

FILED
10-20-2021
Clerk of Circuit Court
Brown County, WI
2021CV001166
Honorable Tammy Jo
Hock
Branch 3

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STEPHANIE MCMANUS, on behalf of
R.M. and M.M.,
Plaintiff,

vs.

UNIFIED SCHOOL DISTRICT OF DE PERE,
BOARD OF EDUCATION OF THE UNIFIED
SCHOOL DISTRICT OF DE PERE, and
BENJAMIN VILLARRUEL, in his official capacity,
Defendants.

MOTION FOR TEMPORARY INJUNCTIVE RELIEF

Plaintiff, Stephanie McManus, on behalf of her minor children R.M. and M.M., by undersigned counsel, file this Motion for Temporary Injunctive Relief pursuant to Wis. Stat. §813.02:

INTRODUCTION

This case concerns certain actions taken and policies enacted by the above-named Defendants. Specifically, Defendants have enacted a policy entitled, “USDD COVID-19 Exposure Protocols.” As explained below, this policy was created, implemented, and enforced without the requisite statutory or constitutional authority. Unless Defendants are enjoined from enforcing this unauthorized policy, Plaintiff will continue to suffer great and irreparable harm.

BACKGROUND

USDD’s Exposure Protocols

In August 2021, the Unified School District of De Pere (“USDD”) enacted a policy entitled “USDD COVID-19 Exposure Protocols.” McManus Aff. ¶6. Pursuant to those Protocols, which were in place as of the date of filing this Motion, fully vaccinated students who have had known or possible exposure to a COVID-19 positive individual do not have to quarantine. Meanwhile, for non-vaccinated students who have had known or possible exposure to a COVID-19 positive individual, those students must stay home and begin to quarantine from the last known contact even if those students have tested negative and do not exhibit symptoms.

For non-vaccinated students, the quarantine’s duration is ten days from the student’s last known contact with the COVID-19 positive individual if that student does not exhibit symptoms and has not received testing. For non-vaccinated students, the quarantine’s duration is seven days the student’s last known contact with the COVID-19 positive individual if that student does not exhibit symptoms and has received a negative Polymerase Chain Reaction (“PCR”) test. Students are able to return to school when their isolation times are complete, and those students are fever free and any symptoms that they did have are improving.

USDD’s COVID-19 Exposure Protocols were not promulgated pursuant to any statute, regulation, or other similar statutory schemes. Rather, USDD’s enactment of its COVID-19 Exposure Protocols was an impermissible overstep of the authority granted to Public Instruction institutions in Wis. Stats. §§ 115-121.

USDD’s Exposure Protocols in Action

Plaintiff Stephanie McManus is the parent of two high-school-aged daughters, R.M. and M.M., who attend De Pere High School. McManus Aff. ¶¶1,2. Plaintiff is

employed as a substitute teacher for De Pere High School, a school within the Unified School District of De Pere. McManus Aff. ¶3. Throughout the 2020-2021 school year, USDD taped QR codes to each school desk in order to trace contact and did not allow those desks to be moved. McManus Aff. ¶5. USDD does not utilize any such tracing tools in order to trace contact this year. McManus Aff. ¶5.

Plaintiff's sophomore-aged daughter, R.M., pursuant to the USDD COVID-19 Exposure Protocols, was quarantined on September 27, 2021, due to a potential exposure on September 23, 2021. McManus Aff. ¶8. R.M. was tested on September 29, 2021 and received a negative test result on September 30, 2021. McManus Aff. ¶9. Pursuant to the USDD COVID-19 Exposure Protocols, R.M. was forced to remain in quarantine until October 1, 2021. McManus Aff. ¶10. Had R.M. not been tested, she would have remained in quarantine until October 4, 2021. McManus Aff. ¶11.

On October 11, 2021, Plaintiff received a letter from Nick Joseph, the principal of De Pere High School, and Defendant Villarruel. McManus Aff. ¶12. The letter stated that, on October 6, 2021, Plaintiff's eldest daughter, M.M., a junior in high school, was thought to have had close contact with a student who tested positive for COVID-19. McManus Aff. ¶14. She did not exhibit any symptoms. McManus Aff. ¶14. With a negative test result, the earliest that M.M. could return to school would have been October 14, 2021. McManus Aff. ¶16. Without a negative test result, M.M. could not return to school until October 17, 2021, for sporting activities and October 18, 2021, for school. McManus Aff. ¶17.

As of the filing of this Complaint, USDD does not accept negative test results from the so-called "rapid test." McManus Aff. ¶18. Rather, USDD only accepts test results from a PCR test. McManus Aff. ¶19. Unless USDD is enjoined from

implementing and enforcing its unauthorized quarantine policy, Plaintiff will continue to suffer great and irreparable harm.

ARGUMENT

“A court may issue a temporary injunction when the moving party demonstrates four elements: 1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; 2) the movant has no other adequate remedy at law; 3) a temporary injunction is necessary to preserve the status quo; and 4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 659, 883 N.W.2d 154, 161.

A. Plaintiff has a reasonable probability of success on the merits.

For the reasons specified below, Plaintiff has a very high probability of success on the merits of this case. Defendants have no statutory, regulatory, or constitutional authority to enact a policy like their USDD COVID-19 Exposure Protocols policy. Therefore, a temporary injunction is appropriate in this case.

The Wisconsin Constitution

The Wisconsin Constitution provides that Wisconsin is a “home rule” state, meaning that cities and villages may determine their own local affairs and government, subject only to the Constitution and to statewide concerns. Wis. Const. art. XI, § 3. As such, measures taken to prevent, suppress, and control communicable diseases, such as quarantine and isolation orders, are largely left to local public health departments. Wis. Stat. § 252.03. However, the Wisconsin Constitution does not authorize school districts to quarantine students who do not appear to have a communicable disease.

The Department of Health Services

The Wisconsin Legislature has also delegated certain powers to certain departments and individuals when it comes to public health issues. Specifically, the Wisconsin Legislature created a Department of Health Services (“DHS”). Wis. Stat. § 15.19. As a result of that creation, the Wisconsin Legislature has delegated powers and duties to DHS, the local health officers acting on behalf of DHS, and local health departments to prevent and suppress diseases. Wis. Stats. §§ 250.04(1), 250.03(1).

DHS and local health officers also have the power to require the isolation of an infected person and quarantine of his or her contacts. Wis. Stat. § 252.06(1). In addition, the public health authority may, in addressing a public health emergency, isolate or quarantine an individual who is unable or unwilling to receive a vaccination for religious, medical, or conscientious reasons. Wis. Stat. § 252.041(1)(b).

Pursuant to the authority granted to DHS under Wis. Stats. §§ 252 and 254, DHS promulgated its own Administrative Code, DHS Chapter 145, “Control of Communicable Diseases.” DHS Chapter 145’s purpose is to control the incidence and spread of communicable diseases. DHS § 145.02. DHS also has promulgated general statements of power to control certain communicable diseases such as COVID-19. DHS § 145.06. Specifically, DHS has the power to deem certain individuals as having a contagious medical condition which poses a threat to others if that person has been medically diagnosed to have that communicable disease and exhibits one of the various behaviors listed.¹

¹ (a) A behavior which has been demonstrated epidemiologically to transmit the disease to others or which evidences a careless disregard for the transmission of the disease to others.

(b) Past behavior that evidences a substantial likelihood that the person will transmit the disease to others or statements of the person that are credible indicators of the person's intent to transmit the disease to others.

DHS may also deem an individual as being suspected of harboring a contagious medical condition which poses a threat to others if that person exhibits any of the factors listed in footnote 1, and, in addition, demonstrates any of the following without medical evidence which refute it:

- (a) Has been linked epidemiologically to exposure to a known case of communicable disease.
- (b) Has clinical laboratory findings indicative of a communicable disease.
- (c) Exhibits symptoms that are medically consistent with the presence of a communicable disease.

DHS § 145.06(3)

A DHS official, when he or she comes to know or suspects that an individual has a contagious medical condition that poses a threat to others, may, among other things, direct that individual to reside part-time or full-time in an isolated or segregated setting. DHS § 145.06(4). DHS has likewise authorized teachers, principals, directors, and nurses serving a school to send home, for the purpose of diagnosis and treatment, any student suspected of having a communicable disease or of having any other disease or

(c) Refusal to complete a medically directed regimen of examination and treatment necessary to render the disease noncontagious.

(d) A demonstrated inability to complete a medically directed regimen of examination and treatment necessary to render the disease noncontagious, as evidenced by any of the following:

1. A diminished capacity by reason of use of mood-altering chemicals, including alcohol.
2. A diagnosis as having significantly below average intellectual functioning.
3. An organic disorder of the brain or a psychiatric disorder of thought, mood, perception, orientation or memory.
4. Being a minor, or having a guardian appointed under ch. 54, Stats., following documentation by a court that the person is incompetent.

(e) Misrepresentation by the person of substantial facts regarding the person's medical history or behavior, which can be demonstrated epidemiologically to increase the threat of transmission of disease.

(f) Any other willful act or pattern of acts or omission or course of conduct by the person which can be demonstrated epidemiologically to increase the threat of transmission of disease to others.

DHS § 145.06(2)(a)-(f)

condition having the potential to affect the health of other students and staff. DHS § 145.07. As such, teachers, principals, directors, and nurses serving a school district are not authorized to quarantine students who do not appear to have a communicable disease. Because Defendants have no authority to promulgate or enforce its USDD COVID-19 Exposure Protocols policy, Plaintiff has a high probability of success on the merits of her Complaint.

B. Plaintiff is likely to suffer irreparable harm if a temporary injunction is not issued.

Plaintiff will surely suffer “irreparable harm absent the temporary injunction.” *Pure Milk Prods. Coop. v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (Wis. 1979). A party “suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain.” *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citations omitted). Indeed, “[i]rreparable harm is that which is not adequately compensable in damages.” *Allen v. Wisconsin Pub. Serv. Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 505, 694 N.W.2d 420, 429. That is the case here

There is no statutory or constitutional authority that Defendants have to enact or enforce a policy like their USDD COVID-19 Exposure Protocols. Hence, an injunction is warranted here because Defendants’ policy creates a potential for irreparable harm—such as loss of educational experience, one on one instruction, participation in sporting events and other extracurricular activities, etc.—to Plaintiff and others without an injunction. Furthermore, an injunction will not harm Defendants in any way.

C. Plaintiff has no other adequate remedy at law.

“[A]n injunction is an appropriate remedy” when the party’s “remedy at law would be inadequate.” *Am. Mut. Liab. Ins. Co. v. Fisher*, 58 Wis. 2d 299, 306, 206 N.W.2d 152, 156 (1973). Plaintiff has filed suit against Defendants seeking a permanent injunction and declaratory judgment against the enforcement of its USDD COVID-19 Exposure Protocols. However, without a temporary injunction in place preventing Defendants from enforcing its unauthorized policy, Plaintiff, along with many others, suffer the risk of being unconstitutionally and impermissibly quarantined multiple times throughout the remainder of the school year. Students will miss days of school, social events, sporting events and practices, and club meetings.

Put simply, the time it would take for even an answer by Defendants to Plaintiff’s Complaint could result in hundreds of students being quarantined pursuant to a misguided and unauthorized policy. It is difficult, if not impossible, to quantify damages in a case such as this. And remedies at law can be inadequate due to the difficulty or impossibility of measuring damages. *Simenstad v. Hagen*, 22 Wis. 2d 653, 664, 126 N.W.2d 529 (Wis. 1964).

D. A temporary injunction is necessary to preserve the status quo.

A temporary injunction is necessary in the present case to preserve the status quo. The primary goal of this lawsuit is to prevent Defendants from quarantining and isolating their students. The “status quo” for students is to remain in school. Defendants’ quarantine policy disrupts this status quo by impermissibly quarantining students and thereby preventing them from going to school for a number of days.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court grant Plaintiff's Motion for a Temporary Injunction enjoining Defendants from implementing and enforcing its unauthorized and impermissible COVID-19 Exposure Protocols policy.

Dated October 20, 2021.

Respectfully submitted,

Levine Eisberner LLC

Atty. Johner Allison (#1116087)
johner@leattys.com
2802 Coho Street, Suite 201
Madison, Wisconsin 53713
(Office) 888-367-8198
(Facsimile) 608-268-8607



Atty. Johner Allison

Atty. Brent G. Eisberner(#1098038)
brent@leattys.com
2802 Coho Street, Suite 201
Madison, Wisconsin 53713
(Office) 888-367-8198
(Facsimile) 608-268-8607



Atty. Brent G. Eisberner

Attorneys for Plaintiff