

No. 04-22-0092
No. 04-22-0093
No. 04-022-0094
Consolidated with
04-22-0090

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

JULIEANNE AUSTIN, as the parent or legal guardian of T.L. and L.A., *et al.*

Plaintiffs-Respondents,

v.

THE BOARD OF EDUCATION OF COMMUNITY UNIT SCHOOL DISTRICT #300 *et al.*,

Defendants,

And

ILLINOIS DEPARTMENT OF PUBLIC HEALTH; DR. NGOZI EZIKE, in her official capacity as Director of the Illinois Department of Public Health; ILLINOIS STATE BOARD OF EDUCATION; DR. CARMEN I. AYALA, in her official capacity as Director of the Illinois State Board of Education; and GOVERNOR JAY ROBERT PRITZKER, in his official capacity,

Defendants-Petitioners.

Appeal from the Circuit Court of Sangamon County, Illinois

Case No. 2021-CH-500002

The Honorable Raylene Grischow,
Judge Presiding

MARK and EMILY HUGHES, as the parents and guardians of students G.H. and L.H., as well as on behalf of all parents and guardians of students similarly situated

Plaintiffs-Respondents

v.

Appeal from the Circuit Court of Sangamon County, Illinois

HILLSBORO COMMUNITY SCHOOL DISTRICT #3, a body politic and corporate, DAVID POWELL, as Superintendent of HILLSBORO COMMUNITY SCHOOL DISTRICT #3

Defendants,

ILLINOIS DEPARTMENT OF PUBLIC HEALTH and DR. NGOZI EZIKE, in her official capacity as Director of the Illinois Department of Public Health, ILLINOIS STATE BOARD OF EDUCATION and DR. CARMEN I. AYALA, in her official capacity as Director of the Illinois State Board of Education, and GOVERNOR JAY ROBERT PRITZKER, in his official capacity,

Defendants-Petitioners.

Case No. 2021 CH 500005

The Honorable Raylene Grischow
Judge Presiding

MATTHEW ALLEN, as well as all Other educators similarly situated, *et al.*

Plaintiffs-Respondents

v.
500007

ILLINOIS DEPARTMENT OF PUBLIC Honorable HEALTH, *et al.*

And

THE BOARD OF EDUCATION OF NORTH MAC COMMUNITY UNIT SCHOOL DISTRICT #34, A body politic and corporate, *et al.*

Defendants.

2021 CH

The
Raylene Grischow
Judge Presiding

PLAINTIFFS-RESPONDENTS SUPPLEMENTAL BRIEF
PURSUANT TO APPELLATE COURT ORDER

Discussion

This Court has asked the Attorney General on behalf of the State Defendants, as well Mr. William Gerber and Mr. Thomas DeVore as counsel for the Plaintiffs in all the consolidated matters, to advise the Court how the actions of the Joint Committee of Administrative Rulemaking (“JCAR”) might have impacted this Court’s interlocutory review of the Honorable Judge Grischow’s grant of temporary restraining order.

The Plaintiffs in this cause have so far successfully argued that when it comes to quarantine, vaccination or testing of citizens in this state, in order to prevent the spread of an infectious disease, that the legislature has delegated this authority to the Illinois Department of Health (“IDPH”), who then delegated it to the certified local health departments, via the Illinois Department of Public Health Act (“IDPHA”). They have further successfully argued the IDPHA provides due process of law for any citizen who the certified local health department desires to subject to quarantine, vaccination or testing.

The State Defendants have made several arguments as to why the Plaintiffs arguments have no likelihood of success on the merits, and based upon their arguments, for this Court to find Judge Grischow abused her discretion.

- 1) The Governor’s executive orders, presuming he has ever been delegated authority to issue executive orders regarding sweeping matters of public health under the Illinois Emergency Management Agency Act (“IEMAA”), supersede the IDPHA under Section (m) of the IDPHA.
- 2) The emergency rule of IDPH provides that masking and exclusion requirements do not constitute quarantine and as such it doesn’t apply. In addition, the

emergency rule was cloaking school districts with authority to force masks and exclusion.

- 3) The Illinois State Board of Education (“ISBE”) emergency rule provides that school personnel must submit to vaccination or testing.
- 4) The Governor has authority under the Illinois Constitution to issue executive orders on all of these matters.

Before addressing the JCAR ruling, it is worth noting the precarious part of the Governor’s independent authority argument, which he has never been called upon by the people of the state to answer, is that irrespective of his ability, or lack thereof, to promulgate an executive order, what is the lawful method of enforceability. A lawful method of enforceability is a separate question as to the executive’s ability to instill fear as a tool of compliance. Would it be enforced against the school districts? Would it be enforced against the citizens directly? None of these questions have ever been answered by any branch of government as up until recent either fear, or the otherwise kind nature of people to follow “rules”, has never required this question to be addressed. One of the Plaintiff’s averments to the trial court in regard to the Governor’s clear lack of authority to issue executive orders regarding such matters of public health is evidenced by the fact that no enforcement mechanism exists for him. If the legislature ever intended the Governor to have such broad sweeping power over matters of public health, he would have been provided a remedy. The point being made is that knowing that no such remedy exists, is why the Governor in his executive order directed IPDH and ISBE to issue emergency rules consistent with his policy directives outlined in the executive orders. These administrative agencies do have some enforcement mechanisms which can be used to seek compliance if in fact a lawful rule is

being violated. ¹Without any such rule, these executive orders over sweeping matters of public health against are citizens are merely hollow policy directives.

Much of the 18-page appeal submitted by the Attorney General is grounded upon the argument that the emergency rule promulgated by IDPH provided that masks were not a type of quarantine. It also provided that exclusion from school was not a type of quarantine. This Court is presently being asked to decide if Judge Grischow abused her discretion in finding the Plaintiffs had in fact raised a likelihood of success on the merits that the emergency rule was procedurally and substantively invalid. Given she found the emergency rule to be invalid, the long-standing provisions of the administrative code clearly lay out how masks, as a type of device intended to prevent the spread of a disease, as well as exclusion from school, are types of quarantines. ²Now that JCAR has refused to extend the IDPH emergency rule, which the State Defendants were relying upon as a crux argument in this appeal, the legislature has rendered it unnecessary for this Court to determine at this stage whether Judge Grischow abused her discretion in finding the Plaintiffs had raised a fair question that the IDPH rule was invalid. While the question of the legality of the actions by IDPH overall may in fact return to this Court on a final ruling in the future, that is a separate issue, but as it relates to this interlocutory appeal, the State Defendants can no longer rely upon the authority of an emergency rule that JCAR unanimously chose to suspend. The State Defendants are left with only one argument at this interlocutory stage, and that is did Judge Grischow abuse her discretion in finding the Plaintiffs have raised a

¹ The question being is the rule lawful. The Governor cannot grant new power to an administrative agency, for he can only direct them to utilize the power they have been given by the legislature.

² Given JCAR has suspended the rule, regardless of Judge Grischow's ruling, our courts now find themselves in the same posture as those judges who ruled in favor of students in Adams, Macoupin, Bond, Montgomery, Clinton and Effingham Counties. Masks and exclusion are clearly types of quarantine and the emergency rule, which Judge Grischow called evil, has been completely eliminated by our legislature.

fair question in regard to the Governor not having any authority under the Illinois Constitution, or the IEMAA, to independently promulgate and enforce quarantine, vaccination and testing of our citizens, without providing a shred of due process, to allegedly prevent the spread of an infectious disease.

It is also necessary to point out to this Court that the emergency rule of the Illinois State Board of Education (“ISBE”) which was also promulgated on September 17, 2021 has been allowed to expire and was not even attempted to be renewed by ISBE. As it relates to the educators in the 500007 case, the same arguments made herein as to the IDPH emergency rule apply there as well. In regard to vaccination or testing of our educators, the emergency rule of ISBE is no longer an argument the State Defendants can utilize.

Also, this Court is still left to consider the argument made by a couple of the school districts that they have inherent authority under the Illinois School Code to adopt masking policies, exclusion policies, as well as vaccination or testing policies. The JCAR decision does not directly vitiate those arguments.

CONCLUSION

As the parties all concur, this Court should review the trial court’s granting of the temporary restraining order at issue here for an abuse of discretion. An abuse of discretion will be found only where the court’s ruling is arbitrary, fanciful, unreasonable, or where or where no reasonable person would take the view adopted by the trial court. Abuse of discretion means clearly against logic; the question is not whether the appellate court agrees with the trial court, but whether the trial court acted arbitrarily, without employing conscientious judgment or whether, considering all the circumstances, the court acted unreasonably and ignored recognized principles of law, which resulted in substantial

prejudice.

The JCAR ruling has vitiated a significant part of the State Defendants argument. Should this Court listen to the JCAR audio, it was clear this legislative body was giving due respect and deference to Judge Grischow's ruling, and in fact committee members scolded the IDPH representative for continuing to pursue re-issuance of a rule which Judge Grischow had found to be invalid. This legislative committee showed the proper respect to our judiciary that the executive agency was not. As for this Court, the question for today is what is left for it to decide given the actions by JCAR. It is the position of the Plaintiffs that the only matter left to review is whether Judge Grischow abused her discretion when she found Plaintiffs have raised a likelihood of success in showing a fair question exists that the IDPHA applies in regard to matters of quarantine, vaccination or testing, and exclusion from school, and that neither the Governor under some inherent Constitutional authority, or under some delegated authority under the IEMAA can authorize quarantine, vaccination or testing, and exclusion from school and disregard the due process protections of Plaintiffs. Also, this Court is left to decide those same questions as it relates to any inherent authority of the school districts. As to both of these questions, the Plaintiffs argue Judge Grischow has not abused her discretion, her restraining order should be affirmed, and the matter sent back to proceed to a final ruling on the merits off all of the pending matters.

Plaintiffs-Appellees,

/s/ Lance C. Ziebell

/s/ Thomas G. DeVore

By: Their Attorneys

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CERTIFICATE OF SERVICE

I certify that on February 16, 2022, I electronically filed the foregoing Notice of Interlocutory Appeal with the Clerk of the Circuit Court for the Seventh Judicial Circuit, Sangamon County, by using the Odyssey eFileIL system.

I further certify that the other participants in this case, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system. As a courtesy, the other participants also will be served via e-mail.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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