STATE OF VERMONT

SUPERIOR COURT
ORLEANS UNIT

CIVIL DIVISION
DOCKET NO. 22-CV-00597

MICHAEL DESAUTELS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
NORTH COUNTRY SUPERVISORY UNION,)
)
Defendant.)

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT

Defendant, North Country Supervisory Union ("NCSU"), through its attorneys, Lynn, Lynn, Blackman & Manitsky, P.C., respectfully submits this Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiffs' Verified Complaint. Plaintiffs' Opposition fails to demonstrate NCSU requiring face masks in schools during a pandemic was anything other than a valid exercise of NCSU's statutory authority. Since NCSU has the authority to require face masks in schools during a pandemic, and for the additional reasons discussed below, Plaintiffs' Verified Complaint fails to state a claim upon which relief can be granted.

I. Legal Argument

A. Plaintiffs Fail to Demonstrate NCSU Lacks the Statutory Authority to Require Face Masks In School

Plaintiffs began, in their Verified Complaint, by ignoring two statutory provisions giving NCSU the power to require face masks in school. *See* Ex. A to Def's Mot. at ¶¶ 31-32. Defendant's Motion to Dismiss ("Motion") highlighted the two statutory provisions Plaintiffs ignored. *See* Def's Mot. at 4-7. Now, having been forced to confront the two statutory

provisions they hoped to ignore, Plaintiffs attempt to argue NCSU's statutory authority is limited to "education related acts" and does not include the ability to require face masks in schools. Pls' Opp. at 4. Plaintiffs' argument is unsupported by Vermont law.

Plaintiffs' Opposition cites one Vermont case in support of Plaintiffs' argument that the statutory authority granted to NCSU by the Vermont legislature does not include the ability to require students to wear face masks during a pandemic. *See id.* at 4 (*citing City of Montpelier v. Barnett*, 49 A.3d 120, 129 (Vt. 2012)). The lone Vermont case Plaintiffs cite addressed the City of Montpelier's ability to prohibit boating, fishing, and swimming in Berlin Pond. *See City of Montpelier*, 49 A.3d at 123. As such, *City of Montpelier* does not support Plaintiffs' argument that "NCSU lacks the authority to issue a mask mandate . . . ." *See id.*

With no Vermont case law to support their argument that NCSU's statutory authority does not enable NCSU to require face masks in school during a pandemic, Plaintiffs turn to cases from other jurisdictions. *See* Pls' Opp. at 1-6 (discussing cases from other jurisdictions challenging regulations). Plaintiffs fail, however, to draw any connection between the authority underlying the regulation challenged in each of those cases and the statutory grant of authority underlying NCSU's regulation here. *See id.* The fact that a regulation issued by the Center for Disease Control, the Occupational Safety and Health Administration, the executive branch of the State of Illinois, the State of New York's Commission of Health, the Secretary of the Pennsylvania Department of Health, or the President of the United States may have lacked supporting authority is of no moment, as not one of those cases played out against the Vermont statutory background present here. *See id.*

Indeed, for the cases cited in Plaintiffs' Opposition to support Plaintiffs' position, Plaintiffs would have to demonstrate – at the very least – that the statutory and/or other authority

underlying the regulation in each case was similar to the statutory authority underlying NCSU's face mask requirement. Plaintiffs make no attempt to analogize between the underlying authority in the cases cited in their Opposition and NCSU's statutory authority here. *See id.* As a result, the cases cited by Plaintiff from jurisdictions across the country have no bearing on NCSU's ability to require face masks in schools.

What does bear on NCSU's ability to require face masks in schools is the Vermont Supreme Court's recognition that a school board has the power "to prescribe rules and regulations for the conduct and management of their respective school," *Rutz v. Essex Junction Prudential Comm.*, 142 Vt. 400, 405 (1983), the fact a school board may "exercise . . . the broad general powers given to a legislative branch of a municipality," *Leopold v. Young*, 340 F. Supp. 1014, 1017 (D. Vt. 1972), and the recognition that the authority given to school boards to conduct their affairs has been "generously delegated" by the Vermont legislature. *Barnes v. Bd. of Directors, Mount Anthony Union High Sch. Dist. (No. 14)*, 418 F. Supp. 845, 848 (D. Vt. 1975). Plaintiffs make no attempt to distinguish or limit this authority, all of which was cited in Defendant's Motion. *See generally* Pls' Opp.

Plaintiffs, instead, turn to outlandish examples, suggesting NCSU exercising its statutory authority to require face masks during a pandemic is akin to NCSU requiring "all students to wear dunce caps or gorilla costumes all day, every day." *Id.* at 4. To state the obvious: NCSU does not contend the authority granted to it by Vermont statute is boundless or that NCSU could use that authority to require students to wear dunce caps or gorilla costumes. NCSU does, however, contend that it has the statutory authority to "take any action that is required for the sound administration of the school district" and to "exercise the general powers given to a legislative branch of a municipality." 16 V.S.A. § 563(2); 16 V.S.A. § 563(15). Plaintiffs'

Opposition does not contain a shred of legal support for Plaintiffs' argument that this statutory authority stops short of enabling NCSU to require face masks in schools during a pandemic.

In the end, the best Plaintiffs' Opposition can do is argue Vermont statute does not expressly identify requiring face masks during a pandemic as part of the authority granted to NCSU. *See* Pls' Opp. at 6. Vermont statute need not, of course, be that specific. The "broad general powers" that were "generously delegated" to NCSU by Vermont statute grant NCSU the authority to require face masks in school during a pandemic to keep students and staff safe. *Leopold*, 340 F. Supp. at 1017 (first quotation), *Barnes*, 418 F. Supp. at 848 (second quotation).

Since Vermont statute grants NCSU the authority to require face masks in schools and to enforce that requirement, there are no circumstances that will entitle Plaintiffs to relief on Count I, Count IV, or Count V – all of which are grounded in the assertion NCSU lacks the authority to require face masks in schools – of their Verified Complaint. Accordingly, Count I, Count IV, and Count V should be dismissed.

B. Plaintiffs Misunderstand and/or Attempt to Distort the Doctrine of Preemption

Plaintiffs' Opposition argues "the Department of Health's regulatory framework for communicable diseases [is] extensive and comprehensive and, thus, preempt[s] this entire regulatory field." Pls' Opp. at 7 (emphasis added). That is, according to Plaintiffs, since the Department of Health has not established a rule regarding face masks in schools during a pandemic, any rule issued by a municipal entity is preempted by the Department of Health's silence on the issue. *See id.* The Vermont Supreme Court has made clear that is not how the doctrine of preemption works.

The doctrine of preemption operates "when [a] local law is a barrier to what the state has required to be done, or allows what the state has said must be prohibited." *In re Patch*, 140 Vt.

158, 176 (1981). For example, if the State of Vermont promulgated a rule requiring face masks in schools, that would preempt a municipality from promulgating a rule prohibiting face masks in schools. *See id.* Similarly, if the State of Vermont promulgated a rule prohibiting face masks in schools, that would preempt a municipality from promulgating a rule requiring face masks in schools. *See id.* If the State of Vermont is simply silent on the issue of face masks in schools, however, a municipal entity is not preempted from promulgating a rule related to face masks in schools. *See id.*

Plaintiffs cite no legal authority in support of their argument that the State of Vermont's silence on the issue of face masks in schools preempts any municipal entity from promulgating a rule related to face masks in schools. *See* Pls' Mot. at 7-8. Plaintiffs' inability to identify legal support for its argument is unsurprising, as Plaintiffs' argument misunderstands and/or attempts to distort the doctrine of preemption. Reinforcing that Plaintiffs' argument misunderstands and/or attempts to distort the doctrine of preemption, and confirming that the State of Vermont neither preempted nor intended to preempt NCSU from requiring face masks in schools during a pandemic, the Vermont Agency of Education informed school districts they could require students to wear masks in school. *See* https://education.vermont.gov/sites/aoe/files/documents/edu-memo-school-disctrict-mask-authority.pdf. As there are no circumstances in which Plaintiffs can prevail on Count II in their Complaint – which seeks relief solely on the basis NCSU's face mask requirement is preempted – Count II of Plaintiffs' Verified Complaint should be dismissed.

C. Plaintiffs Fail to Identify Authority Supporting the Existence of Their Claimed Constitutional Right

Plaintiffs' Opposition cites two cases in support of their argument that the Vermont

Constitution provides Plaintiffs with an unequivocal right to "make medical and healthcare decisions for their children." *See* Pls' Opp. at 8-9. Neither case supports the exists of such a right. First, Plaintiffs return to *Boisvert v. Harrington*, which – as discussed in Defendant's Motion – involved a termination of guardianship and did not hold a parent has an unequivocal right to "make medical and healthcare decisions for their children." 173 Vt. 285, 292 (2002); *see also* Def's Mot. at 9-10 (discussing *Boisvert*). As such, *Boisvert* cannot be the source of the constitutional right Plaintiffs claim.

Second, Plaintiffs cite an Arkansas case they caption as "*Matt Sitton, et al. v. Bentonville Schools, et al.*" *See* Pls' Opp. at 3 (citing *Sitton* for first time); *id.* at 8 (short citing *Sitton*). Plaintiffs describe *Sitton* on page three of their Opposition as an Arkansas circuit court decision that issued a "temporary retraining order against school district mask mandate because district lacked the express authority to do so." *See* Pls' Opp. at 3. Plaintiffs subsequently return to *Sitton* on page eight of their Opposition to note the circuit court in *Sitton* "held the Plaintiffs absolutely have [a] constitutional interest in the care and custody of their children under the Arkansas Constitution . . . and the [school district's] mask mandate infringed on the parents' constitutional liberty interest." *Id.* at 8 (internal quotation marks omitted). Plaintiffs suggest the circuit court's decision in *Sitton* supports Plaintiffs' position here. *See id.*

Plaintiffs fail to mention, however, that the Supreme Court of Arkansas subsequently reversed and remanded the circuit court's decision in *Sitton*.[1] *See Bentonville School Dist. v. Sitton*, 2022 Ark. 80, 2, 2022 WL 1113953 at *1 (2022) ("We reverse the circuit court's temporary restraining order and remand to the circuit court for the entry of an order consistent with this opinion."). In reversing the circuit court's decision, the Supreme Court of Arkansas

[1] Defendant assumes Plaintiffs' failure to alert this Court and Defendant to the fact that the *Sitton* decision on which Plaintiffs rely was reversed and remanded on appeal is simply an unfortunate oversight by Plaintiffs.

recognized a parent's right to care for their child is not unequivocal and, on the contrary, explained the "government has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id.* at *5 (*citing Prince v. Massachusetts*, 321 U.S. 158, 167 (1944)) (internal quotation marks omitted). As such, *Sitton* not only fails to stand for the proposition Plaintiffs claim, but, in fact, runs directly counter to Plaintiffs' position.[2] *See id.* Additionally, even if *Sitton* were somehow helpful to Plaintiffs' position – and *Sitton* is most certainly not helpful to Plaintiffs' position – *Sitton* discusses rights under the Arkansas Constitution, not the Vermont Constitution, which Plaintiffs rely on here.

Ultimately, Plaintiffs fail to identify any legal authority supporting the existence of the constitutional right they claim. Since the constitutional right Plaintiffs claim NCSU violated does not exist, there are no circumstances in which Plaintiffs will prevail on Count III of their Verified Complaint. Count III of Plaintiffs' Verified Complaint should be dismissed.

D. Plaintiffs' Opposition Fails to Identify Facts in Plaintiffs' Verified Complaint Sufficient to Support Plaintiffs' IIED Claim

Plaintiffs' Opposition sets forth dozens of Plaintiffs' allegations against NCSU in support of Plaintiffs' IIED claim. *See* Pls' opp. at 18-19. Plaintiffs' Opposition does not identify a single allegation in Plaintiffs' Verified Complaint, however, that NCSU acted intentionally to cause emotional distress or with reckless disregard of the probability of causing emotional distress, as required to sustain an IIED claim. *See*, *e.g.*, *Boulton v. CLD Consulting Engineers, Inc.*, 175 Vt. 413, 427 (2003). As discussed in Defendant's Motion, the allegations in NCSU's Verified Complaint plead only that NCSU intentionally adopted its face mask requirement and intentionally enforced its face mask requirement against R.D., which is not the equivalent of an

[2] It is perhaps unsurprising, then, that in reversing and remanding the circuit court's decision the *Sitton* court also found "the [school district] properly authorized its policy [requiring face masks]." *Id.* at *13.

allegation that NCSU acted intentionally to cause R.D. or anyone else emotional distress. *See* Def's Mot. at 11-13. Given the absence of an allegation in Plaintiffs' Verified Complaint that NCSU acted intentionally to cause emotional distress or with reckless disregard of the probability of causing emotional distress, Plaintiffs' IIED claim must fail. *See Boulton*, 175 Vt. at 427.

Defendant's Motion also argued Plaintiffs' IIED claim must fail as a matter of law because NCSU exercising its statutory authority by adopting a face mask policy and enforcing that policy against R.D. cannot amount to the "atrocious and utterly intolerable" conduct required to sustain an IIED claim. *See Fromson v. State*, 176 Vt. 395, 399 (2004). Plaintiff's Opposition does not challenge NCSU's argument or identify authority supporting that NCSU's conduct could meet the "atrocious and utterly intolerable" standard required to sustain an IIED claim. *See* Pls' Opp. at 18-20. Since NCSU exercising its statutory authority to adopt and enforce a face mask requirement to keep students and staff safe during a pandemic does not amount to the atrocious and utterly intolerable conduct required to sustain an IIED claim, Plaintiffs' IIED claim must fail on that basis as well. Accordingly, Count VI of Plaintiffs' Verified Complaint should be dismissed.

E. NCSU Contends Only That Plaintiffs' Request for a Temporary Restraining Order and/or Preliminary Injunction Is Moot

Plaintiffs' Opposition discusses mootness at length. *See* Pls' Opp. at 9-17. With the exception of Plaintiffs' request for a temporary restraining order and/or preliminary injunction, however, NCSU does not contend Plaintiffs' claims are moot. NCSU did raise the issue of mootness in its Supplemental Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction ("Supplemental Memorandum"), but NCSU's

Supplemental Memorandum made clear the mootness argument applied only to Plaintiffs' request for a temporary restraining order and/or preliminary injunction.

To the extent Plaintiffs believe a temporary restraining order and/or preliminary injunction is still warranted in this matter – with NCSU no longer requiring face masks in schools – NCSU contends Plaintiffs' request for a TRO is moot, for the reasons set forth in NCSU's Supplemental Memorandum. NCSU makes no mootness argument beyond Plaintiffs' request for a TRO and/or preliminary injunction. Plaintiffs' other claims all fail for the reasons discussed above, but Plaintiffs' other claims are not moot.

II. Conclusion

Plaintiffs leave no doubt they disagree with NCSU's decision to require face masks in schools to keep students and staff safe during a deadly pandemic. Plaintiffs' Verified Complaint and Plaintiffs' Opposition, meanwhile, leave no doubt Plaintiffs' claims against NCSU are legally baseless. Plaintiffs can attempt to ignore – and have attempted to ignore – NCSU's statutory authority to adopt and enforce a face mask requirement. Plaintiffs' Opposition makes clear, however, that Plaintiffs cannot demonstrate NCSU lacked the statutory authority to adopt and enforce a face mask requirement. Nor can Plaintiffs demonstrate NCSU otherwise violated any of Plaintiffs' rights.

Accordingly, since Plaintiffs' Verified Complaint fails to state a claim upon which relief can be granted, Defendant respectfully requests the Court grant NCSU's Motion to Dismiss and enter an order dismissing Plaintiffs' Verified Complaint with prejudice.

Dated at Burlington, Vermont this 17th day of May 2022.

NORTH COUNTRY SUPERVISORY UNION

*/s/ Pietro J. Lynn*_____

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