

1 **THE COURT:** The Court will take up the matter
2 of the Bentonville Schools, Civil 21-2181, and we
3 are here today simply for decision.

4 I've heard and studied the arguments of
5 Plaintiffs' and Defendants'. And --

6 **MR. PAYNE:** Your Honor --

7 **THE COURT:** Yes.

8 **MR. PAYNE:** Um, before you proceed, there was a
9 Motion, Post-Hearing Brief filed --

10 **THE COURT:** Uh-huh.

11 **MR. PAYNE:** -- unsolicited. I would just like to
12 represent the Defendants (unintelligible) I would
13 ask that be stricken

14 **THE COURT:** I'm not going to strike it. It just
15 simply reiterated authority, which I had asked for
16 in court, so I am going to allow it to stand. And, I
17 will tell you that I have read it and I've looked at
18 the authority cited in it.

19 **MR. PAYNE:** All right.

20 **THE COURT:** Okay. All right, sir. I guess I had
21 better put on the record, Mr. Payne and Mr. Story
22 you are here representing the Plaintiffs, correct?

23 **MR. STORY:** Yes, Your Honor.

24 **THE COURT:** And, Mr. Nye, here representing the
25 Defendants --

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MR. NEY: Yes, Your Honor.

THE COURT: -- in toto, all of them?

MR. NEY: Yes.

THE COURT: Okay. All right. So, the Plaintiffs claim a liberty interest in the care and custody of their children under the Arkansas Constitution. They absolutely have that constitutional interest, but it is not absolute. Everybody agrees with that. Under certain circumstances, for the welfare of their children, governmental entities can step in and usurp those rights. The usual circumstances, in which that happens, they are not applicable here, it's generally a finding of unfitness and that's certainly not a claim of any unfitness of these plaintiffs to provide for the care and custody of their children.

The parties admit that the plaintiffs have children in the Bentonville School District who are attending Bentonville Schools and who are being subjected to a masking policy against their will. The Plaintiffs' liberty interest, in the care and custody of their children, is being infringed upon by the school district, which is a governmental entity, a political subdivision. The question is, does the school district have the authority to

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impose that infringement? The Defendants claim that they have offered the Plaintiffs a way to exempt out of the policy; they can leave their schools. The Plaintiffs have made no claim that they've tried to do so.

The first question, the initial question, is whether or not the Plaintiffs are required to ask the district for permission to leave in order to have standing.

The Bentonville School District is obligated, just like all other public school districts in this state, to provide a free, efficient and adequate education for all the students in their district who choose to utilize it.

Defendants claim the Plaintiffs must either chose to accept an additional burden in order to have their children educated or they have to forego a constitutional right to raise their children. So, the education offered to these Plaintiffs here is not as free to them as it may be to others. The Court finds, based upon this, that the Plaintiffs have standing to proceed without applying for the offered exemptions.

The next issue is whether or not the school district Defendants have the authority to impose

1 this limitation on Plaintiffs' constitutional
2 rights. This limitation being, of course, the
3 masking requirement. If the Defendants have that
4 authority, the Plaintiffs have failed to show
5 irreparable harm, they have failed to show
6 likelihood of success on the merits. If the
7 Defendants do not have that authority, the
8 Plaintiffs have met their burden on both.

9 The Defendants argue, and the Court agrees,
10 that the Plaintiffs' liberty interest is not
11 absolute. The Defendant further argues that because
12 this school policy is reasonably related to public
13 health, it does not violate the constitution.

14 Governmental entities and political
15 subdivisions do not have inherent rights and powers;
16 people do. All the rights, powers and authority not
17 granted to governmental entities reside in the
18 people.

19 For this reason, the Court had asked the
20 Defendants for a list of authorities they relied
21 upon to impose the burden of masking on the entirety
22 of th student body in the district and the
23 Defendants have provided that list in court and with
24 the supplemental brief, as well as in their
25 pleadings. I've studied the list of cases, I've

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studied the statutory authority. Some of those cases the Court dealt directly with school districts, such as the *Blytheville School District* case where the Court determined that the parents don't get to choose which school within the district their children will attend.

The *Prince* case, from Massachusetts, involved, not the schools, but a state statute against child labor and allegations brought against a mother for violating that.

The *Davis versus Smith* case, which is an Arkansas case, dealt with an adoption and parents who had been declared, by the Court, to be unfit. Again, it wasn't a school case, but it certainly was government involvement and infringement upon these Plaintiffs' rights to raise their children. The Court there determined that the parents had that right to have the care and custody of their children, except when urgently necessary to provide their children with reasonable protection.

There's also a line of cases where school board policy, such as prohibiting wearing cosmetics and participation in secret clubs, has been upheld, much like the dress code authority that was argued by the Defendants that authority is granted to the schools

1 by state statute. This is Ark. Code Ann. §6-15-1005,
2 which requires the district to ensure the safety of
3 its students from weapons, drugs, gangs, etc.;
4 allows the district to impose a code of behavior, to
5 respect the rights of others and maintain a safe and
6 orderly environment; and to adopt a policy to
7 address disruptive students, a disciplinary policy.
8 Under subsection (a)(2) of that same state law, §6-
9 15-1005, the Defendants argue they are required to
10 meet state and federal requirements. That subsection
11 specifically applies to buildings. However, there is
12 not a state or federal masking requirement. So, I'm
13 not sure that that particular subsection is
14 applicable here.

15 Evidently, the Defendants are arguing that this
16 general authority is broad enough or should be
17 declared so, by the Court, to encompass a mandatory
18 masking against communicable diseases.

19 The Defendants further argue that since there
20 is no state law or no law prohibiting them from
21 masking the students, they can do it. I reject the
22 argument that authority exists in the absence of a
23 prohibition. I am not buying into that one.

24 These are the general duties that are set out
25 for the schools.

1 The Defendants had further quoted the American
2 Rescue Plan for authority to mask because the state
3 had accepted federal funds, under that plan, and the
4 strings attached to the acceptance of those funds
5 said the school must follow the CDC guidelines or
6 risk investigation by the federal government. And,
7 therefore, from that, they derived the authority to
8 mask the students. There's also the additional
9 argument that it's the school board's obligation to
10 oversee the district's finances under §6-13-620.
11 That same statute also obligates the district to do
12 all other things necessary and lawful for the
13 conduct of an efficient and free school.

14 I don't believe, however, that the school
15 district can rely on a deal made with another
16 governmental entity as authority to step on anyone's
17 constitutional rights. I don't think that's a
18 legitimate argument. I looked at the memo, from the
19 Arkansas Department of Health to the Arkansas
20 Department of Education, that was attached to the
21 pleadings supplied by the Defendants, wherein the
22 schools are urged to mitigate as possible. The
23 authority cited in that memo is for the Secretary of
24 Health, with the governor, "...to quarantine and
25 isolate people to control communicable disease and

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for the principal of each school to exclude from the school, any student, employee or faculty member affected with a communicable disease until they are free from that disease." The memo goes on to cite the *Jacobson* case, which, again, dealt with a state law that imposed a small pox vaccine requirement. We don't have a state statute here, we're not dealing with a state statute.

Moving on to specific authority regarding communicable diseases, the statute found at §20-7-109 gives statutory authority for the control of those diseases to the Arkansas Board of Health. That board promulgated rules and regulations as it was required to do. Those were approved by the legislature in 2019. From those rules, the Director of the Department of Health has the authority to impose such quarantine and restrictions and regulations upon commerce, common carriers and individuals to prohibit the introduction and spread of communicable diseases. Those rules also authorize and require schools to report three or more cases of any of the listed conditions to the Department of Health and to exclude any person affected with one of those communicable diseases from the school, again, until they are free of the disease.

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The Director or the Secretary of Health does not, at this time, have any restriction in place requiring the masking of students.

Arkansas Code Annotated §12-75-101, and those following sections, set out the governor's emergency powers, which he has exercised in the past, in consultation with the Secretary of Health, to impose masking requirements on the citizens of this state engaged in various activities delineated in that Executive Order. The governor has no Executive Order in place requiring the masking of students in this state. Even in light of the injunction that has stopped the enforcement of the state law prohibiting mask mandates.

The specific authority -- the specific statutory authority for the Defendants in this case to deal with communicable diseases is found in A.C.A. §6-18-708. That authorizes school districts to develop procedures in athletics and physical education to recognize and manage events and conditions encountered therein. There is an entire list of those, but one of them is communicable diseases. The Defendants did adopt a policy to deal with masking during P.E. and during athletics and that policy removed any requirement for masking

1 during those activities. Even though the Department
2 of Education referred the schools to the Department
3 of Health because these are higher risk activities
4 than those associated with the classroom attendance.
5 Additional authority for the schools to act is found
6 at §6-10-126 and §6-18-701 which allows the district
7 to delay start or release early for communicable
8 diseases and to hire a doctor and nurse to detect
9 the disease.

10 In conclusion, I don't find any statutory
11 authority for the Defendants to mask healthy
12 students. Their specific authority, with regard to
13 communicable diseases, is, "... to exclude the sick
14 until they are healthy again. To develop a policy to
15 recognize and manage communicable disease during
16 athletics and P.E., which they did adopt a policy
17 excluding those activities from the masking
18 requirements. To delay the start of school or
19 release school early and to report three or more
20 cases to the Department of Health." Other than that,
21 the authority and obligation to deal with
22 communicable diseases resides with the Arkansas
23 Department of Health.

24 This Court is not willing to expand the meaning
25 of providing a general, suitable, efficient system

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of free public school, to allow a school board to mask healthy students over the objection of their parents exercising their constitutional rights to raise their children.

The general authority of schools is to do all things necessary and lawful to conduct an efficient free school.

Further, the Court is not willing to read the general language in A.C.A. §6-15-1005 authorizing schools to impose a code of behavior to respect the rights of others and maintain a safe and orderly environment to extend to the point of infringing on the constitutional rights of one group of students, especially in light of the specific and limited authority of the schools to act in instances of communicable diseases.

Likewise, this Court does not accept the premise that because the district accepted federal money in exchange for their agreement to mask their students, they now have the authority to infringe on the Plaintiffs' constitutional rights to avoid a potential investigation in the future, based upon CDC guidelines.

The only apparent authority for masking citizens, over their objections, appears to be,

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perhaps, with the governor and the Secretary of Health, neither of whom has chosen to exercise that authority even after the injunction was imposed on the state's law prohibiting masking mandates.

The Court finds the district policy violates the Plaintiffs' constitutional rights and was enacted without proper authority and is enjoined.

Mr. Payne will draw the Order, please.

MR. PAYNE: Yes, Your Honor.

THE COURT: All right, court is in recess.