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APPELLATE COURT 4TH DISTRICT

No. 4-22-0090

IN THE
APPELLAATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

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| ROBERT GRAVES and KIM GRAVES<br>As Parents and Guardian of K.G.,<br>Et al.,<br>Plaintiffs-Respondents,<br><br>vs.<br><br>JAY ROBERT PRITZKER, in his capacity<br>As Governor of Illinois,<br>Et al.,<br>Defendants-Petitioners<br><br>PLAINFIELD COMMUNITY<br>CONSOLIDATED DISTRICT #202,<br>Et al., | ) | Interlocutory Appeal from the<br>Circuit Court from the Seventh<br>Judicial Circuit, Sangamon County<br>Illinois.<br><br>No. 2021-CH-500003<br><br>The Honorable<br>RAYLENE D. GRISCHOW<br>Judge Presiding |

**RESPONSE TO STATE-DEFENDANT'S PETITION FOR 307(d) REVIEW OF TRO**

**BACKGROUND**

Plaintiffs filed Verified Complaint for Writ of Injunction, as well as a Verified Motion for Temporary Restraining Order and Preliminary Injunction in Kendall County, Illinois on or about October 18th, 2021. Upon Motion of the State parties, the Supreme Court of Illinois consolidated matters 2021-CH-500002, 50003, 5005, and 50007 pursuant to an Order dated November 22nd, 2021. The Plaintiffs in cause number 2021-CH-50002, 5005 and 5007 filed Verified Complaints for Writ of Injunction, as well as a Verified Motions for Temporary Restraining Orders and Preliminary Injunctions. Pursuant to an oral motion made by the State parties, through their attorney, Thomas Verticchio, the transcript of proceedings in causes 2021-CH-50002, 50005, and 500007 were incorporated into the temporary restraining order proceedings held in 2021-CH-50003, and vice versa. Arguments were held on all respective Temporary Restraining Order's (TRO) on January 3rd, 2022, January 5th, 2022, January 19th,

2022 and January 20th, 2022, respectively. After arguments and review of the TRO legal factors, Judge Grischow entered a TRO on February 4th, 2022. *See* SR1940.

## LEGAL REQUIREMENTS FOR TRO

To qualify for a TRO, the moving party must show, by a preponderance of the evidence, must establish the following: (a) a clearly ascertainable right in need of protection; (b) irreparable injury in the absence of an injunction; (c) no adequate remedy at law, and (d) a likelihood of success on the merits. *County of DuPage v. Gavrilos*, 359 Ill. App. 3d 629, 296 Ill.Dec. 86, 834 N.E.2d 643 (2005). Further, prior to issuing the TRO, the Court should determine whether the grant of temporary relief outweighs any possible injury to the Defendant resulting from the issuance of the TRO. *Kanter & Eisenberg v. Madison Assocs*. 116 Ill. 2d 506, 516 (1987).

The issuance of an injunction is within the sound discretion of the trial court when the plaintiff demonstrates there is a fair question as to the existence of the right claimed and the circumstances lead to a reasonable belief the moving party will be entitled to relief. *Stenstrom Petroleum Services Group, Inc. v. Mesch,* 375 Ill. App. 3d 1077, 1089, 874 N.E.2d 959 (2d Dist. 2007).

## STANDARD OF REVIEW

The State-Parties ("Petitioners") in their Petition have alleged the circuit court abused it's discretion in finding that the 1) Plaintiffs had a clear ascertainable right in need of protection; 2) Plaintiffs had a likelihood of success on the merits; 3) Plaintiffs would suffer irreparable injury in the absence of an injunction; and 4) granting of the temporary relief outweighed any possible injury to the Defendants.

The Petitioner's arguments relative to "a likelihood of success on the merits" is premised on legal issues and whether the Governor, Illinois Department of Public Health ("IDPH"), and Illinois State Board of Education had statutory and/or constitutional authority under the Illinois Emergency Management Agency Act ("IEMA"), Illinois Department of Public Health Act ("IDPHA") and/or Illinois Administrative Procedures Act to proceed in the fashion set forth in

the Complaints filed herein. Given that the propriety of those issue rests purely on legal issues, the appropriate standard of review for that matter would be *de novo*. *Fox Fire Tavern, LLC v. Pritzker*, 161 N.E. 3d 1190, 1194, 443 Ill.Dec. 538 (Ill.App. 2020); citing *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63, 310 Ill.Dec. 274, 866 N.E.2d 85 (2006).

The circuit courts granting of the TRO, itself, should be reviewed under an abuse-of-discretion standard. *Fox Fire Tavern, LLC v. Pritzker*, 161 N.E. 3d at 1194.

## I. THERE IS A CLEAR ASCERTAINABLE RIGHT IN NEED OF PROTECTION

In review of this element, the Court is to determine if the Plaintiff has "raised a fair question about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits." *Buzz v. Barton Associates, Inc. v. Giannone*, 108 Ill. Ed. 373, 386 (1985) (emphasis added). Associated with this matter, Plaintiffs raised the following questions as to their clearly ascertainable rights: 1) they have a statutory right to due process protection as set forth in the Illinois Department of Public Health Act prior to being excluded from school until such time as a permanent injunction is heard; 2) they have a statutory right to due process protection as forth in the Illinois Department of Public Health Act prior to being forced to wear a mask in school until such time as a permanent injunction is heard; 3) they have constitutional right to in-person education free from undue governmental interference until such time as a permanent injunction is heard; and 4) they have a right to insist the Governor, and other State administrative bodies, act within the specific confines of their statutory authority until such time as a permanent injunction is heard.

In the passing of the IDPHA, the Legislature made clear citizens have individual due process rights when being subjected to quarantine, vaccinations, and/or testing. 20 ILCS 2305(2)(c). The legislature in the implementation of the IDPHA specifically contemplated that people may object to quarantine, vaccinations, and/or testing thus laid out procedural due process methods in which to address those objections. The IDPHA sets forth explicit procedures on what the agency is required to do in the event a person disagrees with the agency on the issues of

quarantine, vaccinations, and/or testing. See 20 ILCS 2305(b)(c)(d). Amongst the specific due process rights afforded citizens are as follows: a right to a hearing by clear convincing evidence; a right to hearing in which it is shown all other reasonable means of correcting the problem have been exhausted; and a right to hearing in which it is shown no less restrict alternatives exist. *Id.*

These rights were acknowledged by the ISBE and IDPH by way of Joint Guidance was issued on or about August, 2021 in which they made clear "local health departments" were to make the final determinations on issues of close contacts, as well as determinations as to who would be mandated to quarantine and for how long. SR588. This guidance permitted the schools to assist with contract tracing but did not give schools any authority to make final determinations on who was to quarantine and for how long. The joint guidance further acknowledged "Test to Stay" was a form of modified quarantine. SR589. Schools continued to operate under this guidance without issue until September 17th, 2021 when the Governor proceeded to issue Executive Order 24 ("EO24").

After Governor JB Pritzker issued Emergency Order 18 (EO18), the following district courts ruled EO18 violated the mandated due process procedures set forth in Section 2(b) of the IDPHA: Effingham County – 2021-MR-140, Clinton County – 2021-CH-697, Macoupin County – 2021-MR-88, and Adams County – 2021-MR-186. SR57 – SRSR84. At the time of the issuance of EO18 (which has continued to be renewed), "quarantine" was clearly defined to include "modified-quarantine". Modified-Quarantine encompassed two very important aspects subject to dispute in this case: 1) removal of children from school; and 2) mandating students to wear a device that's intended purpose is to limit the spread of an infectious disease. 77 Ill. Admin. Code 690.10.

In direct response to these court rulings, Governor JB Pritzker issued EO24 that created the definition for the word "exclusion". SR54. In said definition, the Governor made an independent and unilateral decision that removal from school would not be a type of "quarantine" in contradiction to current law. *Id.* Such action completely removed the judiciary from any oversight in the issue of masking and improper removal of children from school through attempting to bypass the IDPHA. As noted in *In Re Bradwell*, it is well established that

the General Assembly is the department of government to which the constitution has entrusted the power of changing the laws. 55 Ill. 535, 540. In passing the IDPHA, the General Assembly made clear the IDPH had "supreme authority in matters of quarantine and isolation." 20 ILCS 2305/2. These issues bring into questions significant violations of the separation of powers doctrine by the Governor in this state. "The real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments . . . it may be irrelevant if an agency has legislative or judicial characteristics so long as the legislature or the judiciary can effectively correct errors of the agency." *City of Waukegan v. Pollution Control Board*, 311 N.E.2d 146, 149, 57 Ill.2d 170 (1974). The Respondents have right to insist the Executive Branch act with the confines of their power set forth in Section 8, Article V, of the Constitution and not invade the legislatures power as stated under Article II, Section 1, of the Constitution.

As conceded by the Petitioners at the TRO hearing, the IDPH emergency rules were promulgated in response to the directives set forth in the Governor's executive orders. SR1287. In adopting administrative rules, administrative agencies must comply with the public notice and comment requirements set forth in the Illinois Administrative Procedures Act. *Champaign-Urbana Public Health District v. Illinois Labor Relations Bd*., 354 Ill. App. 3d 482, 489 (4th Dist. 2004); 20 LICS 3305/18(a). The IDPH failed to have appropriate public notice, failed to set forth appropriate reasoning for the issuance of the emergency, as well as failed to follow appropriate time frames as set forth in the Illinois Administrative Code in the issuance of the administrative rules. See 5 ILCS 100/5-45. The IDPH indicated it's reasoning for the rules was "in response to Governor JB Pritzker's Gubernatorial Disaster Proclamations issued related to COVID-19. SR307. However, it is important to note that the Governor, and IDPH had been aware of COVID-19 for over 1 ½ years at the time IDPH implemented their emergency rules.

Under the pretext of an emergency, the IDPH emergency rules deleted and/or modified the terms of quarantine and modified-quarantine to fit the parameters of the Governor's executive order. SR323 – SR326. Further, the IDPH attempted to delegate their authority to local school schools in Subsection (d) of Title 77 of the Illinois Administrative Code. SR329. As noted by the court, the problem with the IDPH actions had to do with violations of their own

administrative rules. The administrative rules provide that the "certified local health department shall establish plans, policies, and procedures to instituting and maintaining emergency measures necessary to prevent the spread of a dangerously contagious or infection disease or contamination." 77 Ill. Admin. Code 690.1315(f) (emphasis added). The IDPHA does not provide the health department authority to transfer or delegate its duties and responsibilities to the ISBE and local districts as attempted to be done. As such, this also raises fair questions as to the legitimacy of the IDPHA actions and the emergency rules herein.

For the above reasons, fair questions were raised throughout this matter as to whether the executive branch of government acted outside the confines of their executive authority in the implementation of the executive orders and emergency administration rules that were the subject to this review.

## II. THERE IS IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION

For a party to succeed under this element, the party must show that the injured party cannot be adequately compensated in damages or where damages cannot be measured by any certain pecuniary standard. "Plaintiffs need not show injury that is beyond repair or beyond compensation in damages, but rather, need only show transgressions which are of a continuing nature." *Bollweg v. Richard v. Marker Assocs., Inc*., 353 Ill. App. 3d 560, 577 (2d. Dist 2004). The injury of a plaintiff "must be in the form of plaintiff's legal rights being sacrificed if plaintiff is forced to await a decision on the merits." *Hough v. Weber*, 2020 Ill. App. 3d 674, 686 (2d Dist. 1990)

K.G. and G.T. were both excluded from school associated with this matter despite the uncontroverted fact that they were both healthy at all given times during their periods of exclusion of school. SR12 and SR15. The Joint Guidance issued by the ISBE and IDPH specifically indicated remote learning leads "not only to learning loss, but also worsening mental health for children, as well as parents." SR277. Issues such as learning loss and worsening of mental health as noted by the ISBE and IDPH are not issues that can be clearly compensated for

in the form of pecuniary damages. At no time were K.G. and G.T. given an opportunity to refute the allegations that their respective districts deemed them a "close contract" subject to quarantine requirements that should have been mandated by the IDPH. The decisions made by the districts, in accordance with the Executive Orders and Emergency Rules, were merely arbitrary because the decisions were predetermined rather than reviewed subjectively with all the information provided the districts by K.G. and G.T. The districts herein have specifically adopted policies attached to the pleadings that have further indicated the children will be excluded from school in the event they do not wear a mask on school premises in violation of the Executive Orders, further preventing them from receiving an in-person education. SR92 and SR125.

Further, through the actions of the State Defendants/Petitioners herein, the procedural and substantive due process rights of the Plaintiffs/Respondents are being sacrificed each and every day. The Plaintiffs/Respondents have a right to insist there be compliance with 20 ILCS 2305 *et seq.* before school districts partake in masking, exclusion from school, quarantine, isolation, vaccination, or testing policies. This issue is even more critical in the context of K.G. and G.T. when there is no evidence that the children are contagious or likely to spread a contagious disease. As indicated by the circuit court, due process was specifically codified by the Legislature under 20 ILCS 2305 *et seq.* and if they did not feel due process rights, as well as methods for objection, were vital, they would not have created an entire statute on these issues. Deprivation of procedural and substantive due process rights protected by both statutory and constitutional law cannot be compensated in the form of pecuniary damages. As noted in *Makindu v. Illinois High School Assn*, when rights such as these are being violated, irreparable injury is satisfied. 2015 IL. App. 2d 141201 (2015).

For the above reasons, this element was also satisfied associated with hearing.

## III. THERE IS A LIKELIHOOD OF SUCCESS ON THE MERITS

To succeed on this element, Plaintiff need only show a genuine question regarding the existence of a claimed right and a fair question that they will be entitled to the relief prayed for if

the proof sustains the allegations. *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 903 (2d Dist. 2009).

In review of the definitions of "quarantine" and "modified-quarantine" set forth in the Chapter 77 of the Illinois Administrative Code (both of which were in existence upon the issuance of EO18 and EO24), it is very clear that a child's exclusion from school, a teacher's inability to engage in their occupation, and a requirement for a child to wear a mask that is intended to limit the spread of an infectious disease all fit within the confines of quarantine. 77 Ill. Admin. Code 690.10. As such, the statutory requirements set forth in the IDPH are to be followed prior to the removal of a child from school. Further, at the time EO24 was issued, the Joint Guidance issued by both the ISBE and IDPH indicated the IDPH was to make final determinations as to quarantine and lengths of time as to quarantine. SR558. The Governor, in issuance of EO18, mandated schools follow this very Joint Guidance in its operations. SR47.

The Petitioner's argue the Governor has inherent authority to issue the Executive Orders in question through the statutory authority granted him by the legislature in the IEMA. 20 ILCS 3305/5 *et seq*. The Governor has taken the position that the IEMA supersedes that of the IDPHA by reason of Section 2(m) of the IDPHA and gives him "triple broad" discretion to do as he pleases in the issuance of the executive orders. *See* 20 ILCS 2305/2(m). SR1311. The Petitioner's fail to acknowledge, however, that the Legislature has granted the IDPH the <u>supreme authority</u> in matters of quarantine and isolation. 20 ILCS 2305/2. *Emphasis Added*. Further, the Petitioners fail to acknowledge the mandatory language set forth in subsection (f) of the IEMA that indicates the Governor "shall" coordinate with the IDPH with respect to public health emergencies. 20 ILCS 3305/5(f)(2.6). The Governor is not provided with unchecked authority to do as he sees fit in times of public health emergencies in this State. At hearing, the Governor attempted to cite *Fox Fire Tavern, LLC*, to substantiate his legal opinion. 161 N.E. 3d 1190. SR1317. However, it should be noted the Court in *Fox Fire Tavern, LLC* at no time indicated the IEMA superseded the IDPHA in any capacity. In fact, there was a specific analysis of whether EO61 was tantamount to a "quarantine order" which would implement the procedures set forth in the IDPHA. The Court indicated EO61 did not amount to an order of quarantine because it was not a closure of business, but rather prescribed guidelines to safely operate the

restaurant. *Id.* at 1200. As such, the Court indicated the IDPH did not apply in the circumstances set forth in *Fox Fire Tavern, LLC*. In contradiction to the Petitioner's position, the courts have made clear that IEMA and IDPHA must be read together and the Governor cannot make independent decisions during times of an emergency without coordinating with the IDPH.

As noted in *In Re Bradwell*, it is well established that the General Assembly is the department of government to which the constitution has entrusted the power of changing the laws. 55 Ill. 535, 540. In passing the IDPHA, the General Assembly made clear the IDPH had "supreme authority in matters of quarantine and isolation." 20 ILCS 2305/2. The General Assembly further indicated only the IDPH could "amend rules . . . as it may from time to time deem necessary for the preservation of public health." *Id.*; Emphasis added.

Both the Illinois School Code and IDPHA adopted the Illinois Administrative Procedures Act and the adoption of rule-making therewith. The Illinois Administrative Procedures Act require public notice and comment requirements. 20 ILCS 3305/18(a). Further, the implementation of emergency rules require the agency publish the reason for the emergency rules. *See* 5 ILCS 100/5-45. The published reason by the IDPH indicated it was "in response to Governor JB Pritzker's Gubernatorial Disaster Proclamation issued related to COVID-19." SR307. Any such reasoning is subject at best given COVID-19 had been in existence for a period in excess of 1 ½ years at the time of the issuance of emergency rules. As noted above, prior to the implementation of EO24 and the Emergency Rules, the judiciary maintained a role in the oversight of 'contact tracing' and 'quarantine' as the Joint Guidance issued by the ISBE and IDPH made clear the IDPH had final determination in these matters and the IDPHA would be used in the event there was an objection raised in matter of quarantine. SR588. In review of the definitions of "quarantine" and "modified-quarantine" set forth in the Chapter 77 of the Illinois Administrative Code (both of which were in existence upon the issuance of EO18 and EO24), it is very clear that a child's exclusion from school, a teacher's inability to engage in their occupation, and a requirement for a child to wear a mask that is intended to limit the spread of an infectious disease all fit within the confines of quarantine. Sections 2(c), (d), and (e) of the IDPHA have explicit provisions that provide for judicial oversight to prevent the arbitrary and

predetermined decisions of removing healthy children from public in-person learning. After implementation of EO24 and the Emergency Rules, the judiciary was removed from this process through attempts at redefining "quarantine" as written in current law. The Emergency Rules go as far to authorize the mandating of vaccinations in contradiction to the provisions set forth in Section 2 of the IDPHA. See 77 Ill. Admin. Code 690.361(d)(6). "The real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments . . . it may be irrelevant if an agency has legislative or judicial characteristics so long as the legislature or the judiciary can effectively correct errors of the agency." *City of Waukegan v. Pollution Control Board*, 311 N.E.2d 146, 149, 57 Ill.2d 170 (1974). The Governor, IDPH, and ISBE all attempted to remove the judiciary from oversight in matters of 'contact tracing' and 'quarantine' through the issuance of the Executive Orders and Emergency Rules in question, which fails to maintain the separate branches of government clearly intended by the General Assembly in the implementation of the IDPHA. The mere purpose of implementing the rules was to vitiate the court's oversight in matters of quarantine.

The actions taken by the Governor and other State parties in this matter are not proper in any fashion and the Respondent's herein have raised fair questions as to claimed rights and that they would be entitled to the relief requested herein.

## IV. THEIR WILL BE NO UNDUE HARM IN THE ISSUANCE OF THE INJUNCTION

Until numerous Court rulings throughout this State indicated removing healthy children from school, as well as masking children, was a form of quarantine that implicated the procedures set forth in the IDPHA, local schools had been operating under the Joint Guidance issued by the ISBE and IDPH mandating that the IDPH had final say in issues of 'contract tracing" and 'quarantine.' SR588. No affidavits were submitted to the circuit court relative any hardships assumed by the schools and/or local health departments that continued compliance with such guidance would amount to an undue hardship herein. Numerous conclusory statements and conjecture were provided to the circuit court about what may happen in the event

the local health departments were required to act in accordance with the IDPHA. SR272, SR1112, SR1884. As indicated above, it is clear the General Assembly specifically contemplated that people may object to quarantine, testing, and/or vaccination in the implementation of the IDPH, thus they laid out procedural methods in which to address those objections. Requesting the local health department determine matters of quarantine as contemplated by the legislature in the adoption of the IDPHA will not subject them to any undue harm. The local health departments are better equipped to make these decisions as shown by the inappropriate removal of K.G. and G.T. from public in-person education in this matter.

As the circuit court noted in its ruling, "the provisions of 20 ILCS 2305 and the relevant provisions found in 77 Ill. Adm. Cod 690.1330 were meant for times such as our State current finds itself. The Legislature understood that during times like these, liberty interest were at stake, and as such, provided due process under the law for citizens to rely upon should he or she choose to do so. It is not this Court's role to question the Legislature's balancing of the competing interests as being adequate or not. If the Legislature was of the opinion that the public health laws as written were not satisfactory to protect public health from COVID, it has had adequate opportunity to change the law since March 2020." SR1884. *See People v. Kohrig*, 113 Ill. 2d 384, 396-397 (1986).

The IDPHA, as intended by the Legislature, provides adequate protection to the citizens of this State and there will be no undue harm in the issuance of the TRO.

Respectfully Submitted,

/s/ William J. Gerber

Dated: 2/8/2022 By: _____

William J. Gerber, their attorney

Prepared By:
William J. Gerber
Attorney at Law
Law Office of William J. Gerber, LLC
210 West Oak Street
Fairbury IL 61739
Telephone: 815.692.2224
Facsimile: 815.692.8227
Email: will@gerberlaw.net
ARDC #: 6303375

**CERTIFICATE SERVICE**

I certify that on February 9th, 2022, I electronically filed the foregoing Response with the Circuit Court of the Illinois Appellate Court, Fourth Judicial District, and further certify that the following counsel in this matter were served by transmitting a copy from my e-mail address to the primary and secondary e-mail addresses designated by those participants.

Thomas J. Verticchio
Isaac F. Jones
Jeffrey J. Vandam
Jonathaan J. Sheffield
Assistant Attorney Generals
100 W. Randolph St.
12th Floor
Chicago, IL 60601
thomas.verticchio@ilag.gov
Isaac.freilichjones@ilag.gov
Jeffrey.vandam@ilag.gov
jonathan.sheffield@ilag.gov
*Counsel for State Defendants*

Thomas DeVore
tom@silverlakelaw.com
*Counsel for: Jeremy Pate; Mary and Emily Hughes; and Plaintiffs in Julieanne Austin et al.*

Shelli L. Anderson
sla@franczek.com
Caroline K. Kane
ckk@franczek.com
*Counsel for Plainfield Community Consolidated District #202 and Lane Abrell, as Superintendent of District #202*

Jason Manning
jmanning@hlerk.com
*Counsel for Yorkville Community Unit School District #115*

By: /s/ William J. Gerber
_____
Attorney for Plaintiffs-Respondents

William J. Gerber
Law Office of William J. Gerber, LLC
210 W. Oak Street
Fairbury IL 61739
Telephone: 815.692.2224
Facsimile: 815.692.4223
Email: will@gerberlaw.net
ARDC: 6303375