VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ALEXANDRIA CITY SCHOOL BOARD,
et al.,

Plaintiffs/Counter-Defendants

v.

CASE NO. CL22000224-00; -01

GLENN A. YOUNGKIN, Governor of Virginia,

Defendant/Counter-Plaintiff

MEMORANDUM OPINION

This matter came before the Court on cross motions for injunctive relief filed by seven school boards, Alexandria City, Arlington County, Fairfax County, Falls Church City, Hampton City, Prince William County and Richmond City ("School Boards"), and the Governor of Virginia, Glenn A. Youngkin ("the Governor").

The School Boards' Verified Complaint seeks declaratory and injunctive relief, specifically, asking the Court to find that Governor Youngkin's Executive Order Number 2 ("EO2") violates the Constitution of Virginia and S.B. 1303 (2021 Acts of Assembly, Ch. 456) ("SB1303") and that the Governor lacked authority to issue certain provisions of EO2. Within this Complaint, the School Boards also seek, preliminarily and permanently, to enjoin the Governor from taking any action to enforce EO2 against them.

The Governor Counterclaims that since the issuance of EO2, the School Boards have not followed its directive and have not followed the statutory directives of SB 1303 and ask the Court for declaratory relief to so find.

Both parties filed Motions for temporary injunctive relief as sought in their Complaints. The matter was briefed and, on February 2, 2022, argued to the Court. The matter was taken

under advisement to further review all arguments and law submitted. The Court is prepared to rule.

I. Statement of the Case

On January 15, 2022, the Governor issued EO2 which directs the following:

> Therefore, by virtue of the authority vested in me as Governor by Article V of the Constitution of Virginia, by § 44-146.17 of the *Code of Virginia*, by other applicable law, and by virtue of the authority vested in the State Health Commissioner pursuant to §§ 32.1-13, 32.1-20, and 35.1-10 of the *Code of Virginia,* Executive Order Number Seventy-Nine (2021) is rescinded and the following is ordered:
>
> 1. The State Health Commissioner shall terminate Order of Public Health Emergency Order Ten (2021).
>
> 2. The parents of any child enrolled in an elementary or secondary school based early childcare and educational program may elect for their children not to be subject to any mask mandate in effect at the child's school or educational program.
>
> 3. No parent electing that a mask mandate should not apply to his or her child shall be required to provide a reason or make any certification concerning their child's health or education.
>
> 4. A child whose parent has elected that he or she is not subject to a mask mandate should not be required to wear a mask under any policy implemented by a teacher, school, school district, the Department of Education, or any other state authority.
>
> 5. The Superintendent of Public Instruction shall rescind the Interim Guidance for COVID-19 Prevention in Virginia PreK-12 Schools, issued January 14, 2021, and updated October 14, 2021, and issue new guidance for COVID-19 Prevention consistent with this Order
>
> 6. School districts should marshal any resources available to improve inspection, testing, maintenance, repair, replacement and upgrades of equipment to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating ventilation, and air conditioning systems, filtering, purification, fans, control systems and window and door repair.

The Governor ordered that EO2 would become effective on January 24, 2022. On January 24, 2022, the School Boards filed their Complaint along with a Notice and Request for

an Emergency Hearing to issue a temporary restraining order. In their requests the School Boards observe that EO2 conflicts with their policy requiring all children, staff and any visitors to a school to wear a mask. They assert that if EO2 is enforced, the universal masking policy is undermined and ineffective. Without a decision of a court, the School Boards assert that they would be unable to enforce the universal masking policy they have adopted. On January 28, 2022, the Governor filed his Counterclaim and Motion for Temporary Injunction asserting that the School Boards are not allowing parents to choose whether to send their children to school without a mask, in accordance with EO2, and he wants to enforce EO2's directives. The Court ordered that the matter be set for hearing on the requests for issuance of a temporary restraining order and injunctive relief.

II. Legal Standard, Virginia's Temporary Injunction Test

A temporary injunction under Virginia law, like a federal preliminary injunction, is an extraordinary remedy. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61, 662 S.E.2d 44, 53 (2008). This form of preliminary relief "allows a court to preserve the status quo between the parties while litigation is ongoing." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18, 822 S.E.2d 358, 367 (2019). Although the *Code of Virginia* provides that "[n]o temporary injunction shall be awarded unless the court shall be satisfied of [a party's] equity," *Va. Code* § 8.01-628, the Virginia General Assembly and Virginia appellate courts have not yet provided any additional guidance regarding how Virginia circuit courts should evaluate motions for temporary injunctions.

Most courts have routinely relied on the federal standard for preliminary injunction set out in *Winter v. Natural Resources Defense Counsel.* 555 U.S. 7, 20 (2008) to inform that exercise of discretion. *See e.g. Dillon v. Northam,* 105 Va. Cir. 402, 408-09 (Va. Beach 2020);

Wing, LLC v. Capitol Leather, LLC, 88 Va. Cir. 83, 89 (Fairfax Cnty. 2014). Under *Winter* the requesting party must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 555 U.S. at 20.

A. Likelihood of success on the merits.

The Governor argues that in an emergency, under the Virginia Emergency Services and Disaster Law of 2000 ("VESDL") he is empowered to issue executive orders addressing the state of emergency and, "In general, the Governor's emergency powers are very broad and only limited by his judgment pursuant to § 44.1-146.17...." *Schilling v. Northam*, 105 Va. Cir. 343, 347 (Albemarle Cnty. 2020). Indeed, this grant of "broad emergency powers" and the commitment of "the exercise of those powers to the Governor's judgment" reflects "a legislative determination that the Governor must be able to respond immediately and effectively to emergency situations." *Va. Mfrs. Ass'n v. Northam*, 74 Va. App. 1, 14 (2021). The Governor points to at least half a dozen executive orders issued by his predecessor, restricting movement, school attendance, religious services, business closures and more which were upheld by Circuit Courts and the Court of Appeals during the pandemic with few exceptions.[1] There appears to be no quarrel with the conclusion that there is an existing emergency and that EO2 was issued in the midst of this emergency and under the VEDSL's authority, and the Court can so conclude.

Accepting that EO2 was issued during an emergency, the Court moves to whether the language and effect of the order is legally valid. Article VIII, § 7 of the Virginia Constitution,

[1] *See e.g., Lynchburg Range & Training, LLC v. Northam*, 105 Va. Cir. 159 (Cty. Lynchburg 2020) found that the governor's emergency order conflicted with the limitations protecting a right to bear arms imposed by the General Assembly within the VEDSL itself.

places supervision of the public schools in the hands of the Commonwealth's local school boards. Stated in its entirety, Article VIII, § 7 states, "The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law." Even with this broad statement, everyone agrees that school boards in Virginia are not independent sovereigns whose authority is neither unfettered nor unbounded. Indeed, as was pointed out in oral argument, Title 22 of the *Code of Virginia* is dedicated to the General Assembly's enactments binding, regulating and guiding Virginia's school boards. This is so because, under the Virginia Constitution Article VIII, § 1, "The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained." It stands to reason, therefore, that the General Assembly would have a strong hand in regulating and issuing legislation affecting education in the Commonwealth.[2]

It is also fair to understand, however, that abundant caselaw has developed in Virginia deferring to the judgment and decisions of local school boards regarding the safety and welfare of its students and generally acknowledging local school board authority to supervise its schools. (*See e.g., Commonwealth v. Doe,* 278 Va. 223 (2009); *Bradley v. Sch. Bd. Of City of Richmond,* 462 F.2d 1058 (4th Cir. 1972); *Hanover Cty. Unity of NAACP v. Hanover Cty.*, No. 3:19 Civ. 599, 2019 WL 558227 (E.D. Va. Oct. 29, 2019); *Fairfax Cty. Sch. Bd. V. S.C. by Cole*, 297 Va. 363 (2019)).

[2] Moreover, it is clear in the Constitution of Virginia that entities other than school boards have authority over the education of children in the Commonwealth, including the Board of Education (Art. VIII, §§ 4 and 5) and the Superintendent of Public Instruction (Art. VIII, § 6).

Importantly, just last year amidst COVID-related school closures, the General Assembly passed SB 1303 to create a structure in which learning could resume in person. The language of SB 1303 speaks to that goal:

> § 2. Each school board shall offer in-person instruction to each student enrolled in the local school division in a public elementary and secondary school for at least the minimum number of required instructional hours and to each student enrolled in the local school division in a public school-based early childhood care and education program for the entirety of the instructional time provided pursuant to such program. For the purposes of this act, each school board shall (i) adopt, implement, and, when appropriate, update specific parameters for the provision of in-person instruction and (ii) provide such in-person instruction in a manner in which it adheres, to the maximum extent practicable, to any currently applicable mitigation strategies for early childhood care and education programs and elementary and secondary schools to reduce the transmission of COVID-19 that have been provided by the federal Centers for Disease Control and Prevention.

The School Boards complain that EO2 undermines the clear authority vested in them by the General Assembly in SB 1303 to implement a re-opening plan consistent with the information provided by the Centers for Disease Control and Prevention ("CDC"). Specifically, the School Boards argue that the CDC's guidance for in-person learning in schools recommends "universal masking" – that is, that everyone in the school setting must wear a mask at all times. The School Boards explain that they adopted the CDC recommendations and determined that a mask requirement for everyone was feasible and indeed practicable and has been implemented. EO2 essentially removes the universality of masking by allowing parents to decide whether wearing a mask is in their child's best interest.

The School Boards urge the Court to conclude that the language of EO2 is not really designed to "impede the transmission of COVID," does not address the emergency at hand and therefore is not properly enacted under the VEDSL. The Court declines to do so for several reasons. First, the Governor has argued in his pleadings with the Court that deference to parents regarding mask wearing is a *revision* to the universal masking requirement of his predecessor in

prior Executive Order Number 79 (repealed by EO2) and addresses COVID transmission, albeit in a different way. Again, without deciding whether selective masking by individuals within a school setting is better or worse that universal masking requirements, it is clear that the Governor views the costs associated with universal masking as greater than the benefits that policy may convey and endeavors to achieve a different approach to COVID transmission in the school setting. To take on the *validity* of the Governor's policy would require more than a difference of opinion at this stage and the Court has taken no evidence on these issues.

Second, and most importantly, the efficacy of the Governor's school mask policy contained in EO2 does not bear upon whether he has the authority to issue it. The single issue before the Court is whether the Governor, via his emergency powers, can override the decision of local school boards delegated to them under SB 1303. On this pivotal point, the Court concludes that the Governor cannot.

Understanding that both the Governor's emergency powers under the VEDSL and the School Boards' authority under SB 1303 were granted by the General Assembly, this decision rests upon traditional statutory construction analysis. The Governor's order, in an emergency, has the force of law, thus the Court evaluates both SB 1303 and EO2 on equal footing. "Courts are required to apply the plain language of a statute when possible and may not rewrite it." *Parker v. Warren*, 273 Va. 20, 23 (2007) (citing *Halifax Corp. v. Wachovia Bank,* 268 Va. 641, 653 (2004)).

The language of SB 1303 is express and clearly states that the General Assembly delegated certain policy determinations regarding practicability of CDC COVID mitigation protocols to the local school boards across Virginia. In the Court's view there is no ambiguity. It is also clear that SB 1303 is *specific* to the circumstances presented during a pandemic to

address the need to reopen schools to in-person learning. The observation that a governor's order under the VEDSL has the force of law does not, in and of itself, *require* the Court to conclude that EO2 supplants the General Assembly's grant of authority to the local school boards. In furtherance of the General Assembly intentions, SB 1303 also states that "each school board" should determine whether any "update[s]" to such protocols are appropriate. The entirety of SB 1303 directs action by local school boards or The Department of Education.[3]

While the General Assembly has granted to the Governor significant and sweeping general powers to address an emergency, when confronted with a specific statute addressing the manner in which in-person learning can resume *and* directs local school boards to follow the guidance of the CDC, "to the maximum extent practicable", it does not follow that the Governor, even in an emergency, can direct the School Boards to ignore the General Assembly's deference to CDC guidance and to abandon their considered determination about what is practicable regarding those mitigation strategies. EO2, in other words, goes to the crux of the subject matter and judgment specifically delegated to the local school boards as well as the guideposts erected by the General Assembly, that is, to follow CDC COVID mitigation recommendations for schools.

The Court concludes that the School Boards will likely succeed on the merits of their claim that EO2 is contrary to the clear language of SB 1303.

B. Irreparable harm.

The School Boards stress certain negative and inevitable health outcomes from a denial of a temporary restraining order, but again, the Court need not base its decision on those

[3] 1. §4. The Department of Education shall establish benchmarks for successful virtual learning and guidelines for providing interventions to students who fail to meet such benchmarks and for transitioning such student back to in-person instruction. *S.B. 1303. (2021).*

allegations.[4] Irreparable harm can arise in a number of ways and in this instance the Court concludes that upending a policy that has been in place since the beginning of the school year and understanding that reliance on a universal mask policy would be undone by a rule allowing parents to choose whether to mask their children, would create irreparable harm in these school communities.

C. Balance of equities.

For similar reasons, the Court finds that the balance of equities tips in favor of the *status quo ante*. Keeping rules in place that have been established over the school year helps children, families and staff understand how they may be impacted during the pandemic. Without a restraining order, children and staff would have to reassess certain health conditions they believe are impacted by a mask policy (any mask policy), having relied upon a universal mask mandate implement by the School Boards. During the time the case is pending there appears to be a benefit to keeping the current policies in place. Additionally, because there is a sunset provision in SB 1303 of August 1, 2022, on balance, keeping the approach contemplated by the General Assembly in place again tips in favor of the School Boards.

D. In the public interest.

The public's interest in consistency and reasonable expectations is essentially the same as those of children, parents, and employees of a school; indeed, one could conclude that this is the public this decision addresses. To the extent that the greater public would be affected by a

[4] It is the Court's view that evidence regarding mask efficacy and appropriate mask policy is evolving and debated. In fact, EO2 is evidence that reasonable minds can differ on the utility of masks, the costs of wearing masks, and the benefits of masking. As well, studies are ongoing about mandatory mask policies and debated widely around the country. The Court has taken no evidence in this case and could not conclude that either the School Boards' adoption of CDC guidance regarding universal masking or the Governor's approach to allow parents to decide, is the appropriate policy. Consequently, finding irreparable harm on the basis of either position is not possible based on the record before the Court.

change in policy, the Court concludes that consistency, during the pendency of a court case, benefits the public interest.

Having addressed all aspects of whether a temporary restraining order should issue, the Court concludes that the School Boards' Motion for a Temporary Restraining Order with regard to optional masking of children should be granted, and the Court will issue an appropriate order, effective immediately. Plaintiffs' counsel will circulate and submit an order directly to Judges Chambers for entry.

With express appreciation to counsel for their thorough briefing, their cooperation with the Court and one another and special thanks to Mr. Cafferky and Mr. Popps for their indulgence and patience with the Court's questions; their candor and clarity have immeasurably assisted the Court in these determinations.

Dated: February 4, 2022.

Louise M. DiMatteo
Judge