The standards concerning preemption are broader than expressed by the Superior Court. See RA 1343. A municipal regulation will be invalidated where "the local regulation would so frustrate the state statute as to warrant the conclusion that preemption was intended." *LeClair v. Town of Norwell*, 430 Mass. 328, 337 n.11 (1999). "[T]he legislative intent to supersede local enactments need not be expressly stated for the State law to be given preemptive effect. Where legislation deals with a subject comprehensively, it may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be

frustrated." *Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564 (1981).

The Superior Court concluded CHRM "ha[s] not pointed to any conflict between the DPH's order, which did not bar mask mandates, and the mandates here," and there was no "evidence of an express legislative intent that municipalities not impose health related rules in their own schools." RA 1343. As stated previously, however, legislative intent to supersede local enactments need not be expressly stated. Other districts have ruled favorably in support of CHRM's argument herein.

For example, in December 2021, a California state court granted a writ of mandate restraining a requirement by the San Diego Unified School District that all students receive the COVID-19 vaccine in order to attend school in person and participate in extra-curricular activities because the District attempted to impose a new requirement (the vaccine) in a field that the state legislature fully occupied through its health and safety regulations, and the California Department of Public Health had not added the COVID-19 vaccine to the state's immunization schedule. *Let Them Choose v. San Diego Unified School District, et al*., Case No. 37-2021-43172-CU-WM-CTL (Cal. Super. Ct. Dec. 20, 2021).

Similarly, in *Austin, et al. v. The Board of Education of Community Unit School District #300, et al*., Case No. 2021-CH-500002 (Ill. Cir. Ct. Feb. 4, 2022),

an Illinois state court issued a temporary restraining order against two state-wide executive orders requiring school children to wear masks and either receive the COVID-19 vaccine or submit to weekly testing because the Governor, Illinois Department of Public Health, and Illinois Board of Education lacked the statutory authority to enact these measures, and the measures violated the due process rights of parents and children codified in applicable Illinois statutes.

Here, DPH has a comprehensive statutory and regulatory scheme concerning infectious diseases that broadly requires it take various actions when a dangerous disease exists, including investigating the pandemic, providing certain healthcare services and resources, and quarantine measures. G.L. c. 111, §§ 7, 95, 96; 105 C.M.R. 300.200, 300.210. At the time of filing the underlying actions, DPH's regulations concerning infectious diseases specifically included a response to novel or unusual coronaviruses. See 105 C.M.R. 300.200 (listing novel or unusual coronaviruses and authorizing local boards of health and DPH to implement and enforce isolation and quarantine requirements outlined therein). Nothing in Chapter 111 or in 105 C.M.R. 300.000 (as it stood as of the filing of these suits) required the use of masks to prevent the spread of a novel coronavirus. See *Id.* Rather, DPH's regulations specifically required the use of masks for certain types of outbreaks but not the Coronavirus. See 105 C.M.R. 300.200 (requiring masks,

or "droplet precautions" for bacterial meningitis, meningococcal disease, mumps, plague, non-congenital rubella, and viral hemorrhagic fevers).[2]

The DPH Order the Court references above required face masks only in certain congregate settings, but not in schools.[3] The DPH, however, is presumably empowered to issue that Order based on the comprehensive statutory scheme empowering the DPH to make rules in response to a pandemic. The mere fact that the Order does not mandate masks in schools does not mean municipalities are free to issue their own mask mandates for school children since municipalities are barred from making those rules due to the comprehensive statutory scheme empowering DPH. Section 3 of the Order merely states the Order "does not alter the authority of any agency to make such rules or issue such as it may be authorized to do, provided the terms are consistent with this Order." See fn. 3. This mere acknowledgement does not empower agencies or municipalities to issue their own masking orders in other settings not contemplated in the Order and not in conjunction with DPH requirements.

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2 The current version of 105 C.M.R. 300.200, amended May 27, 2022, now bases DPH's minimum isolation period for coronaviruses "on the most current recommendations by the Centers for Disease Control and Prevention," and quarantine requirements are "subject to recommendations based on the specific coronavirus exposure as determined by the Department."

3 See Order at [https://www.mass.gov/doc/reissuance-of-certain-public-health-orders/download], pp. 21-22 (last accessed July 29, 2022).

The DPH's comprehensive framework preempts any local measure that requires masks in schools in response to a novel coronavirus because those measures conflict with DPH's scheme that does not require masking in response to novel coronaviruses nor in schools. At worst, local measures frustrate DPH's statutory and regulatory scheme.

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

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

A "record of a primary fact, made by a public officer in the performance of an official duty" is considered an exception, but "[s]tatements of opinion or judgment," however, "are not admissible under the exception." *Commonwealth v. Shangkuan*, 78 Mass. App. Ct. 827, 830-1 (2011). Evaluative reports, opinions, and conclusions contained in a public report are not admissible. *Commonwealth v. Nardi*, 452 Mass. 379, 387-95 (Mass. 2008) (findings of a medical examiner concerning the nature and extent of the victim's injuries and his or her ultimate opinion as to the cause of death were evaluative statements that fell outside the

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

The Superior Court relied on several out-of-court statements, opinions, and recommendations from public health officials to conclude COVID-19 justifies the Appellants' mask mandates or presents a compelling need for them. See, *e.g.*, RA 1334 ("Both the CDC and the DPH have recommended mask wearing . . . ."); 1336 (Cambridge relied on a COVID-19 "Working Group . . . comprised of scientists, doctors, educators, and families" that recommended that masks be required"); 1343 ("the mandates were guided by the DPH, other public health authorities, and medical experts"); and 1345 ("the mandates were created, tailored, and implemented in consultation with medical experts and on the basis of widely accepted public health recommendations"). These statements are hearsay and do not fall under any exception. The Superior Court should have excluded them.

Inasmuch as the Superior Court based its conclusion on hearsay statements, this Court should reverse the Order of the Superior Court.

VII. The Superior Court erred in concluding the mask mandates do not violate CHRM's Members' Constitutional rights to direct the care and upbringing of their children.

In *Matt Sitton, et al. v. Bentonville Schools, et al.*, Case No. 4CV-21-2181 (Ark. Cir. Ct. Oct. 12, 2021), the Circuit Court of Benton County, Arkansas held that the Bentonville School District's mask mandate violated parents' Constitutional right to direct the care and upbringing of their children, concluding parents "have [a] constitutional interest" "in the care and custody of their children under the Arkansas Constitution," and that the school district's mask mandate "infringed" on that right. *Id*., at 2. While this opinion has since been overturned due to mootness, its reasoning was sound. See *Bentonville Sch. Dist. v. Sitton*, 643 S.W.3d 763, 771 (Ark. 2022), citing *Wisconsin v. Yoder*, 406 U.S. 205, 234–35, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) for the proposition that "Parents do have a liberty interest in shaping their child's education."

The Court ignored the *Sitton* opinion at the Circuit Court, reasoning that it "is not authoritative and is undercut by [...] a plethora of decisions from other jurisdictions." RA 1344 fn.8. Those other decisions, however, do not concern school district mask mandates, and all of them concern different Constitutional challenges (e.g., freedom of speech, freedom of assembly, due process, etc.), not

the challenge asserted here and in *Sitton* – that the mask mandate interferes with parents' rights to make healthcare decisions for their children.

Further, the Superior Court's reliance on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and *Desrosiers v. Governor*, 486 Mass. 369 (2020), is misplaced. *Desrosiers* acknowledged the District Court's rejection of *Jacobson* in *County of Butler v. Wolf*, 486 F. Supp. 3d 883 (W.D. Pa. 2020), for its far too deferential standard applied to a constitutional challenge to an (unrelated) state health measure (a vaccine mandate with an opt-out provision to pay a small criminal fine) and agreed *Jacobson* would "not lead us to disregard constitutional scrutiny and defer completely to the executive's orders." *Desrosiers*, 486 Mass. at 387 n.25. *Desrosiers* does not apply for the further fact that it does not address a challenge to a school mask mandate and whether it infringes on parents' Constitutional rights.

Jacobson is equally inapplicable. In his concurrence in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), Justice Gorsuch explained *Jacobson* "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." *Id.* at 70. The "Court essentially applied rational basis review to [...] Jacobson's challenge to a state law." *Id*. "Jacobson claimed that he possessed an implied 'substantive due process' right to 'bodily integrity' that emanated from the Fourteenth Amendment." *Id*. Given "the different nature of the restriction in *Jacobson*," where "individuals could accept the

vaccine, pay the fine, or identify a basis for exemption," "[t]he imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest," and could have "easily survived rational basis review, and might even have survived strict scrutiny." *Id.* at 71.

Under strict scrutiny, as applied here, the mask mandates must fail; they do not serve a compelling government interest because there was no evidence in the record that COVID-19 poses any threat to the health of children, nor that face masks have curbed the spread of COVID-19. Further, two experts opined that face masks harm children, and Appellees presented no evidence to refute that information. The members of CHRM have a liberty interest in shaping their children's education, as do all Americans, and the real-world effect of Covid on school children is practically nothing. The problems caused by forcibly masking children during school hours far outweigh any claimed benefit of masking.

VIII. The Superior Court erred in concluding CHRM could not establish irreparable harm.

CHRM, at a minimum, established the *presumption* of irreparable harm where, as here, it alleged the violation of its members' constitutional rights and statutory rights. *See* RA 334-45. The Court's brief reference to whether CHRM could establish irreparable harm is incorrect. RA 1345.

Apart from the presumption of harm, the only evidence in the record on this issue demonstrated the prolonged use of masks can and would harm children

mentally and physically which outweighs any claimed benefit of masking. There was also no support in the record for Appellants' contention that enjoining mask mandates would expose children to the risk of contracting COVID-19.[4] The CDC even published a large-scale study in May 2021 demonstrating the use of masks in schools showed no "statistically significant benefit" in preventing COVID-19 transmission. *See* RA 294. There was no evidence in the record that Massachusetts' state-wide mask mandate curbed the spread of COVID-19 in 2020. RA 315-17. There was, however, substantial evidence in the record that COVID-19 has had virtually no impact on children in Massachusetts. RA 307-9. Thus, the interest allowing children to breathe freely in school, avoid excess bacteria on their faces, and see the expressions on each other's faces while communicating, i.e., not wearing masks, is not outweighed by any attempt to use masks to try to control the spread of COVID-19, which poses virtually no risk to children and the spread of which masks do not prevent.

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

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's Order denying CHRM's request for injunctive relief.

Respectfully submitted,

Children's Health Rights of Massachusetts,

By Its Attorney,

Dated: August 1, 2022

/s/ Brian Unger

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email this 1st day of August 2022 upon all counsel or parties of record.

Dated: August 1, 2022

/s/ Brian Unger
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