

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

---

GEORGE M. BORELLO, NEW YORK SENATOR,  
et al.,

Petitioners,

**DECISION AND ORDER**

Index No. 908134-21

– against-

NEW YORK STATE DEPARTMENT OF HEALTH,  
HOWARD A. ZUCKER, in his official capacity  
as the Commissioner of Health for the State of New York, and  
KATHLEEN COURTNEY HOCHUL, in her official capacity  
as the Governor of the State of New York,

Respondents.

---

APPEARANCES:

COREY HOGAN, ESQ  
Attorney for Petitioners  
2410 North Forest Road, Suite 301  
Amherst, New York 14068

LETITIA JAMES  
Attorney General of the State of New York  
Attorney for Respondents  
Michael McCartin, AAG, Of Counsel  
The Capitol  
Albany, New York 12224

Ryba, J.,

Petitioners, New York State Senator George Borello, 14<sup>th</sup> District Legislator John Syracuse, NY Parents to Unmask Children, Inc., St. John Ev. Lutheran Church & School, and five parents individually and on behalf of their minor children, commenced this CPLR Article 78 proceeding by Order to Show Cause against respondents New York State Department of Health (DOH), Howard A. Zucker, in his official capacity as the Commissioner of Health for the State of New York, and Kathleen Hochul, in her official capacity as the Governor of the State of New York, challenging the DOH regulation set forth at 10 NYCRR § 2.60. The challenged regulation, which was promulgated by emergency rule-making procedures effective August 27,

2021 through November 24, 2021, authorized DOH to require the use of face masks in certain public settings, including schools, upon the issuance of a finding that such face covering were a necessity. Pursuant to that authority, on August 27, 2021 DOH issued a determination requiring face coverings for all teachers, staff, students and visitors to Pre-Kindergarten through Twelfth Grade schools who are over the age of two and able to medically tolerate a face covering. The petition alleges, among other things, that: 1) there is no medical emergency that justifies the use of DOH's regulations as it applies to Pre-Kindergarten through Twelfth Grade; 2) the remedy of requiring face-masks for all students, teachers and visitors aged two and up will not accomplish the stated goal; 3) DOH failed to make the requisite factual findings to invoke the emergency rule-making procedure; 4) respondents failed to comply with the State Administrative Procedure Act (SAPA) and 5) the DOH directive to nearly 3 million students, tens of thousands of teachers, staff and visitors is an invalid exercise of his authority and requires legislative action by the full NYS Senate and Assembly.

The issue presented herein, as framed by petitioners' submissions to the Court, is limited to whether petitioners are entitled to a preliminary injunction enjoining respondents from enforcing the school masking mandate during the pendency of this proceeding. Respondents oppose the requested relief, arguing that petitioners have failed to demonstrate the requirements for the issuance of a preliminary injunction. In reply, petitioners once again reiterate that the relief they are requesting herein is limited to a preliminary injunction. The Court heard oral argument on October 14, 2021, at which time the Court granted the requests of both parties to supplement their prior briefings by October 15, 2021. To that end, respondents submitted a transcript of New York State Supreme Court Justice Jeannette Ogden's decision from the bench in Christian Central Academy v Hochul, Erie Co. Sup. Ct. No. (Index No. 812301/2021). In response, petitioners submitted a letter setting forth distinctions between Christian Central

Academy and this matter, as well as distinctions between this matter and the Federal decision L.T., et al. v Zucker, Case No. 1:21-cv-1034 (NDNY 2021). The application for a preliminary injunction is now ripe for determination.

To prevail on a motion for a preliminary injunction, the moving party has the heavy burden to must establish by clear and convincing evidence: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in the movant's favor (see, Doe v Axelrod, 73 NY2d 748 [1988]; Gluck v Hoary, 55 AD3d 668[ 2008]). A preliminary injunction is drastic relief and should be issued sparingly (see, Rural Cmty. Coal., Inc. v Vill. of Bloomingburg, 118 AD3d 1092, 1095 [2014]; Troy Sand & Gravel Co., Inc. v Town of Nassau, 101 AD3d 1505, 1509 [2012]; Welcher v Sobol, 222 AD2d 1001, 1002 [1995]; Clark v Cuomo, 103 AD2d 244, 246 [1984]). Thus, when one prong of the tripartite test for preliminary injunctive relief is not established, an application for a preliminary injunction will be denied as a matter of law without the need to address the remaining prongs of the test (see, Doe v Axelrod, 73 NY2d at 751 [1988]; McGrath v Town Bd. of Town of N. Greenbush, 254 AD2d 614, 619 [1998]).

Petitioners' application for a preliminary injunction is denied because they have failed to establish that irreparable harm will likely result absent an injunction. Notably, the irreparable harm prong of the preliminary injunction test requires a clear showing that the claimed harm is imminent, rather than remote or speculative (see, Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo, 64 NY2d 233, 240 [1984]). Here, petitioners argue that enforcing the school masking mandate will result in irreparable harm absent a preliminary injunction because mask wearing has a negative impact on growth and development of children, including their language and communication skills, social development, and speech. In support

of this contention, petitioners have offered three Expert Affirmations/Affidavits: (1) Dr. Michael Kirsch, MD, PhD;(2) Dr. Michael Santa Maria, PhD; and (3) Dr. Paulette Niewczyk, MPH, PhD.<sup>1</sup> Initially, the expert affidavit of Michael P. Santa Maria, Ph.D., asserts that:

[there are] two serious problems for children who wear masks: (1) the mask presents a visual barrier to those who rely on facial communication signals (mouth, lips, teeth, tongue, etc.) and intuitively, this nonverbal aspect of communication is very important for social development, and (2) voices are attenuated and distorted with mask use to the extent that individuals with compromised hearing may perceive speech as unintelligible.

Moreover, Michael Kirsch, Ph D. asserts in his expert affidavit that continuous mask wearing causes the wearer to inhale unacceptably high levels of carbon dioxide, and that breathing higher concentrations of carbon dioxide induces anxiety. However, Kirsch identifies only one study that he relies upon for this assertion, and he concedes that this study has since *been retracted*. Although the third expert, Paulette Niewczyk, MPH PhD, claims in her expert affidavit that “several studies have found negative health effects from wearing face masks”, the scientific studies and articles that she references do not support this contention. Initially, the vast majority of the studies that Niewczyk claims to establish that mask wearing causes harmful health effects *pre-date the COVID-19 pandemic by more than a decade*, and therefore could not even purport to provide a relevant scientific analysis of the issues presented herein. Moreover, none of the scientific studies relied upon by Niewczyk actually involved the measurement of the impact that mask wearing may have on the wearer’s physical or mental health or development. Rather, the scientific studies that were actually performed during the 2020-2021 Covid-19 pandemic all relate to the efficacy of mask wearing on preventing the spread of the Covid-19 virus, not the

---

<sup>1</sup> Petitioners also offer the expert affidavit of Dr. Clayton J Baker, MD, CM, however he offers no opinion on the issue of irreparable harm.

alleged negative health effects of masks on the wearer. Finally, notably missing from petitioners' expert proof was any reference to findings of the Centers for Disease Control and Prevention (CDC). In the Court's view, the foregoing does not constitute competent, nonspeculative proof to establish petitioners' claim that enforcement of the school masking mandate will have an imminent and irreparable negative impact on the health and development of mask wearers.<sup>2</sup>

In opposition to petitioners' claims, respondents rely on the affidavit of Johanne E. Morne, Deputy Director for Community Health, NYS DOH which includes numerous timely studies attached that reference scientific research, and the CDC which all conclude that mask wearing has no significant adverse health effects for wearers. Furthermore, Morne's affidavit sets forth that there is no reported change "in oxygen or carbon dioxide levels while wearing a cloth or surgical mask either during rest or physical activity" and "mask use was safe even during exercise" with "no physiologic differences [] identified between periods of rest or exercise while masked or non-masked." Morne additionally avers that surgical and cloth masks do not significantly compromise ventilation and oxygen supplies in healthy individuals, and that "the myth that wearing a cloth face mask will lead to a bacterial or fungal infection has been discredited." Morne also references at least two studies on children using N95 masks that found no significant effect on the ability to breathe. With regard to exceptions to the mask wearing requirement set forth in § 2.60, respondents reference the fact the September 2, 2021 Interim Guidance (issued for P-12 schools for the 2021-2022 academic years) sets forth that people with

---

<sup>2</sup>While petitioners argue for the first time in their reply papers that the school masking mandate violates certain constitutional rights, this specific example of irreparable harm was improperly raised for the first time in reply and will therefore not be considered (see, Goldstone v Gracie Terrace Apt. Corp., 110 AD3d 101 [2013]; Brach v Harmony Servs., Inc., 93 AD3d 748 [2012]).

“medical or developmental conditions that prevent them from wearing a mask may be exempted from mask requirement as documented by a medical provider.”

Given the lack of competent proof offered by petitioners to establish their claim that enforcing the school masking mandate will cause imminent and negative health effects on mask wearers, and considering the competing evidence offered by respondents on that issue, the Court concludes that petitioners have failed to make a clear showing of irreparable harm in the absence of a preliminary injunction preventing the enforcement of the school masking mandate. Notably, the likelihood of irreparable harm is further minimized by the fact that the Interim Guidance provides an avenue for individuals with medical or developmental conditions that may be worsened by wearing a mask to seek an exemption from the requirement. Based on petitioners’ failure to meet the irreparable harm prong of the preliminary injunction test, the request for a preliminary injunction is denied without the need to reach the other two prongs of the analysis.

For the foregoing reasons, it is

ORDERED that petitioners’ request for preliminary injunction is denied.

This constitutes the Decision of the Court, the original which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, counsel for respondents shall promptly serve notice of entry on all other parties (see Uniform Rules for Trial Courts [22 NYCRR § 202.5-b [h][1], [2]).

**SO ORDERED.**

Dated: November 18, 2021



Christina L. Ryba  
Supreme Court Justice

11/19/2021

