CV-21-498

IN THE ARKANSAS SUPREME COURT

BENTONVILLE SCHOOL DISTRICT;
DR. DEBBIE JONES, in her official capacity;
ERIC WHITE, in his official capacity;
MATT BURGESS, in his official capacity
KELLY CARLSON, in his official capacity;
BRENT LEAS, in his official capacity;
WILLIE COWGUR, in his official capacity;
JOE QUINN, in his official capacity; and
JENNIFER FADDIS, in her official capacity — APPELLANTS

v.

MATT SITTON, MATTHEW BENNETT, and
ELIZABETH BENNETT — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY
THE HONORABLE XOLLIE DUNCAN, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutions, Statutes & Rules

ARGUMENT

This case involves a policy of the Bentonville School District (the "School District") that governs student conduct within the four walls of the school building. The Policy requires students to wear masks only while at school and nowhere else. Much like a dress code, students may remove their masks as soon as they exit the schoolyard, and parents maintain the authority to regulate their child's conduct with respect to masks both before and after school hours.

Parents in this case claim that the Policy violates their fundamental right to the care, custody, and management of their minor children. Although Parents have the right to direct the education of their children, that right extends no farther than the choice of whether and where to send their children to school. *See Stevenson v. Blytheville Sch. Dist.* #5, 800 F.3d 955, 966 (8th Cir. 2015) (collecting cases and explaining that "parents simply do not have a constitutional right to control each and every aspect of their children's education"). Once that decision is made, parents do not have a constitutional interest in "micromanaging" the choices of the school as to the policies and curriculum of the school. *Borishkevich v. Springfield Pub. Sch. Bd. of Educ*., No. 20-03240-CV-S-BP, 2021 WL 2213237, at *4 (W.D. Mo. May 27, 2021).

The Policy does not violate Parent's constitutional rights, and the circuit court therefore erred in issuing a preliminary injunction enjoining the Policy.

I. Standard of Review

Because this case involves a challenge based on Parents' rights under the Arkansas Constitution, a *de novo* standard of review applies. *See, e.g.*, *Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., LLC*, 2012 Ark. 157, at 9, 400 S.W.3d 701, 707 (holding that de novo review applies to "both the circuit court's interpretation of the constitution as well as issues of statutory interpretation"). Appellees do not provide any authority otherwise.

But even under the abuse-of-discretion standard, injunctions are not immune from appellate review. For example, this Court has reversed the grant of a preliminary injunction where the trial court failed to fully analyze the likelihood of success on the merits before granting a preliminary injunction. *See Baptist Health v. Murphy*, 362 Ark. 506, 511, 209 S.W.3d 360, 363 (2005) (reversing and remanding the trial court's preliminary injunction because it lacked "findings on the issue of the likelihood of success on the merits"); *see also Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) (reversing and remanding grant of preliminary injunction because trial court did not consider whether plaintiff satisfied necessary requirements to sustain a facial challenge to state regulation).

II. School Districts Are Political Subdivisions That Exercise Governmental Functions

Much of Parents' argument rests on their position that the School District is not the State and school policy is not law. Appellees' Br. at 13. But school districts

are political subdivisions that "function in a quasi independent manner[.]" *Dermott Special Sch. Dist. v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477, 480-81 (2000). As political subdivisions, they are "organized for the public advantage"; "their chief design is the **exercise of governmental functions"**; and "to the electors residing within each is, to some extent, **committed the power of local government**, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing." *Id.* (emphasis added). This Court has likened school districts to housing authorities, counties, cities, or towns. *Id*. This Court further has explained that "the State's connection with school districts has been limited to the act of bringing such districts into being. The school boards operate the schools in their respective districts, purchase the required property, hold title to the property for the district, and have complete charge of maintenance. *Id.* (quoting *Muse v. Prescott Sch. Dist*., 233 Ark. 789, 349 S.W.2d 329 (1961)).

Appellees cite *Crenshaw v. Eudora School District* for the unremarkable proposition that school districts are not state agencies, but rather are not subject to sovereign immunity and may sue and be sued and. 362 Ark. 288, 292, 208 S.W.3d 206, 209 (2005). That case relates to the doctrine of sovereign immunity, which is not in dispute here. Notably, the *Crenshaw* court reaffirmed the holding in *Dermott Special School District v. Johnson* and noted the extensive statutory power of Arkansas school districts. *Id.* 362 Ark. at 299, 208 S.W.3d at 213-14.

III. Because the School District Is Not Regulating Conduct Outside of School, Appellee's Authority Is Inapposite

Parents argue that only the Governor or the executive branch has the power to regulate public health. Specifically, Parents point to rules promulgated by the Arkansas Department of Health regarding quarantine and isolation ("ADH Rules") and the Governor's previous Executive Order requiring masks. But this argument misapprehends the Policy which governs conduct only within the confines of the school grounds.

To the contrary, the ADH Rules apply to all citizens of Arkansas and require limitation of freedom of movement in all facets of life in instances of isolation or quarantine. (RP24). Thus, the ADH Rules relate to issues wholly separate from mask wearing and govern conduct well beyond that which occurs in schools. Likewise, the Governor's previous Executive Order requiring masks applied to "every person in Arkansas" and "in all indoor environments." (RP10-11).

Parents also cite cases regarding the State Board of Health's vaccination requirements. But mask wearing and vaccines are not remotely analogous. Masks are facial coverings that may be removed when students exit the school building, whereas vaccines are longer lasting and more invasive. In any event, the cases relied upon by Parents involved the state's power to require vaccinations and said nothing about a school district's authority.

Here, the School District is not requiring isolation, vaccination, or requiring any conduct outside of school. Contrary to Parents' argument, the School District is not attempting to make health care decisions for students. Appellees' Br. at 18. Rather, the Policy is more akin to a dress code in which the School District dictates the conduct of students on school property. The School District simply is attempting to regulate student conduct when students are on campus, which is well within its authority *in loco parentis*. *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, —— U.S. ——, 141 S. Ct. 2038, 2046-47 (2021).

IV. The Policy Does Not Violate Parent's Fundamental Right to the Care of Their Children

The Court provided no analysis regarding the constitutionality of the Policy, which is reason alone to reverse the injunction.

First, the Court did not make any determination as to the level of scrutiny that must be applied to the Policy. Parents argue that because the Policy is unconstitutional, rational basis review does not apply. Appellees' Br. at 19. But that logic is circular, and Parents offer no support for their position.

To the contrary, courts across the United States have applied rational basis review to mask mandates in public schools and have held that such mask mandates are constitutional. *See, e.g.*, *Gunter v. North Wasco Cty. Sch. Dist. Bd. of Educ.*, No. 3:21-CV-1661-YY, 2021 WL 6063672, at *10 (D. Or. Dec. 22, 2021); *Monica Branch-Noto v. Sisolak*, No. 2:21-CV-01507-JAD-DJA, 2021 WL 6064795, at *5

(D. Nev. Dec. 22, 2021); *Stepien v. Murphy*, No. 21-CV-13271 (KM) (JSA), 2021 WL 5822987, at *8 (D.N.J. Dec. 7, 2021); *Doe #1 v. Delaware Valley Sch. Dist.*, No. 3:21-CV-1778, 2021 WL 5239734, at *22 (M.D. Pa. Nov. 11, 2021); *Doe v. Franklin Square Union Free Sch. Dist.*, No. 2:21-5012-FB-SIL, 2021 WL 4957893, at *19 (E.D.N.Y. Oct. 26, 2021); *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333, at *8 (M.D. Pa. Sept. 30, 2021); *Guilfoyle v. Beutner*, No. 2:21-CV-05009-VAP (MRWx), 2021 WL 4594780, at *14 (C.D. Cal. Sept. 14, 2021); *Let Them Play MN v. Walz*, 517 F. Supp. 3d 870, 883 (D. Minn. 2021).

It is well established that the right of parents to direct their children's education is not unfettered. *See Blytheville Sch. Dist. #*5, 800 F.3d at 966. On this issue, the United States Supreme Court has stressed the "limited scope" of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), cited by Parents, pointing out "that it lent no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" and "rather held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools." *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (quotation marks omitted).

Parents rely on *Linder v. Linder*, 348 Ark. 322, 330, 72 S.W.3d 841, 844 (2002) in support of their argument that parents have a role in shaping their child's

education. That case is distinguishable, however, because it involved the mother's "right to raise her child" including decisions about who would enter the home, have access to the child, and help raise the child. *Id*. at 348, 72 S.W.3d at 855. That case related to the "private realm of the family." *Id.* This case, on the other hand, is about a policy affecting children on school property.

Here, Parents had the right to choose to send their children to the School District, as opposed to selecting in-home learning or another school where no masks were required. As a result, Parents did, in fact, exercise their fundamental right to direct the education of their children as interpreted by courts. With respect to the Policy, under either the *Jacobson* framework or traditional rational basis review, the Policy is valid because it is rationally related to achieving a legitimate governmental objective.

In a case involving a challenge to a school district's mask policy, another court recently held that the policy did not violate a parent's fundamental liberty interests. *See Gunter v. North Wasco Cty. Sch. Dist. Bd. of Educ.*, No. 3:21-CV-1661-YY, 2021 WL 6063672, at *9 (D. Or. Dec. 22, 2021). That court held that "[Parents'] general right to direct their children's education is an insufficient basis to show that their right to preclude their children from wearing masks during a pandemic is a fundamental right, deeply rooted in the country's traditions and the concepts of

ordered liberty." That court dismissed Parents' claims as a matter of law and denied Parents' motion for injunctive relief. *Id*. at *15.

V. The School District Had Authority To Issue the Policy

As set forth in Appellants' Opening Brief, the School District had ample authority to institute the Policy. Each of Parents arguments to the contrary fails.

First, Appellees concede that if the Policy is constitutional, then the School District would have the authority to implement the Policy pursuant to Ark. Code Ann. § 6-13-620(11) (providing school districts may "[d]o all other things necessary and lawful for the conduct of efficient free public schools in the school district."). Appellees' Br. at 20. The Policy is constitutional for the reasons previously argued, so even under Parents' theory, the School District had authority to implement the Policy.

Second, Parents argue that because there exists a subchapter in the Arkansas Code regarding student health (Ark. Code Ann. § 6-18-701 *et seq*.), the more general powers provided to school districts cannot form the basis for the School District's authority. But nothing in the health sub-chapter conflicts with (or even relates to) the issue of mask wearing. As such, the rule of statutory construction that "a general statute must yield when there is a specific statute involving particular subject matter" does not apply. *Comcast of Little Rock, Inc. v. Bradshaw*, 2011 Ark. 431, at 9, 385 S.W.3d 137, 143. Moreover, there are other statutes regarding student safety and

well-being outside the health subchapter, so Parents' argument fails as a factual matter. *See, e.g.*, Ark. Code Ann. § 6-18-111(b) (creating a school safety and crisis line that provides a way for a student to anonymously report criminal activity near a public school, bullying, and physical or sexual abuse); Ark. Code Ann. § 6-18-2004(b)(2) (requiring that all public schools have school counselors who provide services to students for, among other things, students who are at risk of dropping out of school, prevention of school bullying, and addressing age-appropriate suicide awareness and prevention); Ark. Code Ann. §§ 6-18-1501, 1502 (requiring that all students take an eye and vision screening test and requiring all students who do not pass to have a comprehensive eye and vision examination by an optometrist or ophthalmologist).

Further, the Policy was implemented for a variety of reasons, not just limited to student health. For example, it was passed to reduce the number of quarantines, to increase student attendance, and to promote student achievement. As a result, the Policy was implemented pursuant to the School District's more general powers.

Third, Parents attempt to distinguish Ark. Code Ann. § 6-15-1005 without success. That statute provides, among other things, that schools must have "safe and functional facilities"; "[i]nstructional facilities will be designed and structured to support learning"; "[t]he school climate will promote student achievement"; schools must "ensure the safety of every student during school hours at school-sponsored

activities;" and schools must "enforce a code of behavior for students that respects the rights of others and maintains a safe and orderly environment[.]" Ark. Code Ann. § 6-15-1005. The statute was passed "to provide a quality educational opportunity to every public school student in every community and in every school district in the state." Ark. Code Ann. § 6-15-1002. The Policy at issue was implemented to reduce instances of quarantines and therefore to promote student learning and achievement. As a result, the Policy was implemented pursuant to the School District's authority under Ark. Code Ann. § 6-15-1005.

Fourth, Parents argue that health measures do not fall within the scope of "safe schools" all because an advisory board in another sub-chapter does not include a medical professional. *See* Ark. Code Ann. § 6-15-1305. That provision relates to emergency safety measures such as disaster preparedness, has no bearing on this dispute, and was not relief on by the School District.

Fifth, Parents argue that the federal government cannot interfere with state education. Parents misconstrue 20 U.S.C. § 1232a as prohibiting any and all federal control of education. While § 1232a may restrain the federal government from playing an *overly* active role in supervising local expenditures of federal education grants, the statute does not prevent the federal government from enforcing federal requirements in local schools which the state had accepted by receiving federal aid for those programs. *See Crawford v. Pittman*, 708 F.2d 1028, 1036 (5th Cir. 1983);

see also Wheeler v. Barrera, 417 U.S. 402, 416–19 (1974); *United States v. Miami Univ.*, 294 F.3d 797, 819 (6th Cir. 2002).

VI. The Circuit Court Erred In Finding There Was Irreparable Harm

The circuit court held that if the School District had the authority to implement the Policy, then there would be no irreparable harm. (RT201). There is no constitutional violation for the reasons set forth above and in Appellant's Opening Brief. Thus, there is no irreparable harm.

VII. The Circuit Court Erred in Determining That There Was a Justiciable Controversy.

For the reasons set forth in Appellants' Opening Brief, there was no justiciable controversy for the circuit court to consider because Parents did not seek an exemption within the Policy, did not seek at-home instruction, and did not seek to transfer their student to another school district that did not have a mask policy. Parents simply repeat their unavailing arguments about the School District's authority rather than responding to the real issue as to why they did not attempt to opt out of the Policy.

CONCLUSION

The School District's mask policy does not violate Parents' fundamental liberty interest in raising their children, and the Policy was issued within the scope of the authority delegated to the School District by the General Assembly. As a result, the Policy was proper. Further, the circuit court erred in determining that

Parents suffered irreparable harm or had presented a justiciable controversy for review. For these reasons, the Policy should not have been enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be served on the following counsel of record via eFlex on January 5, 2022:

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I further hereby further certify that a true and correct copy of the foregoing will be served upon the following via U.S. Mail, on this 5th day of January, 2022:

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By: */s/ Marshall S. Ney*
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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney, hereby certify that the Appellants' Reply Brief complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "Case Record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

I further certify that this Brief satisfies Administrative Order 21, Section 9 which states that briefs shall not contain hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing brief conforms to the word-count limitation identified in Rule 4-2(d). According to Microsoft Word (Office 365), the brief contains 2,677 words.

/s/ *Marshall S. Ney*
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