

IN THE CIRCUIT COURT OF KANAWHA COUNTY

WEST VIRGINIA FEDERATION OF TEACHERS,
AFL-CIO and FRED A. ALBERT, its President, and
its members,
JERRY THROCKMORTON,
GREG GARBER, and
AMY HADEN,

Petitioners,

v.

Civil Action No. 21-C-56

WEST VIRGINIA DEPARTMENT OF EDUCATION,
and W. CLAYTON BURCH, in his official capacity as State
Superintendent of Schools;
WEST VIRGINIA BOARD OF EDUCATION,
KANAWHA COUNTY BOARD OF EDUCATION and
DR. TOM WILLIAMS, in his official capacity Kanawha
County Superintendent,

MEMORANDUM OF LAW IN SUPPORT OF
PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

I. Introduction

In conjunction with their verified COMPLAINT, Petitioners have filed PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION. This MEMORANDUM OF LAW is submitted in support of this MOTION.

II. Facts

Petitioners re-state the Factual Allegation contained in the Verified Complaint.

III. Standard for Issuing a Temporary Restraining Order and Preliminary Injunctive Relief

Rule 65(b) of the West Virginia Rules of Civil Procedure authorizes this Court to issue a temporary restraining order when (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required. In the present case, counsel for Petitioners certified that he has telephoned counsel for the West Virginia Department of Education and West Virginia Board of Education ("WVBOE"), Heather Hutchens, and counsel for the Kanawha Count Board of Education ("KCBOE"), Lindsey McIntosh, and has sent to them by email copies of the VERIFIED COMPLAINT OF THE WEST VIRGINIA FEDERATION OF TEACHERS, AFL-CIO, FRED A. ALBERT, ITS PRESIDENT, AND ITS MEMBERS JERRY THROCKMORTON, GREG GARBER, AND AMY HADEN SEEKING A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, A PERMANENT INJUNCTION, A RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT LIE AND DECLARATORY JUDGMENT.

A plaintiff seeking injunctive relief must establish the following four factors:

- (1) that he is likely to succeed on the merits;
- (2) that he is likely to suffer irreparable harm in the absence of preliminary relief;
- (3) that the balance of equities tips in his favor; and
- (4) that an injunction is in the public interest.

In *Michael T. v. Bowling*, 2016 WL 4870284 (S.D.W.Va. 2016), the United States District Court for the Southern District of West Virginia summarized the standards applied to a request for

a temporary restraining order or preliminary injunction:

“The Supreme Court established the standard for imposing a preliminary injunction in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 ... (2008).” *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013). “That case requires parties seeking preliminary injunctions to demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest.” *Id.* (citing *Winter*, 555 U.S. at 20). “[C]ourts considering whether to impose preliminary injunctions must separately consider each *Winter* factor,” *Id.* at 320, and “[a]ll four elements must be established by a ‘clear showing’ before the injunction will issue,” *Imagine Medispa, LLC v. Transformations, Inc.*, 999 F. Supp. 2d 862, 868 (S.D. W. Va. 2014) (quoting *Real Truth I*, 575 F.3d at 346). “The party seeking the injunction bears the burden of providing a sufficient factual basis” for issuance of an injunction “by offering some proof beyond the unverified allegations in the pleadings.” *Id.* at 868–69 (citations omitted). *See generally G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016) (“[A]dmissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context ...”); *Imagine Medispa*, 999 F. Supp. 2d at 869 (“[T]he weight to be accorded affidavit testimony is within the discretion of the court, and statements based on belief rather than personal knowledge may be discounted.” (citation omitted)). Preliminary injunctions involve “the exercise of very far-reaching power” and are “to be granted only sparingly and in limited circumstances.” *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)).

IV. Argument

Petitioners have satisfied all of the elements required for the issuance of a temporary restraining order and preliminary injunction. As more fully discussed herein, the facts set forth in the verified COMPLAINT clearly show that Petitioners have and will likely suffer immediate and irreparable injury, loss, or damage before Respondents can be heard in opposition.

Irreparable Harm to Petitioners

Petitioners have a constitutional right to a safe and secure school environment.

The West Virginia Constitution, Article XII, Section I, mandates that our children receive a “thorough and efficient system of free schools” and makes education a fundamental, constitutional right in the State of West Virginia. Syl. Pt. 3, Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). Of course, the “thorough and efficient” clauses require “a safe and secure school environment.” The West Virginia Supreme Court of Appeals has found:

Implicit within the West Virginia constitutional guarantee of “a thorough and efficient system of free schools” is the need for a safe and secure school environment. Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.

(emphasis supplied) Phillip Leon M., et al. v. Greenbrier Cnty. Bd. of Educ., 199 W. Va. 400, 484 S.E.2d 909 (1996). Clearly, Petitioners and all school personnel and students have a clear, legal right to a safe and secure school system.

The risk to Petitioners is adverse health consequences, severe illness or death. It is self-evident that in-person instruction requires prolonged indoor contact between students and school employees. In many instances (even with split classes), adequate social distancing can prove challenging, if not impossible, and possibly lead to greater spread of the virus. Thus, the spread of the virus will affect teachers, students and the community, all of which threatens to increase positivity rates, hospitalizations, stress on the health care system, and deaths. Simply put, education employees are exposed to dire health risks without full vaccination protection. Not only is the premature return to in-person instruction a threat to the physical well-being of the employees, it is also a source of stress and anxiety.

Petitioners’ pleadings have established that the school environment will be unsafe, thereby

depriving them of a constitutional right.

As a parallel to this procedure, in the Federal Court system, for the Petitioners to satisfy the irreparable harm standard, they need only show “that injury is certain, great, actual, and not theoretical.” *Harper v. Blagg*, (S.D.W. Va. 2014). The violation of a person’s constitutional rights, as Petitioners clearly have established in their verified COMPLAINT, meets this irreparable harm standard. In *Harry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir. 1960), the Fourth Circuit explained:

The District court is without discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right. *See Clemons v. Bd. of Educ.*, 288 F.2d 853, 847 (6th Cir.1956).

The same analysis applies herein. Petitioners have established that, given that we are currently experiencing the deadliest, most infectious period of the pandemic, the school environment will be unsafe, thereby depriving Petitioners of a constitutional right.

Likelihood of Harm to Respondents

There is no risk of harm to Respondents from the requested Temporary Restraining Order or preliminary injunction. Respondents, both on the State and county levels, have been operating safely for approximately ten months with remote and virtual instruction. Respondents will undoubtedly contend that it is better for students to be in a classroom setting – a fact no one disagrees with under normal circumstances. However, given the extraordinary pandemic in which the parties find themselves, and the concomitant risk of death or severe health consequences, such classroom instruction must be briefly delayed until full vaccinations are administered.

There have been mixed reports as to the danger of returning to school for students and

teachers. On January 12, 2021, a public health study in Montreal found that schools were a source of spread; that elementary school children are passing the virus to adults; that this leads to community transmission; and that “distance learning” is a safe option. “Schools are spreading COVID-19 in Montreal, new study finds.” Montreal Gazette, January 12, 2021. Thirty-eight (38) students or employees of the KCBOE have contracted the virus in just the past two weeks. On January 19, 2021, two positive cases and a case of exposure were identified at a Kanawha County high school. West Virginia University Law Professor Joshua Weishart observes that efforts by the WVBOE to open schools “at the deadliest, most infectious period in the pandemic yet” could risk “lives unnecessarily.” Professor Weishart astutely notes that the “principal disparities and deprivation” of school children in West Virginia are poverty and unfair school funding and returning to in-school teaching will not cure these educational injustices. He notes that COVID is now “widespread” in West Virginia, and that studies show that “community spread” is caused by in-person instruction when pre-existing case rates are high in a given county (and that community spread is less significant where counties have lower rates). He concludes that the threat to teachers while conditions are still unsafe risks the loss of quality teachers. “Commentary: Remote Learning Highlights Inequities in Public Education But a Premature Return to In-Person Learning Could be Worse,” Joshua Weishart, 100 days in appalachia.com., January 14, 2021.

Professor Weishart’s observations are particularly true given that: (1) at least one county is being permitted by the WVBOE to ignore its edict of in-class instruction; and (2) vaccinations will be completed and effective in a matter of weeks.

If Respondents are not enjoined from their proposed course of conduct, including prematurely opening schools to in-person instruction on January 19, 2021, Petitioners face irreparable harm in the form of unquantifiable physical and emotional injuries. The virus will continue to spread and

result in severe illness, long-term and unpredictable health complications, and, in some cases, death.

Likelihood of Success On the Merits

Petitioners have a substantial likelihood of success on the merits. The constitutional right to a safe school environment is well-established. Moreover, there is little to no threat to the thorough and efficient operation of the schools for several reasons. First, WVDOE has been offering – with great success – virtual learning to students for years. This would continue if an injunction were granted. Second, schools and their staff have received additional training to teach virtually during the pandemic. This would also continue. Third, the amount of time needed to vaccinate public education employees is very short – from two to three weeks.

The threatened injury to the lives of public school students, Petitioners, and Kanawha County residents outweighs any possible harm to Respondents. Respondents will still achieve their objectives through a very short extension of the virtual and on-line instruction until the vaccine process for school employees is complete.

Petitioners' injuries cannot be compensated adequately by damages or otherwise remedied at law. This is not an issue that can be cured with money. Lives – and the health and safety of our community – are at stake.

Balance of Equities Favor Petitioners

When weighing the parties' respective injuries and balancing the equities to determine whether a preliminary injunction should be issued, the court should consider: (1) the relative importance of the rights asserted and the act sought to be enjoined; (2) the preservation of the status quo; and (3) the balancing of damage and convenience generally. *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932).

As explained herein, Petitioners will suffer irreparable harm if forced to continue to provide instructional teaching prior to receiving a final vaccination; during a surge of the pandemic; and with a 50% more contagious strain already in the United States. Respondents will not suffer any harm as instruction will temporarily return to remote learning for a few weeks. This is particularly true as at least one county board of education - - without repercussion - - continues to provide remote instruction only. The balance of equities clearly favors Petitioners.

The Public Interest

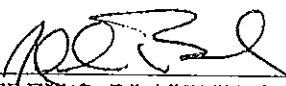
It is imperative that the public schools of this State operate in a safe manner. Petitioners propose a method to do that: allow education personnel to be fully vaccinated before mandating a return to in-class instruction. In the interim, remote and virtual instruction would continue until education personnel are fully vaccinated. By allowing most, if not all, education employees to be fully vaccinated, it will protect not only students and their families, but the community as a whole. In contrast, exposing teachers and others to the virus only harms the public – which is why KCBOE and other counties wished to wait for their employees to be vaccinated – until the WVBOE intervened in these traditionally local decisions.

It is axiomatic that when a constitutional right – such as the right to a safe and secure school – is protected, the public interest is upheld.

V. Conclusion

For all of the reasons stated in the verified COMPLAINT and in this MEMORANDUM, Petitioners respectfully submits they have satisfied each and every element required to obtain a temporary restraining order and preliminary injunction against the Respondents as more fully discussed herein.

WEST VIRGINIA FEDERATION OF TEACHERS
AFL-CIO, FRED A. ALBERT its President, and its
MEMBERS, et al;
By Counsel



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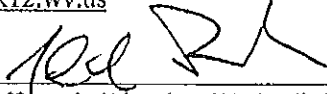
Respondents.

CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, do hereby certify that on January 20, 2021, a copy of the foregoing
MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR
TEMPORARY RESTRAINING ORDER were emailed to counsel for the West Virginia
Department of Education, Heather Hutchens, and Lindsey McIntosh, General Counsel for the
Kanawha County Board of Education, to the following:

Heather Hutchens, Counsel for
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