

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION**

LITTLE ROCK SCHOOL DISTRICT

PLAINTIFF

v.

CASE NO. 60CV-21-_____

STATE OF ARKANSAS and HON. ASA
HUTCHINSON, GOVERNOR, in his Official
Capacity

DEFENDANTS

COMPLAINT

For its Complaint, the Little Rock School District (“LRSD”) states:

Introduction

This case presents the question of whether there exists a rational basis for exposing public school students in Little Rock and throughout Arkansas to the very real threat of serious illness and death. Arkansans are living through a worsening Covid-19 pandemic. The strong consensus of medical and public health experts is that requiring the wearing of masks in schools will significantly reduce the risk of contracting that highly contagious and virulent disease. No rational reason exists for denying public school students, teachers and staff, and the school boards which are obligated to keep them safe, the ability to ensure that all who work and learn in our public schools are as safe as possible.

Parties

1. Plaintiff LRSD is a “body corporate” with the statutory authority to sue and be sued in its own name. Ark. Code Ann. § 6-13-102. LRSD is responsible for maintaining a safe learning environment for its students and a safe working environment for its teachers and staff.

2. Defendant Hon. Asa Hutchinson is the Governor of Arkansas. He signed Act 1002 of 2021 into law in April 2021. Governor Hutchinson is sued in his official capacity.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction pursuant to Ark. Code Ann § 16-111-102 and Ark. Code Ann. §16-111-103.

4. Venue lies in Pulaski County because the Plaintiff Little Rock School District has its principal office in Pulaski County pursuant to Ark. Code Ann. § 16-60-101 and because Plaintiffs bring their action against the State and a State officer pursuant to Ark. Code Ann. § 16-60-104.

Facts

5. Act 1002 of 2021 prohibits certain governmental entities, including school districts, from requiring the mandatory use of face masks without regard to the risk that students, teachers and staff will be exposed to a highly contagious and virulent disease. Arkansas Acts of 2021, No. 1002 (attached as Exhibit A). According to Act 1002, “[t]he use of a face mask, face shield, or other face covering shall not be a condition for entry, education, or services.”

6. Act 1002 of 2021 would prohibit LRSD from mandating the use of protective face masks even in classes such as chemistry, stagecraft, welding and shop, and in athletic activities such as football and baseball.

7. When the General Assembly passed Act 1002 in April of 2021, Covid-19 cases were on the decline. The seven-day average of new cases in April was below 200, down from a peak in January 2021 of over 3,000.

8. Due largely to the highly contagious and virulent Delta variant, Covid-19 cases in Arkansas and in the Little Rock School District are rising rapidly. The seven-day average of new cases in Arkansas on July 28, 2021 was over 1,600.

9. As of July 27, 2021, 1,025 Covid-19 patients were hospitalized in Arkansas, with 382 of those in intensive care, leaving only 39 ICU beds available statewide. The number of patients on ventilators was 205, up from 172 the day before. Twenty-four young patients were hospitalized in Arkansas Children's Hospital. All of these numbers are steadily increasing.

10. As of July 27, 2021, there were 2,052 new Covid-19 cases statewide within the last twenty-four hours. The number of new cases reported each day is steadily increasing. On July 29, the number of new cases was 2,843, the highest number since January 2021.

11. The University of Arkansas for Medical Sciences is experiencing a record number of hospitalized Covid-19 patients.

12. The State's top public health official, Health Secretary Jose Romero, announced on July 28, 2021 that he would seek money from the State's Coronavirus Relief Fund to expand hospital capacity. Dr. Romero's announcement came as the number of hospitalized Covid-19 patients exceeds 1,000 for the first time since January 2021 and continues to grow.

13. On July 27, 2021 the Arkansas Department of Education released its "2021-2022 COVID- 19 Guidance for Schools". That guidance includes the following:

Because children under the age of 12 cannot be vaccinated against COVID-19 at this time, *consistent and correct mask usage is recommended while indoors in all school settings with children under age 12*. In addition, consistent mask usage should be strongly considered in any classroom setting where the vaccination status of students of any age cannot be confirmed.

2021-2022 COVID-19 Guidance for Schools, p. 2. (emphasis added).

14. The ADE’s guidance also notes the conflict between Arkansas law and CDC recommendations: “Although masks or other face coverings can no longer be mandated in Arkansas public schools, as prohibited by Act 1002 of 2021, the CDC currently recommends the following regarding wearing of mask in school settings:

- **Indoors.** Mask use is recommended for people who are not fully vaccinated including students, teachers, and staff. Children under two years of age should not wear a mask.

Id.

15. The Center for Disease Control (CDC) recommended on July 27, 2021 that masks be worn by everyone in schools, whether vaccinated or unvaccinated, as protection against the transmission of Covid-19.

16. The Washington Post reported on July 29, 2021 that an internal CDC document states with respect to the alarming rise in Delta variant Covid-19 cases among both unvaccinated and vaccinated people that “[t]he war has changed” since Act 1002 was passed three months ago.

17. The CDC issued an Order on January 29, 2021 which requires that masks be worn on all public conveyances, including school buses.

18. The Arkansas Chapter of American Academy of Pediatrics (ARAAP) currently recommends “mandatory K-12 student and teacher masks” because “masks are the state’s best tool to prevent spread” of Covid-19.

19. On July 26, 2021, the Federal District Court for the Eastern District of Arkansas issued an order requiring that masks be worn throughout the federal courthouse.

20. In late July of 2021, circuit court judges in Pulaski County began to move back to “virtual only” proceedings.

21. On July 29, 2021 Governor Hutchinson declared a state of emergency due to the precipitous rise in Covid-19 cases.

22. On July 29, 2021, Governor Hutchinson announced that he will call the General Assembly into special session to address the risks that Act 1002 of 2021 poses for schools, and particularly younger students who are not eligible to be vaccinated saying: “This is necessary really for providing local school boards the ability to protect those most vulnerable young people twelve and under as they go to school.”

23. The first day of school for students in the Little Rock School District is August 16, 2021. Teachers and staff are already gathering in the schools to prepare for that day. Athletic teams are already practicing, and other extracurricular activities are also underway.

24. LRSD employs approximately 3,400 people, including about 1,900 teachers.

25. LRSD is responsible for the education of about 21,612 students at 47 schools. 22. LRSD contracts with a private company for the transportation to and from school for many of its students, but provides transportation directly for its special education students.

26. LRSD has a duty to keep its schools safe for its students. *See, e.g.* Ark. Code Ann. § 6-18-708 (“A school district must develop procedures concerning student physical activity to keep students safe from, among other things, ‘a communicable disease’”.); Ark. Code Ann. § 6-10-126 (“A superintendent may delay the start of school or close school early in emergency circumstances including a ‘contagious disease outbreak’”.); Ark. Code Ann. § 6-18-701 (“A school district board of directors may appoint a physician or nurse to conduct physical examinations of public school students ‘to detect contagious or infectious diseases’”.)

27. Arkansas has compulsory school attendance laws which require students to attend school. Ark. Code Ann. § 6-18-201. This includes, of course, students under the age of twelve for whom no Covid-19 vaccine is currently available.

28. While there exist highly effective vaccines against Covid-19, no vaccine is available for children under the age of twelve. As of July 29, Arkansas Children's Hospital had twenty-four young Covid-19 patients, and half of those were twelve or younger.

29. Within the Little Rock School District, the Pinnacle View football team has had to stop practice because of a Covid-19 infection and nine students had to be quarantined. On July 26, 2021, the Southwest High School volleyball team was on its way to a tournament in Russellville but had to turn its bus around and return to Little Rock instead of participating in the tournament because of a Covid-19 infection which resulted in 18 students being quarantined. LRSD is receiving daily reports of additional staff and student Covid-19 infections.

30. On July 26, 2021, LRSD Board of Directors unanimously passed a resolution declaring that, if not for Act 1002 of 2021, the LRSD would implement a mask mandate for the safety of its students, their families, their teachers, and the many other LRSD employees who risk being exposed to this deadly disease at school and at work. The resolution is attached as Exhibit B.

Count I – Arkansas Constitution Article 14, § 1

31. Act 1002 of 2021 violates Article 14, § 1 of the Arkansas Constitution which requires that “the State shall ever maintain a general suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”

32. Issues regarding the State’s compliance with Article 14, § 1 are justiciable, and are not “political questions”. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 51-56, 91 S.W.3d 472, 482-83 (2002).

33. The judiciary has a duty to ensure that the State meets its obligations under Article 14, § 1. *Cf. Id.* at 54 (“This court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a disservice to the people of the state. We refuse to close our eyes or turn a deaf ear to claims of dereliction of duty in the field of education.”).

34. The Arkansas Supreme Court “has said repeatedly that in construing the language of our constitution, we must give the language its plain, obvious, and common meaning. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 67, 91 S.W.3d 472, 492 (2002)(citations omitted).

35. In his concurrence in the 2002 *Lake View* decision, Justice Hannah noted that the Arkansas Supreme Court “has not specifically defined the terms ‘general, suitable, and efficient’”. *Lake View*, 351 Ark. at 102. He reviewed the case law concerning those terms (*Id.* at 102-04) and concluded that “[a]lthough the terms ‘General, suitable, and efficient’ might be more finitely defined, under the facts of this case, further definition is not necessary.” *Lake View*, 351 Ark. at 103.

36. In this case, as in *Lake View*, the “meaning of the words general, suitable and efficient that may be derived from our case law is more than sufficient to use in determining whether the constitutional mandate has been met by the General Assembly.” A general, suitable and efficient system of public education is not one which may be accessed only at great risk to the students and their teachers.

37. In two previous cases challenging the State’s compliance with the Education Article of the Arkansas Constitution, the Arkansas Supreme Court found it unnecessary to determine whether the right to a public education is fundamental, because there was clearly no rational basis for the state statutes which were challenged in those cases. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. at 71 (“Nevertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to raise the issue of whether a fundamental right is also implied.”); *DuPre v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 346, 651 S.W.2d 90 (1983)(“Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district.”). The same is true in this case. Requiring students to risk their health and that of their families to receive the education they are promised in the Arkansas Constitution cannot survive even rational basis review.

38. In *Lake View*, the Arkansas Supreme Court held that in the funding context, the State’s obligation to provide a general suitable and efficient system of free public schools required “adequacy” and “equity”. Where the safety and the lives of unvaccinated students are at risk, it should be clear that the State cannot provide a suitable or efficient system of public schools without attempting to mitigate those risks. **Cite**

39. Giving the language of our constitution “it’s plain, obvious, and common meaning,” a suitable and efficient system would not require students to risk their health and their lives to get the education promised to them in the Arkansas Constitution, especially when the State is required to “adopt all suitable means” to provide them “the advantages and opportunities of education.”

40. Act 1002 of 2021 unconstitutionally deprives LRSD students of their right to a “general, suitable and efficient system of free public schools.”

Count II – Equal Protection

41. The Arkansas Constitution contains an equal protection clause at Article 2, § 3 which reads as follows:

Equality before the law.

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.

42. Act 1002 makes irrational distinctions between similarly situated public entities in violation of the equal protection clause of the Arkansas Constitution.

43. For example, Act 1002 does not apply to a “state-owned or state-controlled healthcare facility”, but there is no exemption for other publicly owned or controlled healthcare facilities. This means that, for no rational reason, the University of Arkansas for Medical Sciences can require the wearing of masks, but the many county hospitals throughout the state cannot.

44. Act 1002 also exempts a “facility operated by the Department of Corrections”, but there is no exemption for other schools or detention facilities. This means that, for no rational reason, the Arkansas Correctional School District can require the wearing of masks, but LRSD and other public school districts throughout the state cannot. This also means that, for no rational reason, masks can be mandated at Arkansas state prisons but not at county detention facilities or local jails.

45. Act 1002 also exempts a “facility operated by the Division of Youth Services of the Department of Human Services”. This means that, for no rational reason, masks may be required

throughout the Division of Youth Services' education system, but they may not be required by LRSD or other Arkansas public school districts.

46. These irrational distinctions deprive LRSD and other Arkansas public school districts of "equality... before the law" in violation of Article 2, § 3 of the Arkansas Constitution.

Count III – Federal Preemption

47. LRSD, like most other Arkansas school districts, provides transportation to and from school for some of its students.

48. Section 361 of the Public Health Service Act, 42 U.S.C. § 264, authorizes the Secretary of Health and Human Services ("Secretary") to issue regulations necessary to prevent the foreign and interstate spread of communicable diseases.

49. The Secretary has delegated this authority to the Centers for Disease Control and Prevention (CDC) and the United States Food and Drug Administration (FDA).

50. Subsection (e) sets forth § 361's preemptive scope. It provides that § 361 preempts any state law that "conflicts with an exercise of federal authority under this section," but otherwise generally preserves state law.

51. On February 1, 2021 the Centers for Disease Control's issued an order pursuant to Section 361 of the Public Health Service Act, and 42 C.F.R. 70.2, 71.31(b) and 71.32(b) that requires passengers and drivers on school buses, including buses operated by public and private schools systems, to wear masks for the duration of travel. The CDC's order remains in effect.

52. 42 C.F.R. 70.2 authorizes the CDC to take such measures to prevent such spread of the diseases as deemed reasonably necessary when it determines that the measures taken by health authorities of any State or possession (including political subdivisions) are insufficient to prevent the spread of communicable diseases.

53. In contrast, Act 1002 explicitly provides that the LRSD “shall not mandate an individual in this state to use a face mask, face shield, or other face covering.”

54. Act 1002 further explicitly provides that “the use of a face mask, face shield, or other face covering shall not be a condition for entry, education, or services.”

55. Act 1002’s prohibition on LRSD requiring the use of masks is in direct conflict with the CDC’s February 1, 2021 order and is preempted by the CDC’s order pursuant to subsection (e) of 42 U.S.C. § 264.

Count IV – Separation of Powers

56. The General Assembly has unconstitutionally restricted the Governor’s power to address public health emergencies.

57. The Governor and other “officers of the executive department are not bound to execute a legislative act which, in their judgment, is repugnant to the Constitution.” *Little Rock & Fort Smith Ry. v. Worthen*, 46 Ark. 312, 325 (1885). This is because “[t]heir primary allegiance is due to the constitution; and if there be a conflict between the two, the constitution is the higher law, or, rather, the supposed is not a law at all, being null and void.” *Id.*

58. The General Assembly has unconstitutionally restricted the power of state court judges to manage proceedings in their courtrooms. Act 1002 of 2021 would preclude even the Arkansas Supreme Court from requiring that those employed by the Court, or the litigants who appear before the Court, wear masks.

59. Act 1002 of 2021 violates Article 4, § 1 of the Arkansas Constitution, which divides “[t]he powers of government of the State of Arkansas” into “three distinct departments, the legislative, the executive, and the judicial. Arkansas Constitution, Article 4, § 1.

60. In enacting Act 1002 of 2021, the legislature has usurped the powers allocated in the Arkansas Constitution to the executive and judicial branches.

Individual Liberty vs. Public Safety

61. The United States Supreme Court recognized 116 years ago that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905). In the middle of a smallpox epidemic, the Court struck the appropriate balance between individual liberty and the safety of the general public:

There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

62. The Court observed that there are “manifold restraints to which every person is necessarily subject for the common good.” *Id.* at 26. Organized society could not exist safely otherwise. *Id.* “Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.” *Id.* “Real liberty for all”, the Court found, could not exist under the principle that each individual person can do whatever he or she wants “regardless of the injury that may be done to others.” *Id.*

WHEREFORE, LRSD respectfully requests that the Court:

- (1) Issue a declaratory judgment that Act 1002 of 2021 violates Article 14, § 1 and Article 2, § 3 of the Arkansas Constitution;

- (2) Issue a declaratory judgment that, to the extent Act 1002 of 2021 would prohibit a requirement that masks be worn on school buses, it is preempted by the CDC order of January 29, 2021 requiring the wearing of masks on all public conveyances, including school buses;
- (3) Issue a declaratory judgment that Act 1002 of 2021 violates the separation of powers provision of the Arkansas Constitution found in Article 4, § 1;
- (4) Declare that Act 1002 of 2021 shall have no force or effect, and shall not be enforced by the State of Arkansas, during the pendency of this litigation;
- (5) Issue an injunction enjoining the enforcement of Act 1002 of 2021; and
- (6) Provide such other relief as the Court deems to be just and proper.

Dated: August __, 2021.

Respectfully submitted,

Christopher Heller (AR Bar No. 81083)
Khayyam M. Eddings (Ark. Bar No. 2002008)
FRIDAY, ELDREDGE & CLARK, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, AR 72201-3493
Telephone: (501) 370-1506
Email: Heller@fridayfirm.com
KEddings@fridayfirm.com

By: /s/ Christopher Heller
Christopher Heller
Attorneys for Plaintiff

NOTIFICATION TO DEFENDANTS

For the purpose of satisfying the notice requirement in Ark. R. Civ. P. 65, I certify that a file-marked copy of this Complaint will be mailed and hand-delivered to the following state officials at the following addresses immediately after filing:

Hon. Governor Asa Hutchinson
State Capitol Room 250
500 Woodlane Avenue
Little Rock, AR 72201

Attorney General Leslie Rutledge
323 Center Street, Suite 200
Little Rock, AR 72201

/s/ Christopher Heller

Christopher Heller