

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,

Respondents.

PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION


Petitioners respectfully move the Court, pursuant to Rule 65(b) of the West Virginia Rules of Civil Procedure, to issue a temporary restraining order followed by a preliminary and permanent injunction to enjoin Respondents from forcing the public education employees of Kanawha County Board of Education to return to work prior to receiving their second vaccination based upon the allegations in the verified COMPLAINT filed by Petitioners today. The actions of Respondents in this regard are an unconstitutional denial of Petitioners' right to a safe and secure school workplace. As alleged in the COMPLAINT, Petitioners are at substantial risk of suffering immediate and irreparable injury or loss before Respondents can be heard in opposition. In short, the action of

Respondents violates the Constitution of the State of West Virginia and prior rulings of the West Virginia Supreme Court of Appeals that hold that a thorough and effective education includes a safe and secure school environment. W. Va. Const. XII, Section §1; Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979); Phillip Leon M., et al. v. Greenbrier Cnty. Bd. of Educ., 199 W. Va. 400, 484 S.E.2d 909 (1996). Under the facts of this case, Respondents seek to force Petitioners to return to in-person instruction during a surge of the pandemic and prior to full vaccination even though full vaccination will occur in a matter of weeks.

Counsel for Petitioners certifies that he has provided notice by email and telephone of the COMPLAINT and this MOTION to counsel for the West Virginia Department of Education, Heather Hutchens, and Lindsey McIntosh, General Counsel for the Kanawha County Board of Education.

A proposed order is attached.

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



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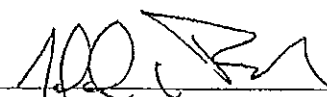
Respondents.

CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, do hereby certify that on January 20, 2021, a copy of the foregoing
PETITIONERS MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, AND PERMANENT INJUNCTION and the verified COMPLAINT 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
West Virginia Department of Education
West Virginia Board of Education
hhutchens@k12.wv.us

Lindsey McIntosh, General Counsel
for Kanawha County Board of Education
lmcintosh@mail.kan.k12.wv.us



Jeffrey G. Blaydes (SBID # 6473)

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Respondents.

TEMPORARY RESTRAINING ORDER

On January 19, 2021, Petitioners filed a verified COMPLAINT seeking declaratory and injunctive relief with respect to the action of Respondents forcing Petitioners to return to work for in-person instruction prior to receiving full vaccination which is scheduled to occur in a matter of weeks.

On the same day Petitioners filed their verified COMPLAINT, Petitioners also filed PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION, and MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION. On January 19, 2021,

Petitioners served a Notice of Hearing on this MOTION, to be held on _____, 2021 at _____ .m.

Having reviewed the verified COMPLAINT and MOTION, supporting exhibits, and memorandum of law, and having conducted a hearing on the MOTION on _____, 2021, the Court GRANTS a Temporary Restraining Order for the reasons stated below.

Findings of Fact

For the purpose of ruling on the MOTION, the Court accepts the allegations set forth in the verified COMPLAINT as true.

Standard of Review

Rule 65(b) of the West Virginia Rules of Civil Procedure authorizes this Court to issue a temporary restraining order when (1) facts set forth in a verified complaint “clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition” and (2) “the movant’s attorney certified in writing any efforts to give notice and the reasons why it should not be required.”

A party 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 *DirexIsrael, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)).

Conclusions of Law

1. For the reasons stated in Petitioners’ verified COMPLAINT, and as more fully discussed at the hearing, Petitioners established that they are likely to succeed on the merits of one or more of their claims.
2. For the reasons stated in Petitioners’ verified COMPLAINT, and as more fully discussed at the hearing, Petitioners established that they are likely to suffer immediate and irreparable injury or loss before the Court makes its final ruling on the request for permanent injunctive relief.
3. Petitioners established that the balance of equities tips in Petitioners’ favor.

Respondents have not established that they will be harmed if student instruction remains virtual or remote until all public employment employees, who choose to do so, receive their second dose of the vaccine. Petitioners will suffer substantial injury, including the violation of their constitutional rights, if they are required to return to in-person instruction until the second vaccine is provided.

4. Petitioners have established that an injunction is in the public interest. Providing a safe and secure education environment during the pandemic is paramount and in the interest of students, employees and the public. Issuing a temporary restraining order and injunction in this case helps to further the laudatory constitutional goal of protecting the health and safety of students, education personnel, and the community.

Based upon the foregoing findings and conclusions, the Court GRANTS the MOTION and the Court ORDERS as follows:

1. Respondents are temporarily restrained and enjoined from requiring in-person schooling until all professional and service personnel who elect to be vaccinated have, in fact, received a complete vaccine, which should occur on or before February 15, 2021.
2. This Order is binding on West Virginia Department of Education, West Virginia Board of Education, and Kanawha County Board of Education.
3. This Order shall remain in effect until _____, unless further extended by the Court.
4. The Court will hold a hearing on further relief in this matter on _____, 2021, at _____ .m. The parties agree to the following schedule of submission in advance of the hearing:

- A. By no later than _____, 2021, the parties shall submit a Statement of Stipulated Facts;
- B. By no later than _____, 2021, Plaintiff shall submit a memorandum of law in support of its motion for preliminary injunctive relief;
- C. By no later than _____, 2021, Defendants shall submit their memorandum in response to Plaintiff's memorandum; and
- D. By no later than _____, 2021, Plaintiff shall submit his reply memorandum.

The Clerk is ordered to forward copies of this Order to all counsel of record and any unrepresented parties.

Entered: _____,

Judge: _____