STATE OF VERMONT

SUPERIOR COURT
ORLEANS UNIT

CIVIL DIVISION
DOCKET NO 22-CV-00597

MICHAEL DESAUTELS and AMY LADEAU)
for themselves and as legal guardians and)
next friends to R.D.,)
HEALTH CHOICE VERMONT, INC.,)
a Domestic Nonprofit Corporation,)
CHILDREN'S HEALTH DEFENSE,)
a GEORGIA Nonprofit Corporation,)
)
Plaintiffs,)
)
vs.)
)
NORTH COUNTRY SUPERVISORY)
UNION,)
)
Defendant.)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW, Plaintiffs, by counsel, Robert J. Kaplan, Esquire and KAPLAN AND KAPLAN and in opposition to Defendant North Country Supervisory Union's ("NCSU") Motion to Dismiss state as follows:

A. North Country Supervisory Union lacks the authority to issue face mask mandates (Count I).

Defendant incorrectly contends that it has broad discretionary authority over conduct at its school buildings and activities that grants it authority to dictate that students wear medical devices on their faces for their entire interaction with school buses, buildings and activities. Courts around the country have rejected similar arguments from administrative bodies in connection with schools and other institutions. Several recent decisions have held that government institutions enacting mask mandates lacked the authority to do so under their governing statutes. For example, just two weeks ago, 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), the United States District Court for 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). 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.

Similarly, three months ago, the United States Supreme Court, in *National Federation of Independent Business, et al. v. Department of Labor*, 142 S. Ct. 661 (Jan. 13, 2022), 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.

The following month, 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 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.

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. *See*, *e.g.*, *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); *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, at * (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 in this case are precisely the same. NCSU lacks the authority to issue a mask mandate because the state legislature did not expressly grant it any authority to enact mandates requiring students to wear face masks or coverings; rather, that authority – if any – resides exclusively with the Department of Health. *City of Montpelier v. Barnett*, 49 A.3d 120, 129 (Vt. 2012); 18 V.S.A. § 126(b).

NCSU's defense relies on the provisions of 16 V.S.A. § 563 (alleging school boards have the authority to "take any action that is required for the sound administration of the school district") and 16 V.S.A. § 563(15) (alleging school boards "[s]hall exercise the general powers given to a legislative branch of a municipality") This argument is unavailing because it ignores the limitations on authority of supervisory unions and school districts over regulatory fields outside its educational mandate and casts too broad a net. Essentially, NCSU argues that it is sovereign over all matters pertaining to the school. Following this logic, NCSU could, therefore, declare itself exempt from OHSA regulations if NCSU determined that OSHA regulations interfered with "the sound administration of the school district." This reasoning would mean that a supervisory union or school district could ignore land use laws and regulations in the construction of schools or decline to register school buses with the Department of Motor Vehicles. If NCSU's reasoning were correct, then supervisory unions and school districts would have the unquestioned authority to require all students to wear dunce caps or gorilla costumes all day, every day. Obviously, the general grant of authority provided by 16 V.S.A. § 563 is intended only to allow supervisory unions and school districts to take sensible **education related** acts as are necessary for the smooth operation of schools. Face masks are medical devices and are not specific to the educational setting any more than any other field of endeavor where

people congregate indoors. The general grant of authority provided by 16 V.S.A. § 563 does not authorize schools to establish their own public health administration agencies or policies.

At least one court has rejected a school district's similar reliance on statutes providing it with broad authority to justify a mask mandate. In *Sitton*, an Arkansas state court issued a temporary restraining order against the Bentonville School District's mask mandate, finding the District did not have the authority to issue the mandate. The Plaintiffs in that case claimed, in part, that no school board in Arkansas was delegated with isolation or quarantine authority by the Arkansas legislature. They alleged, instead, that authority was delegated to the Arkansas Department of Health. Under those rules, they claimed, the Director of the Arkansas Department of Health – *alone* – could impose various quarantine and isolation restrictions upon citizens in the state who were exposed to or had contracted communicable diseases. None of those restrictions involved mask mandates for individuals who were *not* exposed to such diseases, let alone by a local school district or board. Local school boards had only two powers granted to them by these rules: a duty to report an outbreak of three or more cases of communicable diseases, and a duty to exclude any child, teacher, or employer affected with a communicable disease.

The Court held the District lacked the authority to issue the mandate. The Court explained "***[g]overnmental entities and political subdivisions do not have inherent rights and powers; people do. All the rights, powers and authority not granted to governmental entities reside in the people***." *Id.* at 3 (emphasis added). The Court rejected the District's reliance on statutes providing it with the authority to ensure the safety of its students from weapons or drugs, impose a code of behavior, maintain a safe and orderly environment, and adopt a disciplinary policy as authority for impose a mask mandate. *Id.* at 4. The Court concluded the only authority

directing the District to address communicable diseases concerned procedures for athletics, reporting communicable diseases, and managing the start or release time for school. *Id.* at 6. That authority, the Court held, did not authorize the District to direct students to wear masks, and such authority only resided with the Arkansas Department of Health. *Id.* at 6-7.

In Vermont, there is no statute, rule, or regulation that permits supervisory unions or school districts to enact face mask mandates. Rather, supervisory unions have limited duties and authority. *See* 16 V.S.A. § 261a(a)(1)-(13). The powers and authority of school districts are similarly limited. *See* 16 V.S.A. § 563(1)-(32). None of these provisions provides them with the authority to implement a requirement that students wear masks in schools. The Vermont Department of Health provides supervisory unions and schools with only *two* specific obligations and duties concerning communicable diseases. First, school health officials must report cases of communicable diseases to the Commissioner of Health within 24 hours and provide certain identifying information concerning that case. 18 V.S.A. § 1001(a); Vermont Health Regulations, Chapter 4, Subchapter 1, Part 5, § 5.1.7.[1] Second, school health officials must require students to provide records or certificates of certain immunizations in order to be enrolled in school and may exclude students who do not provide such proof. 18 V.S.A. §§ 1121(a), 1123, 1126. Nothing else in any of the statutory and regulatory schemes for supervisory unions, school districts, or the Department of Health provides supervisory unions and school districts with the authority to issue broad health measures. Thus, NCSU lacked the authority to mandate masks.

[1] This emergency health rule became effective on October 15, 2021, and specifically includes COVID-19 among the diseases it covers. *See* Vermont Health Regulations, Chapter 4, Subchapter 1, Part 5, § 5.4.

B. The mandate is preempted by the Department of Health's regulatory scheme concerning communicable diseases (Count II).

NCSU argues "Plaintiffs fail to identify any way in which NCSU's face mask requirement acts as a 'barrier to' the Department of Health's" statutory scheme. Motion at 8. This is inaccurate: As Plaintiffs alleged in their Verified Complaint, NCSU has directly engaged in conduct that is exclusively within the Department of Health's express authority.

The Department of Health's scheme addresses all aspects of communicable diseases and the various measures the state has determined are appropriate for dealing with outbreaks and highly-contagious diseases. *See* 18 V.S.A. §§ 102, 104(e), 107(a). The Department has the authority to investigate public health crises, and the *Department* and *State Board* <u>only</u>– not supervisory unions or school districts – have the authority to issue <u>*health orders*</u> concerning individuals infected with a communicable disease. *See id* & 18 V.S.A. § 126(b). The Board also had the opportunity to promulgate – and did promulgate – rules concerning COVID-19. The only directives the Department of Health chose to enact were reporting requirements concerning COVID-19 and other diseases. *See id.* The statutes and rules which establish the Department of Health's regulatory framework for communicable diseases are extensive and comprehensive and, thus, preempt this entire regulatory field. These statutes and rules preempt any local measure that requires masks in schools because any such measure conflicts with the Department of Health's scheme for COVID-19 which specifically did not require masks in schools to prevent the transmission of COVID-19.

The fact that the Vermont Agency of Education "has informed school districts they 'may adopt a policy requiring students to wear a mask at school and may enforce the policy by refusing to admit a student who does not comply' with the mask requirement" is irrelevant because the Agency of Education did not have that discretionary authority to delegate. *See*

Motion at 8. The Vermont Agency of Education cannot confer authority on supervisory unions and school districts, such as discretion to impose mask mandates, which the Agency of Education does not itself hold because that authority rests exclusively with the Department of Health under the applicable statutory scheme.

C. The mandate violates parents' rights to make medical decisions for their children and to raise and care for their children (Count III).

Parents have a fundamental right to raise and care for their children and make medical and healthcare decisions for them. Part 1, Art. 10, Vt. Const; *Boisvert v. Harrington*, 173 Vt. 285, 295 (2002).

NCSU alleges "there is no legal support for" Plaintiffs' claim. Motion at 10. This is inaccurate: The Court in *Sitton* held the School District's mask mandate violated parents' liberty interest in the care and custody of their children under the Arkansas Constitution. Like the Plaintiffs in this case, the Plaintiffs in *Sitton* alleged the Arkansas Supreme Court – like the Vermont Supreme Court – held that "a parent's right to the care and control of his or her child is a fundamental liberty." *Id.* ¶ 5 (quoting *Tuck v. Ark. Dep't of Human Servs.*, 288 S.W.3d 665, 668 (Ark. Ct. App. 2008)). In granting the Plaintiffs' request, the Court held the Plaintiffs "absolutely have [a] constitutional interest" "in the care and custody of their children under the Arkansas Constitution," no circumstances existed under which the government can usurp that right, and the District's mask mandate "infringed" on the parents' constitutional liberty interest.

Here, the mandate does not serve a compelling governmental interest because there is no state of emergency; there is no question COVID-19 does not pose any threat to the health of children; there is no evidence face masks have done anything to curb the spread of COVID-19; and face masks are harmful for children.

Even if NCSU had a compelling interest, its mask mandate is not narrowly tailored to achieve that end because it applies to children (for whom COVID-19 poses no risk whatsoever); it applies to *all* children (regardless of whether any of those children had COVID-19, are vaccinated, or are health-compromised); it has no exceptions or attainable exemptions; and any such compelling need or interest can be accomplished by other less-restrictive means.

NCSU's mandate violates the Plaintiffs' fundamental rights in the care, upbringing, and education of their children, including the right to make healthcare and medical decisions for their children.

D. Plaintiffs' Claims are Not Moot

NCSU's contention in its Supplemental Memorandum that Plaintiffs' claims are moot because it no longer has a mandatory mask policy is meritless for several reasons.

1. NCSU Voluntarily Ceased its Mask Mandate after this Case was Filed.

NCSU's decision to eliminate the mask mandate was announced ***after this lawsuit was filed***. In other words, during the pendency of this case, NCSU *voluntarily ceased* the challenged practice of requiring children to wear masks.

That voluntary decision does not render this case moot. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). This exception to the mootness doctrine "applies when a defendant voluntarily ceases its illegal conduct before the court can rule on the merits of the case." *Dubois v. U.S. Dept. of Agriculture*, 20 F. Supp. 2d 263, 269 (D.N.H. 1998). "'This exception is meant to prevent defendants from defeating a plaintiff's efforts to have its claims adjudicated simply by stopping their challenged actions, and then resuming their 'old ways' once the case [becomes] moot.'" *Id.* "The voluntary cessation exception is grounded in necessity.

Absent such an exception, defendants might be tempted to engage in a game of legal 'cat and mouse' by voluntarily ceasing illegal activities in the face of pending litigation only to resume that conduct when the claims against them have been declared moot. It is this real likelihood that injury will imminently recur that justifies voluntary cessation as an exception" to mootness. *Id.*

The Vermont Supreme Court acknowledged the voluntary cessation exception to the mootness doctrine in *All Cycle v. Chittenden Solid Waste Dist.*, 164 Vt. 428, 432-433, 670 A.2d 800, 803 (1995). Although *All Cycle* was decided on other grounds, the Court in *Perez v. Touchette*, 2021 Vt. Super. LEXIS 80, *9 specifically held that "[t]he court therefore concludes that our Supreme Court, in the right case, would adopt the doctrine. (Hoar, J. Jan. 27, 2021).

This exception is well recognized by courts throughout the country. "This exception can apply when a 'defendant voluntar[ily] ceases the challenged practice' in order to moot the plaintiff's case, and there exists 'a reasonable expectation that the challenged conduct will be repeated following dismissal of the case.'" *Town of Portsmouth v. Michael P. Lewis in His Capacity of the R.I. Dep't of Transp.*, 813 F.3d 54, 59 (1st Cir. 2016) (quoting *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops* (*ACLUM*)), 705 F.3d 44, 56 (1st Cir. 2013)). "The exception's purpose is to deter a 'manipulative litigant [from] immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after.'" *Id.* (quoting *ACLUM*, 705 F.3d at 54-55). "[T]he Supreme Court has not hesitated to invoke the voluntary cessation exception when considering the conduct of private, ***<u>municipal</u>***, and administrative defendants." *Town of Portsmouth*, 813 F.3d at 59 (emphasis added). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate

suit, and there is probability of resumption." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 n.5 (1953) (quoting *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952)).

Under these circumstances, the party invoking the mootness doctrine "bear[s] a 'heavy' burden in attempting to establish its applicability." *Conservation Law Foundation v. Evans*, 360 F.3d 21, 24 (1st Cir. 2004) (quoting *Mangual v. Rotger-Sabat*, 317 F. 3d 45, 61 (1st Cir. 2003)). That party "must demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.*; *see also Friends of the Earth*, 528 U.S. at 189 (requiring, in cases involving voluntary cessation of challenged conduct, that party claiming mootness satisfy heavy burden of demonstrating that allegedly wrongful behavior could not reasonably be expected to recur)). This burden is not lessened simply because the defendant is a government entity. *See ACLUM*, 705 F.3d at 56 n.10 ("[W]e do not join the line of cases holding that when it is a government defendant which has altered the complained of regulatory scheme, the voluntary cessation doctrine has less application unless there is a clear declaration of intent to re-engage.")

For example, in *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg.*, 2015 DNH 211, the Court held the plaintiffs claim that the defendant's marketing, labeling, and advertising for certain antibacterial soap, which used an active ingredient whose safety was called into question, was false and misleading was not moot. *Id.* at *2-*5. An objector to the litigation argued the case was moot because the defendant no longer sold soap containing triclosan, and it had no intention to do so. *Id.* at *12. The Court held the case fell within the voluntary cessation doctrine because the defendant "voluntarily stopped using triclosan in Softsoap Antibacterial only after plaintiffs initiated this lawsuit," reports concerning the safety of

triclosan remained "tentative," and the defendant continued to maintain its product containing triclosan provided superior health benefits. *Id.* at *13.

Similarly, in *Sierra Club v. U.S. Fish & Wildlife Serv.*, Case No.: 2:20-cv-13-FtM-38NPM (M.D. Fla. Aug. 19, 2020), the United States District Court denied a motion to dismiss the plaintiffs' claims challenging several agency actions concerning a road expansion. *Id.* at *3-*6. After the lawsuit was filed, one of the Defendants (the Florida Department of Transportation("FDOT")) rescinded a categorical exclusion (due to lack of funding) it had invoked concerning the application of the National Environmental Policy Act, which required it to consult with the United States Fish and Wildlife Service (USFWS) to analyze any impacts the project would have on the endangered Florida Panther. *Id.* at *2. That exclusion formed the basis for two of Plaintiffs' claims. *Id.* The Court held the claims were not moot because the defendants "fail[ed] to meet their 'formidable' burden to show the challenged conduct has been 'unambiguously terminated' or that the allegedly wrongful conduct will not recur after this litigation ends." *Id.* at *5. Internal FDOT emails appeared to show the project was simply delayed, and the defendants "never said that they would not continue with the current plans." *Id.* at *6.

Also, in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), the Circuit Court held the plaintiff's claim under the Americans with Disabilities Act and requests for declaratory and injunctive relief were not moot. *Id.* at 1187-90. A diagnostic imaging facility had deprived the plaintiff (who was blind) from entering with her service animal. *Id.* at 1179-80. Nine months into the lawsuit, the defendant facility implemented a new service animal policy that rendered the plaintiff's claims moot and promptly moved for summary judgment. *Id.* at 1181. The Court held it was not clear the facility's conduct would not recur: in large part, the

timing of the change in policy indicated the facility would re-engage its prior policy in the future. *Id.* at 1186-87.

This case falls squarely within the voluntary cessation exception to the mootness doctrine. First, there is no question NCSU voluntarily ceased its mask requirement *after* Plaintiffs filed this lawsuit: indeed, they are principally relying on that voluntary decision to argue the Court should deny Plaintiffs' request for injunctive relief. Second, there is a reasonable expectation NCSU will re-instate its mask requirement if the Court dismisses this case, and NCSU cannot show it is "absolutely clear" its conduct will not recur. NCSU did not state that it would not re-instate its mask requirement for the rest of the school year or for the 2022-23 school year. Its refusal to do so should call into question the genuineness of NCSU's decision to make masks "optional" *after* this lawsuit was filed. Nothing stopped NCSU from making that decision before. It cites no reason for waiting until early March make that decision. This is suggestive of precisely the kind of "manipulation" and "cat and mouse" game courts should prevent when parties voluntarily cease contested conduct and then promptly argue a claim challenging that conduct should be dismissed as moot. Thus, Plaintiffs' claim falls within the "voluntary cessation" doctrine to the mootness doctrine, and they should not be dismissed.

2. NCSU's Mask Requirement is Also Not Moot Because it is Capable of Repetition and Yet May Evade Review.

Another exception to the mootness doctrine are "cases that are capable of repetition but evading review," *Paige v. State* 2017 VT 54, 205 Vt. 287, 171 A.3d 1011 (2017) citing, *State v. Condrick, 144 Vt. 362, 363, 477 A.2d 632, 633 (1984)* ("A case is not moot when a situation is capable of repetition, yet evades review."). To meet this exception "a plaintiff must satisfy a two-prong test: (1) the challenged action must be "in its duration too short to be fully litigated prior to its cessation or expiration," and (2) there must be a "reasonable expectation that the same

complaining party will be subjected to the same action again." *Price v. Town of Fairlee, 2011 VT 48, ¶ 6, 190 Vt. 66, 26 A.3d 26* (quotation omitted).

Cases involving the education of children present a classic example of issues that are capable of repetition, yet evade review, because of the limited and cyclical nature of the school year, and the reasonable likelihood the challenged conduct will occur again. *See In re Matter of Martin F. Kurowski and Brenda A.*, 161 N.H. 578 (2011) (finding that, "[a]lthough the trial court's order governed placement of daughter for the 2009-2010 school year only, and that school year is now concluded . . . . a decision on the merits is justified because the case involves a matter which is capable of repetition yet evading review"). The family court's order in *Kurowski* compelled the enrollment of the daughter in public school for the 2009-2010 school year. *Id.* at 581.

Indeed, in *Honig v. Doe,* 484 U.S. 305, 318 (1987), the United States Supreme Court held a case was not moot as to a student who alleged his suspension from school violated a statute providing safeguards for disabled children, where he had several years of eligibility for educational services remaining under the statute and had not yet completed high school, because there was a reasonable likelihood he would again engage in the same conduct and suffer the same disciplinary action. 484 U.S. at 318-19.

Courts in other jurisdictions have similarly intervened and rendered a decision on the merits in school-related situations. *See*, *e.g.*, *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1040 (5th Cir. 1989) (case was not moot because "conduct giving rise to this suit will recur every school year, yet evade review during the nine-month academic term); *Brody by & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1112 (3d Cir. 1992) (challenge to inclusion of religious elements in high school graduation not moot because issue was "capable of repetition"); *In re*

Appeal of JAD, 782 A.2d 1069, 1069-70 (Pa. Cmmw. Ct. 2001) (challenge to student's suspension was not moot because it was capable of repetition, yet evading review); *In re Appeal of Suspension of Huffer*, 546 N.E.2d 1308 (Ohio 1989) (challenge to high school student's suspension and validity of related school board's rule was not moot because it was "certainly 'capable of repetition,' yet it may 'evade review'"); *Colonial Gardens Nursing Home, Inc. v. Bachman*, 373 A.2d 748 (P. 1977) (court may decide cases with substantial questions, otherwise moot, which are capable of repetition unless settled).

The potential for the challenged conduct to repeat does not need to be certain: "Conduct is capable of repetition if there is a ***reasonable expectation*** or a ***demonstrated probability*** that the same controversy will recur." *Daniel*, 874 F.2d at 1040 (emphases added). In *Daniel*, for example, the dispute between the parties (parents of a handicapped child and the state board of education) concerned whether or not to "mainstream" the child (educate the handicapped child with non-handicapped children). *Id.* The child's IEP had since lapsed, and the child had also been placed in a private school during the pendency of the action, thus rendering the dispute moot. *Id.* The court, nevertheless, held "[t]he parties have a reasonable expectation of confronting this controversy every year that [the child] is eligible for public education." *Id.* at 1041.

In non-school situations, courts have followed the same reasoning: simply because the conduct complained of lapses, if it is capable of repetition, it requires judicial intervention. In *Asmussen v. Commissioner, New Hampshire Department of Safety*, 145 N.H. 578 (2000), for example, the New Hampshire Supreme Court held a plaintiff's challenge to policies affecting administrative license suspensions under the applicable statute should not be dismissed as moot because it "presents a classic situation where the issues are capable of repetition yet evade

review." *Id.* at 591. The Court reasoned, in part, that an administrative license suspension "will likely expire prior to the conclusion of any litigation challenging the manner in which the department administered the statute." *Id.* Similarly, in *Olson v. Town of Grafton*, 133 A.3d 270 (N.H. 2016), the Court reviewed the plaintiffs' challenge to the trial court's determination that it was lawful for the town to include a phrase on the official ballot for the annual town meeting underneath each of the plaintiffs' proposed warrant articles. *Id.* at 271-73.

Here, Plaintiffs' claims concerning NCSU's mask mandate present the same circumstances as the cases above: even though the mandate is no longer in place, the issue raised will almost certainly arise again. Children in daycares across the country are still required to wear masks, and Philadelphia recently re-implemented an indoor mask mandate (only to rescind it days later). Media outlets ceaselessly warn of the next wave of COVID cases.

Accordingly, some form of mask requirement could be re-implemented later this school year or next year. If NCSU's mask requirement is re-instated, it will obviously continue to impact the Plaintiffs as alleged in the Complaint. Thus, the issues raised in this case could repeat themselves. The same mask requirement, however, could likely evade review: if Plaintiffs' claims were dismissed for mootness, and they were forced to re-file this lawsuit, due to the nine-month length of the school year, the aforementioned mask requirement would expire or end with the completion of that school year (again), before the conclusion of the litigation and before the court could hold a hearing on the merits of the Plaintiffs' claims. Accordingly, Plaintiffs' claims require judicial intervention.

3. Plaintiffs' Tort Claim is not Moot.

Plaintiffs' Verified Complaint includes a claim of intentional infliction of emotional distress on behalf Michael Desautels, Amy Ladeau and R.D. There is a recognized exception to

the mootness doctrine for "negative collateral consequences." *Paige v. State* 2017 VT 54, 205 Vt. 287, 171 A.3d 1011 (2017) citing *In re P.S., 167 Vt. 63, 67, 702 A.2d 98, 101 (1997)* ("[A] case is not moot when negative collateral consequences are likely to result from the action being reviewed."). "This exception is based on the premise that the Court should still consider a case — even if it no longer involves a live controversy — if the action challenged by the appellant will continue to pose negative consequences for the appellant if it is not addressed." *Id*. In its defense against this claim, NCSU claims that it was justified through its statutory authority in adopting a mask mandate and, therefore, it cannot have engaged in conduct that was outrageous or in reckless disregard of the probability of causing emotional distress. Thus, in deciding the intentional infliction of emotional distress claim against NCSU, the Court will be required to resolve the questions presented in Plaintiffs' other claims challenging NCSU's authority to adopt and enforce a mask mandate and thereby causing the controversy posed by the mask mandate to be very much live.

Similarly, thirty-two days after the filing of the Verified Complaint against NCSU, on March 22, 2022, The Orleans County State's Attorney's Office initiated a Child in Need of Care and Supervision – Truancy action against Plaintiff's Desautels and Ladeau, at the request of NCSU in *In re: R.D.,* Orleans County Family Division Docket Number 22-JV-00435 even though R.D. had been back in school for over three months by the time the CHINS Petition was filed. This is exactly the sort of collateral consequence considered by the Vermont Supreme Court in State v. J.S., 174 Vt. 619, 817 A.2d 53 (2002) in which the Court held that a controversy is not moot where there are collateral consequences which persist following the cessation of the circumstances giving rise to the initial complaint.

E. Plaintiffs Desautels, Ladue and R.D. have sufficiently stated a claim for Intentional Infliction of Emotional Distress

Defendants argue that a claim for intentional infliction of emotional distress has not been set forth because the adoption of a mask mandate by NCSU was not done with the intention to cause emotional distress to R.D. or her parents or a reckless disregard for the probability of causing emotional distress. NCSU also argues that since it claims to have statutory authority to issue a mask mandate, it is immunized from a claim of intentional infliction of emotional distress for that purposeful act.

The intentional infliction of emotional distress claim presented in the Verified Complaint does not, however, merely rest on NCSU's adoption of a mask mandate. Rather the Verified Complaint alleges that NCSU was presented with a note from a medical doctor excusing R.D. from the mask requirement (*Verified Complaint* ¶ 87), NCSU refused to provide R.D. with a medical exemption from the mask mandate (*Verified Complaint* ¶ 87), NCSU falsely claimed that its refusal to honor the medical note for R.D. and to provide R.D. with a medical exemption from the mask mandate was pursuant to guidance by the Agency of Education (*Verified Complaint* ¶ 89-91), NCSU isolated R.D. from her fellow students and left her in a windowless room for entire school days with only a single school administrator present (*Verified Complaint* ¶ 92), NCSU ultimately barred R.D. from school grounds (*Verified Complaint* ¶ 93), NCSU called the Vermont State Police and threated Desautels and Ladeau with arrest when they tried to bring R.D. back to school without a mask (*Verified Complaint* ¶ 94), NCSU threatened to have R.D. taken into state custody if Desautels and Ladeau did not leave school property with R.D. (*Verified Complaint* ¶ 87), Desautels and Ladeau were threated with truancy action because R.D. was barred from school by NCSU (*Verified Complaint* ¶ 96) and R.D. was ultimately forced to return to school and wear a mask despite her legitimate medical exemption from the mask

mandate because of the extreme harm to R.D. caused by being isolated from her peers and being denied an education by N.C.S.U. (*Verified Complaint* ¶ 96), NCSU's actions have caused emotional harm to R.D., Desautels and Ladeau (*Verified Complaint* ¶ 97-98).

Plainly, the allegations against NCSU are not merely that R.D. was subject to a mask mandate in the same manner as every other student. The allegations demonstrate that R.D. was personally, and specifically, targeted by NCSU for treatment that was extreme and outrageous. NCSU's targeting further extended to Desautels and Ladeau who were threated with arrest and with losing custody of R.D. in retaliation for their protest against NCSU's treatment of R.D. These allegations point to a power hungry administration bent on squashing dissent, not the well meaning bureaucracy doing its best to find a path through a pandemic that NCSU attempts to portray in its Motion. Defendant does not contend that any of this conduct was accidental or that the harm to R.D., Desautels and Ladeau was not foreseeable.

Defendant correctly notes that "[t]o sustain a claim for IIED plaintiff must show defendants engaged in 'outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct.'" *Fromson v. State*, 176 Vt. 395, 399 (2004) quoting *Sheltra v. Smith*, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978). At this stage of the proceeding, where Plaintiffs have initially presented their claims on Vermont's notice pleading standard, this burden has been met by the allegations in the Verified Complaint to establish a cognizable claim for intentional infliction of emotional distress.

"The purpose of a Rule 12(b)(6) motion is 'to test the law of the claim, not the facts which support it.'" *Brigham v. State*, 2005 VT 105, 179 Vt. 525, 889 A.2d 715 quoting *Powers v. Office of Child Support*, 173 Vt. 390, 395, 795 A.2d 1259, 1263 (2002).

> At this early stage in the litigation, however, a court should be reluctant to dismiss a plaintiff's claims, and should not consider the merits of whether a plaintiff's claims will ultimately succeed. See *Sprague*, 145 Vt. at 446-47, 494 A.2d at 125 ("A motion to dismiss for failure to state a claim is not favored and rarely granted."); *Golden v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985) ("The court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint [****13] itself is legally sufficient."); 5B C. Wright & A. Miller, Federal Practice and Procedure § 1356 (3d ed. 2004) (stating that a Rule 12(b)(6) motion "is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case.").

Id. at ¶¶ 11-12. Applying this standard to the claim for intentional infliction of emotional distress set forth in the Verified Complaint, there are more than sufficient facts on which a jury could find that NCSU acted intentionally to punish R.D. and her parents for their objection and dissent to the mask mandate and that NCSU's actions were outrageous acts toward a small child and her parents and that these acts caused sufficient emotional distress to be compensable.

NCSU's further contention that a claim for intentional infliction of emotional distress cannot be made because NCSU had statutory authority to adopt and enforce a mask mandate demonstrates that the question of NCSU's authority to adopt the mask mandate must be decided in order to decide its argument against the intentional infliction of emotional distress claim. This is a tacit acknowledgment that Plaintiffs' claims for injunctive relief are not moot since the central questions to be determined to adjudicate those claims are the foundation of Defendant's defense to the intentional infliction of emotional distress claim.

CONCLUSION

NCSU's contention that it has authority to mandate that all students wear face masks all day at school is simply wrong. The regulatory framework set out in the Vermont Statutes Annotated concerning decision making on medical devices and matters of public health confers authority on the Vermont Department of Health to decide about medical devices and matters of public health. The powers conferred on the Agency and Education and to supervisory unions

and school districts do not extend to public health policy decisions or to the implementation and use of medical devices. Government agencies have only those powers delegated to them and no more. The Agency of Education's "guidance" to supervisory unions and school districts on adopting and enforcing mask mandates was nothing more than an invitation to supervisory unions and school districts to do what neither they, nor the Agency of Education, had the legitimate power to do. Mask mandates in schools have been demonstrated to be a historic wrong, a wrong which is sadly likely to repeat in the future. This action exposes NCSU's lack of authority to impose mask mandates and holds NCSU responsible for its deliberate actions against a young child and her parents to punish them for speaking out against NCSU's authoritarian acts. The claims set forth in the Verified Complaint are cognizable and not barred by the mootness doctrine.

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Deny the Motion to Dismiss; and

B. Award such other relief as is just and equitable.

Respectfully submitted,

MICHAEL DESAUTELS, AMY LADUE,
for themselves and as next friends to R.D.,
HEALTH CHOICE VERMONT, INC.,
CHILDREN'S HEALTH DEFENSE, INC.,

By Their Attorneys,

KAPLAN AND KAPLAN

Dated: May 6, 2022

/s/Robert J. Kaplan

Robert J. Kaplan
95 St. Paul St.
Suite 405
Burlington, Vermont 05401
(802) 651-0013
(802) 448-3478 (fax)
(802) 238-8944 (mobile)
rkaplan@kaplanlawvt.com