THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2021-CV-00277

Maria Nardi Hubert, individually, and on behalf of K.H., her child;
Paul and Lisa Bresciano, individually, and on behalf of P.B., their child;
Jason and Lindsay Machado, individually, and on behalf of A.G. and T.M., their children;
Werner and Heather Niebel, individually, and on behalf of A.N., E.N., and S.N., their children

v.

Hollis/Brookline School District, School Administrative Unit #41

ORDER ON PENDING MOTIONS

The plaintiffs have filed this action against Hollis/Brookline School District, School Administrative Unit #41 ("SAU 41") seeking declaratory and injunctive relief. The plaintiffs previously filed an ex parte motion for a preliminary injunction, which the Court denied. The Court thereafter held a hearing on the plaintiffs' request for a preliminary injunction on June 4, 2021. Prior to the hearing, the defendant filed a motion to dismiss the complaint. For the reasons that follow, the defendant's motion to dismiss is GRANTED, which renders the plaintiffs' request for preliminary injunctive relief MOOT.

Standard of Review

In ruling on a motion to dismiss, the Court considers "whether the allegations in the complaint are reasonably susceptible of a construction that would permit recovery." Kurowski v. Town of Chester, 170 N.H. 307, 310 (2017). The Court must "assume all facts pleaded in the complaint to be true and construe all reasonable inferences drawn from those facts in the plaintiff[s'] favor," but "need not . . . assume the truth of statements in the pleadings that are merely conclusions of law." Id. Dismissal is appropriate if the facts pled do not constitute a basis for legal relief. Id.

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Background

The Court draws the following facts from the complaint. The plaintiffs have children that attend primary or secondary schools in Hollis and Brookline. These schools are all within school districts that are members of SAU #41.[1] In response to the global pandemic caused by the novel coronavirus, SARS-CoV-2 and the disease it causes, COVID-19, the District adopted a policy that required students to wear

> face masks or coverings when riding the bus, entering/exiting buildings, arriving to/leaving a classroom, engaging in small group classroom activities, walking in the hallways and other common areas, and whenever asked to do so by a District employee. It also included wearing face masks or coverings when engaged in physical activity.

(Compl. ¶ 28.)[2] The plaintiffs' children follow (or followed)[3] the mask mandates as required. However, the plaintiffs allege that their children have difficulty breathing when they wear masks. As a result, the plaintiffs filed this action seeking a declaration that the mask mandates violate RSA 126-U:4, a statute prohibiting the use of "dangerous restraint techniques" in schools. The plaintiffs also seek an injunction prohibiting the District from enforcing the mask mandates. The defendant now moves to dismiss, arguing that the mask mandates do not fall within the purview of RSA chapter 126-U.

Analysis

Because the plaintiffs' sole claim is based on alleged violations of RSA chapter 126-U, the resolution of the defendants' motion to dismiss requires the Court to engage

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[1] As the defendant notes, the plaintiffs sued the wrong party. School administrative units provide administrative services to member school districts. They do not make policies for any of the member districts or for any of the schools within the member districts. As such, the plaintiffs should have brought this action against the school districts in which their children attend schools. Although the plaintiffs have failed to recognize this distinction, and dismissal would arguably be appropriate on that basis alone, for ease of analysis, the Court will refer to all of the collective school districts within SAU #41 as the "District."

[2] The Court will collectively refer to all of these policies as "mask mandates."

[3] As the plaintiffs acknowledge in their objection, the school year has ended. It is therefore likely that this entire case is moot.

in statutory interpretation. In interpreting a statute, the Court first looks "to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." State v. Beattie, 173 N.H. 716, 720 (2020). The Court interprets "legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The Court construes "all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. The Court does "not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. This enables the Court "to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id.

In 2010, the legislature enacted RSA chapter 126-U, entitled "Limiting the Use of Child Restraint Practices in Schools and Treatment Facilities." The express purpose of the chapter is "to eliminate child restraint techniques which endanger children and to promote the overall reduction of the use of restraint of children in schools and treatment facilities in New Hampshire." Laws 2010, 375:1. To that end, RSA 126-U:4, I provides, in pertinent part, that:

> No school . . . shall use any of the following restraint and behavior control techniques:
>
> I. Any physical restraint or containment technique that:
>
> (a) Obstructs a child's respiratory airway or impairs the child's breathing or respiratory capacity or restricts the movement required for normal breathing; . . .
>
> (d) Involves pushing on or into the child's mouth, nose, eyes, or any part of the face or involves covering the face or body with anything, including soft objects such as pillows, blankets, or washcloths; or
>
> (e) Endangers a child's life or significantly exacerbates a child's medical condition.

RSA 126-U:4, I(a), (d), (e) (emphasis added). The plaintiffs contend that "[t]here is no question requiring children to wear face masks or coverings contradicts" these three prohibitions. (Compl. ¶ 58.) The Court disagrees.

By its plain language, all of the prohibitions listed in RSA 126-U:4, I only apply to a school's use of a "physical restraint" or a "containment technique." The legislature has specifically defined a "physical restraint" as "occur[ring] when a manual method is used to restrict a child's freedom of movement or normal access to his or her body." RSA 126-U:1, IV(c) (emphasis added). The term "manual method" is not defined in the statute. However, the definition of "manual" is "worked by hand" or "requiring or involving physical skill or energy." Webster's Third New International Dictionary 1378 (unabridged ed. 2002). Thus, a "manual method" of restraint—and consequently a "physical restraint"—only occurs when the restraining person uses his or her own hands or body (without the aid of a mechanical device) to effectuate the restraint. See, e.g., Or. Admin. R. 411-054-0005.80(a) (2021) (defining "manual method" of restraint to mean "physically restraining someone by manually holding someone in place"). Clearly, the mask mandates do not require school staff to use their own hands or bodies to force the plaintiffs' children to wear masks. Rather, the mask mandates require students to put on their own face masks using their own hands. As such, the Court cannot find that the mask mandates involve the use of "physical restraints."

Alternatively, the plaintiffs claim in conclusory fashion that "a face mask is certainly a 'containment technique.'" (Pls.' Obj. at 9.) In the Court's view, the legislature's use of the term "containment technique" implies some sort of established process or known method used by school officials to physically restrain an individual.

See, e.g., Thornton v. Lymous, 489 F. Supp. 3d 470, 495 (E.D. La. 2020) (noting that "upper torso" maneuver was a restraint technique); McAdams v. Salem Children's Home, 701 F. Supp. 630, 632 (N.D. Ill. 1988) (noting that "baskethold restraint" was a restraint technique); State v. Rios, 314 S.W.3d 414, 420 (Mo. Ct. App. 2010) (noting that State produced evidence that defendant "was trained to employ a technique known as the unilateral vascular neck restraint"). A "containment technique," therefore, does not include a *policy* that requires students to wear a piece of fabric—here a face mask.[4] Notably, the plaintiffs have offered no authority or even a developed argument to the contrary. Moreover, if the Court were to agree that the mask mandates are "containment techniques," then science teachers could not require students to wear masks during chemical experiments, gym teachers could not require students to use helmets protecting their mouths, and, taken to the extreme, schools could not even require students to wear any clothing at all. The legislature surely could not have intended such an absurd result, and the Court declines to interpret the statute in such a manner.

Simply put, RSA chapter 126-U has no bearing on the legality of the District's mask mandates. The plaintiffs' argument to the contrary is based on a twisted and tortured reading of the statute. It is an affront to children who have *actually* been subject to unnecessary and dangerous physical restraints while at school. Because the Court concludes that the District's mask mandates do not violate the prohibition on dangerous restraint techniques outlined in RSA 126-U:4, and the plaintiffs' entire

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[4] Similarly, the statute limits the definition of "restraint" to "actions taken by persons who are school or facility staff members, contractors, or otherwise under the control or direction of a school of facility." RSA 126-U:1, IV. As the plaintiffs state in their complaint, the mask mandates "require[ ] a child to cover his or her face." (Compl. ¶ 58.) In other words, the student is the person taking the action—not the school official. Thus, the mask mandates do not involve "restraints" as that term is used in the statute.

complaint was premised on that faulty premise, the Court concludes that the plaintiffs have failed to state a claim for which relief may be granted. The defendants' motion to dismiss is therefore GRANTED. In light of this ruling, the plaintiffs' motion for a preliminary injunction is MOOT.

Finally, the Court is troubled by the factual assertions made in the complaint. In particular, the complaint cites to outdated statements made by Dr. Anthony Fauci, Dr. Robert Redfield, and Dr. Jerome Adams regarding the need to face wear masks during the pandemic. (See compl. ¶¶ 40–42.) These doctors made the statements referenced in the complaint at the beginning of the pandemic when little was known about the spread of SARS-CoV-2 and health care workers were scrambling to find adequate protective gear. However, as any reasonable person would know, all three of the doctors subsequently changed their opinions on face masks as more information emerged about SARS-CoV-2. Indeed, it is well-known that all three of these doctors later embraced the efficacy of face masks. As a result, they unequivocally and repeatedly encouraged members of the public to wear face masks throughout the pandemic. The complaint conveniently omits this information, leaving the reader with the impression that three top government doctors—including the chief medical advisor to the President (Fauci), the former C.D.C. director (Redfield), and the former surgeon general (Adams)—are still against the use of masks.[5] Attorneys have a professional obligation to present accurate information to the courts in which they appear, or, at the *very* least, to not present information that they know is misleading. The complaint's

[5] In addition, the complaint cites extensively to one study that the plaintiffs *knew* was withdrawn. (See Compl. at 10 n.10.) The plaintiffs also cited to German case that was apparently overturned on appeal, but the plaintiffs did not advise the Court of that fact.

reliance on outdated and misleading information in an attempt to obtain injunctive relief does not meet this standard.

So ordered.

Date: July 2, 2021

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 07/06/2021