Vermont Superior Court
Filed 07/12/22
Orleans Unit

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-00597

Michael Desautels et al v. North Country Supervisory Union

ENTRY REGARDING MOTION

Title: Motion for Preliminary Injunction; Motion to Dismiss and/or Temporary Restraining Order - Ex Parte; Plaintiff's Verified Complaint (Motion: 1; 2)
Filer: Pietro J. Lynn; Robert J. Kaplan
Filed Date: February 18, 2022; March 23, 2022

RULING ON NCSU'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In this case, Plaintiffs Michael Desautels, Amy Ladeau, and their minor daughter R.D. seek to challenge a "mask mandate" policy imposed on students and staff by the board of the North Country Supervisory Union (NCSU), which includes the Lowell Graded School, in response to the COVID-19 pandemic.[1] R.D. attended the Lowell Graded School when the mask mandate was in force, though it has since been rescinded. Plaintiffs claim that: (1) NCSU had no statutory authority to adopt such a policy; (2) the policy is preempted by the Vermont Department of Health's authority in this area; (3) requiring R.D. to wear a mask violated R.D.'s parents' constitutional right to make health decisions for her; and (4) NCSU's conduct in response to Mr. Desautels' and Ms. Ladeau's opposition to the policy amounted to the tort of intentional infliction of emotional distress as to all three of them. They seek declaratory and injunctive relief preventing NCSU from ever adopting such a policy again, and they seek compensatory damages for emotional distress. Two other plaintiffs, a Vermont nonprofit, Health Choice Vermont, and a Georgia nonprofit, Children's Health Defense, presumably are interested in the declaratory and injunctive relief alone.[2]

NCSU has filed a Rule 12(b)(6) motion to dismiss for failure to state a claim that addresses all claims of the complaint. Plaintiffs' motion for a preliminary injunction remains pending. The parties agreed, however, that the court would address the legal issues in the motion before holding an evidentiary hearing. They are the same issues presented by the motion to dismiss.

As a preliminary matter, the court notes that about one month after Plaintiffs initiated this case, NCSU rescinded the masking policy. NCSU argues that rescinding the policy moots the motion for a preliminary injunction, but it affirmatively takes the position that the case is not moot otherwise. Plaintiffs contend that no part of the case has become moot. The court will address the request for a preliminary injunction in this decision and otherwise accepts the parties' agreement that the policy change

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[1] For ease of reference, the court will refer to both the supervisory union and its board simply as NCSU.

[2] NCSU has not challenged the nonprofits' constitutional standing, and the court declines to address the matter. The other plaintiffs plainly have standing, and the nonprofits are not raising different issues.

does not moot this case, principally because Plaintiffs' arguments do not depend on the details of the mask policy or the circumstances that prompted it. See n.3 below.

The factual allegations of the complaint, despite its length, are straightforward. Plaintiffs allege as follows. NCSU adopted a mandatory masking policy in response to the pandemic. The policy contained a provision permitting exempting those with a medical need to not wear a mask.[3] Despite the policy, Mr. Desautels and Ms. Ladeau refused to permit R.D. to wear a mask. Because R.D. did not wear a mask, she was made to stay in one room all day at school supervised by a single administrator. At some point, Mr. Desautels and Ms. Ladeau provided proof—a note from a doctor—that R.D. could not wear a mask. The school denied the medical exception in bad faith and then barred R.D. from attending school altogether. Mr. Desautels and Ms. Ladeau nevertheless tried to drop R.D. off at school. In response, administrators threatened that they would call the authorities. Eventually, Mr. Desautels and Ms. Ladeau relented, and R.D. attended school wearing a mask. As a result of these events, all three were injured emotionally.

Statutory authority

The dispute over NCSU's statutory authority to adopt a masking policy centers on the correct interpretation of 16 V.S.A. § 563(2).[4] This provision empowers a school board "to take any action that is required for the sound administration of the school district." NCSU argues that the sweeping breadth of this provision easily encompasses a masking policy during a deadly respiratory pandemic. Plaintiffs argue instead that this provision should not be so interpreted because it simply says nothing about masking policies and, however broadly it may appear, it should be understood to apply strictly to concrete educational matters exclusively—the only legitimate business of a school board. According to Plaintiffs, a masking policy simply has no bearing on educational matters. Plaintiffs may also be understood to argue that a mandatory masking policy is so severe an intrusion on individual rights and liberties that any such delegation of authority by the legislature must be explicit to be enforced.

"If the statute is unambiguous and the words have plain meaning, we accept that plain meaning as the intent of the Legislature and our inquiry proceeds no further." *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 346 (2002).

Section 563(2) is not ambiguous; it is simply broad. See *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("Broad general language is not necessarily ambiguous when congressional objectives require broad terms."). Plaintiffs argue that the Legislature could not have intended it to be so broad as to permit boards to adopt policies that have nothing to do with the institutions they represent. But there is no need to wander past the plain language. The provision does not, contrary to Plaintiffs' suggestions in briefing, nonsensically permit a school board to do anything whatsoever. The power comes with a standard for its exercise—the statute permits any action "required for the sound administration of the school district." And it vests authority to review any such exercises of that discretion with the Secretary of Education on the advice of the Attorney General. See 16 V.S.A. § 563(2) ("The Secretary, with the advice of the Attorney General, upon application of a school board, shall decide whether any action contemplated or

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[3] The text of the policy is not in the complaint and, though the policy may be considered to be incorporated into the complaint due to the many references to it, it is not in the record otherwise. Nor, however, do Plaintiffs' claims in this case appear to depend on the language of the policy. Plaintiffs' various objections are all to the same effect: their grievance is that there was a masking policy of any kind at all, not the nuances of this particular policy. The details of the medical exemption are relevant to the tort claim only.

[4] NCSU also relies on 16 V.S.A. § 563(15), which empowers school boards to "exercise the general powers given to a legislative branch of a municipality." This provision certainly helps to demonstrate that the breadth of authority given to school boards is immense and obviously intended by the legislature, but the parties do not particularly rely on it otherwise. The court sees no need to do so either.

taken by a school board under this subdivision is required for the sound administration of the district and is proper under this subdivision. The Secretary's decision shall be final.").

As far as the Secretary goes, in an August 18, 2021, memorandum to superintendents, he plainly takes the position that a locally adopted and enforced masking policy is within the scope of § 563(2). See Memorandum from Secretary French to Superintendents (Aug. 18, 2021), available at https://education.vermont.gov/sites/aoe/files/documents/edu-memo-school-disctrict-mask-authority.pdf. In an October 26, 2021, memorandum from both the Secretary of Education and the Commissioner of Health, the *local* adoption of masking policies is affirmatively recommended according to certain metrics. See Memorandum from Secretary French and Commissioner Levine to Superintendents and Heads of Independent Schools (Oct. 26, 2021), available at https://education.vermont.gov/sites/aoe/files/documents/edu-vdh-memo-french-levine-advisory-covid19-prevention-measures-fall-2021-updated-10-26_0.pdf.

NCSU does not simply educate students. It operates a congregate setting in which providing for the safety of staff and students is essential to delivering on the educational mission. Taking steps to protect staff and students from a respiratory pandemic in such a setting is simply not unrelated to the educational purposes of the institution. Failing to take prudent steps to preserve public health and safety could seriously undermine a school's educational mission and could incur legal liability for ensuing harm. The authority to take those steps under 16 V.S.A. § 563(2) is necessary and incidental to the school district's broader educational function.

Finally, Plaintiffs cite several federal or state cases from around the country in which courts have struck masking or other policies adopted in response to the pandemic as lacking statutory authority. These cases are not helpful. They could only be analogous in a useful way if they analyzed a statute similar to 16 V.S.A. § 563(2), and none does.[5]

The court understands that Plaintiffs sincerely believe that masks do not help protect the health of children and perhaps are ineffective for others. NCSU's discretion under § 563(2) is broad enough for it to make that determination. NCSU did not lack statutory authority to adopt a masking policy.

Preemption

Plaintiffs argue that NCSU's masking policy is preempted by the relevant authorities granted to the Vermont Department of Health to deal with outbreaks of contagious diseases. NCSU responds that there is no direct conflict (conflict preemption) between NCSU's adoption of a masking policy and any actual statute, regulation, or exercise of authority by the Department. However, the court understands NCSU to be making a field preemption argument. The doctrine of field preemption is more commonly employed to mediate conflicts between federal and state regulation. It applies "when the federal regulatory scheme is so pervasive as to make no room for concurrent state regulation." *In re Investigation into Reg. of Voice Over Internet Protocol Services*, 2013 VT 23, ¶ 14, 193 Vt. 439. The doctrine is sometimes used to the same effect in the case of state and local regulation as well, at least in home rule states such as Massachusetts. See, e.g., *Boston Gas Co. v. City of Newton*, 682 N.E.2d 1336, 1339 (Mass. 1997).

Vermont is a Dillon's Rule state: Vermont municipalities have "only those powers and functions

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[5] The court is unable to determine whether one trial court decision from Arkansas that Plaintiffs rely on may be analogous, *Sitton v. Bentonville School District*. Plaintiffs did not supply the court with a copy of the decision, and the court has been unable to locate it online. In any event, even if the *Sitton* trial court struck down a masking policy based on statutory authority similar to that at issue here, the Arkansas Supreme Court wasted no time reversing the trial court, and that court's ruling is generally supportive of this court's interpretation of 16 V.S.A. § 563(2). *Bentonville Sch. Dist. v. Sitton*, 643 S.W.3d 763 (Ark. 2022).

specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." *City of Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441 (quoting *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977). Thus, if there were any reasonable question as to a municipality's authority to do something, the issue would be resolved against the municipality. See *Barnett*, 2012 VT 32, ¶ 20. It is not clear to the court that a field preemption argument such as the one Plaintiffs are making properly applies in a Dillon's Rule state.

In any event, Plaintiffs neither identify any actual conflict presented by NCSU's masking policy nor show that the Department occupies the field so extensively as to compel the inference that the legislature intended that authority to leave no room for a school district to adopt a local masking policy. Framing the issue in this manner in this context really refers back to the proper breadth of 16 V.S.A. § 563(2). "The key to the preemption inquiry is the intent of Congress." *New York SMSA Ltd. Partn. v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). While Plaintiffs cite to some of the Department's authorities, they nowhere show how the legislature's delegation of authority to the Department regarding respiratory pandemics or contagious diseases, much less mandatory masking policies, is so pervasive that 16 V.S.A. § 563(2) is properly read in a more limited manner than its plain meaning suggests. The court sees no preemption problem in this case.

Due process, Vermont Constitution ch. I, art. 10

Plaintiffs Desautels and Ladeau claim that NCSU's masking policy violates their fundamental constitutional right to make healthcare decisions for their minor daughter, relying on Vermont's Due Process Clause. Vt. Const. ch. I, art. 10. In support of this argument, they again rely heavily on the Arkansas trial court decision, *Sitton v. Bentonville School District*, that the court is unable to read. There are no Vermont cases on point.

As noted above, see supra n.5 at 3, the Arkansas Supreme Court quickly reversed the trial court's decision in *Sitton*. See *Bentonville Sch. Dist. v. Sitton*, 643 S.W.3d 763 (Ark. 2022). On the constitutional issue, the Court ruled as follows:

> The Supreme Court of the United States has long provided a framework applicable "in the context of a public health crisis." That two-part framework is set forth as follows:
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> > [I]n the context of a public health crisis, a state action is susceptible to constitutional challenge only if it, "purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]"
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> In reviewing the two-part . . . framework, we must first determine whether the District's policy has a "real or substantial relation" to the public-health crisis caused by the COVID-19 pandemic. Here, in the "Face Coverings" section of its Safe Schools Plan, the District acknowledged that "[t]he CDC currently recommends . . . the wearing of masks in school settings[.]" Additionally, the District emphasized in its Safe School Plan that it followed the policy recommendations of its Reopening Task Force, which was composed, in part, of medical professionals; its Personnel Policy Committee; the District Administration; and the directives of ADH and the Governor. Further, Superintendent Jones stated in her affidavit that the Board had heard from "parents, students, and medical professionals, including several pediatricians and family practitioners who favored implementing a mask policy," and that she recommended the policy based on recommendations from the CDC, the American Academy of Pediatrics,

and the ADE. Thus, we conclude that the District's policy supports a "real or substantial relation" to protecting the students' health during the COVID-19 pandemic.

> The second . . . inquiry is whether the District's policy was "beyond all question, a plain, palpable invasion" of the parents' rights. Parents do have a liberty interest in shaping their child's education. But the Court has also held that our government "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" In [one case], the Court stated, "Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." The Court has repeatedly "stressed . . . that schools at times stand in loco parentis, i.e., in the place of parents." Thus, in light of this precedent and without delving into the underlying merits of the parents' ongoing claims, we hold that the District's policy is not, "beyond all question, a plain, palpable" violation of the parents' constitutional rights to care for their children.

Bentonville Sch. Dist. v. Sitton, 643 S.W.3d 763, 770–71 (Ark. 2022) (relying substantially on *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); and *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020)) (citations omitted).

The *Sitton* Court's analysis is persuasive, and the court adopts it for purposes of this case. The court adds that a mandatory mask policy is substantially less intrusive than a mandatory immunization policy. See, e.g., 18 V.S.A. § 1121(a) ("No person may enroll as a student in a Vermont school . . . unless the appropriate school official has received a record or certificate of immunization issued by a licensed health care practitioner or a health clinic that the person has received required immunizations appropriate to age as specified by the Vermont Department of Health."). Vaccination requirements are routinely upheld. See 6 Rotunda and Nowak's Treatise on Constitutional Law-Substance and Procedure § 21.9(b)(i) ("Even when the chance of epidemics have been small, the courts have continually upheld vaccination requirements as a precondition to a child's attendance at public school."). There is no constitutional infirmity to a less intrusive mask policy in these circumstances.

Ultimately, Plaintiffs attempt in error to elevate their limited constitutional rights as parents in relation to their daughter's healthcare and education over a matter that more fundamentally is one of public health (not private medical treatment), and they further seek to employ those rights, to whatever extent they may enjoy them privately, to alter the public health policies of a public institution in a manner not protected by the Vermont Constitution. A school masking policy simply does not automatically violate one's due process rights.

Intentional infliction of emotional distress

This leaves Mr. Desautels', Amy Ladeau's, and R.D.'s claims of intentional infliction of emotional distress (IIED). NCSU argues that this claim fails as a matter of law because merely adopting a masking policy and enforcing its terms cannot amount to the tort of IIED. However, that argument depends on an implied, sanitized version of the facts that, however accurate, cannot be considered under Rule 12(b)(6).

IIED is described in the Restatement (Second) of Torts as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." Restatement (Second) of Torts § 46(1); see *Sheltra v. Smith*, 136 Vt. 472, 475–76 (1978) (adopting Section 46 in Vermont). The standard is high. "The conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community.'" *Denton v. Chittenden*

Bank, 163 Vt. 62, 66 (1994) (quoting Restatement § 46 cmt. d). The result must be "extreme emotional distress." *Id*. A plaintiff cannot rely upon his perceptions of the defendant's motives to establish the tort—the test is objective. See *Fromson v. State*, 2004 VT 29, ¶¶ 15, 17, 176 Vt. 395; *Baldwin v. Upper Valley Servs, Inc*., 162 Vt. 51, 57 (1994).

The question under Rule 12(b)(6), however, is not whether Plaintiffs can prove such a claim but merely whether they have alleged it sufficiently to avoid dismissal. The Vermont Supreme Court has been clear that the pleading standard in Vermont is exceptionally minimal. See *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575 ("the threshold a plaintiff must cross in order to meet our notice-pleading standard is 'exceedingly low'"); *Colby v. Umbrella, Inc*., 2008 VT 20, ¶ 13, 184 Vt. 1 ("The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it.").

Plaintiffs' IIED claims are alleged in the complaint in a somewhat conclusory manner. In briefing, they describe the claims as follows:

> 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, NCSU refused to provide R.D. with a medical exemption from the mask mandate, 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, 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, NCSU ultimately barred R.D. from school grounds, NCSU called the Vermont State Police and [threatened] Desautels and Ladeau with arrest when they tried to bring R.D. back to school without a mask, NCSU threatened to have R.D. taken into state custody if Desautels and Ladeau did not leave school property with R.D., Desautels and Ladeau were [threatened] with truancy action because R.D. was barred from school by NCSU 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. NCSU's actions have caused emotional harm to R.D., Desautels and Ladeau.
>
> 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 [threatened] 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.

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Whether, as the evidence develops, this basic narrative may end up supporting Plaintiffs' IIED claims likely will depend on more nuanced details not yet evident, such as the nature of the isolation, the circumstances of the "threats," the circumstances of the request for a medical exemption and its denial, and the tenor of Mr. Desautels' and Ms. Ladeau's conduct throughout the conflict, as well as the nature of any resulting emotional distress. Considering how liberal Vermont's pleading standard is, the court

concludes that these matters will be better "explored in the light of facts as developed by the evidence." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309. While the allegations are to some extent vague and conclusory, they are not so vague and conclusory as to warrant outright dismissal at this time.

SUMMARY

In summary, all claims of the complaint are dismissed but for the IIED claims of Mr. Desautels, Amy Ladeau, and R.D.

Plaintiffs' motion for a preliminary injunction is denied because, for the reasons set forth above, there is no likelihood of success on the merits.

ORDER

For the foregoing reasons, NCSU's motion to dismiss is granted in part and denied in part.

Dated July 12, 2022

David Barra
Vermont Superior Court Judge
Electronically signed