DOCKET NO.: HHD-CV-20-6131803-S	:	SUPERIOR COURT
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CT FREEDOM ALLIANCE, LLC, ET AL.	:	JUDICIAL DISTRICT OF
	:	HARTFORD AT HARTFORD
v.	:	
STATE OF CONNECTICUT	:	
DEPARTMENT OF EDUCATION, ET AL.	:	NOVEMBER 2, 2020

Memorandum of Decision on Injunction

The Freedom Alliance seeks an emergency order blocking mandatory mask wearing in schools. The court has heard evidence on the request but has determined that no emergency exists.

The Freedom Alliance claims the Connecticut Department of Education has illegally ordered children to wear masks in school. The court has to consider this claim of illegality now only because the Alliance alleges that this "mask order" threatens immediate "severe, irreparable physical and emotional harm" to substantially all of the school children in this state. The Alliance says masks don't work, are the wrong way to fight the disease, and, most important for this matter, are a grave danger to children.

The Alliance tried to prove this claim of urgent danger by presenting two witnesses as experts on the perils of mask wearing. One was a California psychiatrist named Mark McDonald and the other was a biostatistician and epidemiologist from New York called Knut Wittkowski. The state recognized the expertise of the latter but not the former.

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The state says that because McDonald's views are too radical he is not an expert the court should recognize. The court hasn't ruled on McDonald's qualifications. It might easily recognize that McDonald has more than common knowledge in his chosen field of psychiatry. But the Alliance presented McDonald as an expert on a lot more than that, and for those purposes the court has determined that even if he were qualified to give those opinions, they cannot be credited.

McDonald testified that in California his existing student patients have been upset by mask wearing. He said he also has new patients who also have emotional troubles from mask wearing.

McDonald was convinced by this experience and by reading a number of articles that masks do two particularly bad things to kids: 1. they block parts of the face that help a child understand what someone is saying, and 2. they block the normal flow of oxygen to the nose and mouth.

From this McDonald asserted that masks for children are a "huge burden as well as harm." He warned of an immediate disaster and a catastrophe in the making. He used the legally talismanic words "imminent" and "irreparable" harm.[1]

He certainly used the right rhetoric, but the trouble with McDonald's claim is that he doesn't have any relevant experience with oxygen deprivation or speech pathology, and the articles he pointed to on those subjects don't support the extreme assertions he made.

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[1] To bypass administrative claims and jump to the head of the line in court, the Alliance admits it must: (1) show its members face imminent and irreparable harm, and (2) prove that its legal claims are correct and that it has no other way to undo the harm its members face. *Waterbury Teachers Ass'n. v. Freedom of Information Commission*, 230 Conn. 441, 446 (1994).

First, several of the articles are just opinion pieces critical of mask wearing. They aren't scientific studies. They reflect no research. They suggest no emergency. They are only the thoughts of people who like McDonald are doctors. McDonald could just as easily have recognized that the doctor who directs the Federal Center for Disease Control has a different opinion about masks and so do the doctors who speak for the 67,000 doctors of the American Academy of Pediatrics. They are just opinions, and most doctors disagree with McDonald.

One document does seem at least to echo some of his language. The document is an internet post about a YouTube video purporting to translate from German a video of a doctor supposedly saying masks are an "absolute no-no" for children and are "criminal' because they restrict breathing. The document doesn't say that in her YouTube appearance the doctor cited any scientific evidence. The court let it come in as an exhibit solely to show what McDonald relied on, and—as with the other McDonald documents— it was not admitted as independent evidence in support of the Alliance's claim.

No matter how we look at it, this document is an unlikely foundation for a sweeping court order banning masks in public schools. In technical terms it is unauthenticated, quadruple hearsay. McDonald says that a piece of paper of unknown origin says that a woman says that a German doctor says masks are bad for kids. Courts don't consider things like this because long experience has taught them that second, third, and fourth-hand accounts of things are frequently unreliable. Undoubtedly, we could gather dozens of things like this from the internet—some saying masks are good and some saying masks are bad. But where is the science in that?

Another passionately-worded document supplied by McDonald may get better to the heart of his—and perhaps the Alliance's— claim. It is the "Great Barrington Declaration". The Declaration is roughly in the form of a petition. It has been signed by many doctors and lay people. Its message is clear. While the most vulnerable might want to stay indoors, the rest of the planet should return to normal and let the virus go about its business of infecting people. The virus will spread. But it will gradually burn itself out because it will have too few people without immunity to feed on.

The Great Barrington document reflects the view that the best way to end the epidemic—the best way to achieve "herd immunity"—is by allowing a critical mass of people to become sick and therefore incapable of spreading the disease. The theory assumes that once they have had the disease and have recovered, the infected people can't get the virus again or spread it. Of course, the court is aware that this theory is opposed by the view that it is immoral—that it would likely come at the sacrifice of thousands or even millions of innocent lives among the vulnerable who don't know they are vulnerable and the vulnerable who do know they are vulnerable but have no place to hide.

This is a very dramatic clash of options, but it isn't the court's job to decide if we would be better off in the long term by burning out the virus or by vaccinating it out. The court has to stay with the task in hand. What matters is whether mask wearing spells immediate disaster, catastrophe, and irreparable harm to children. About this, the Great Barrington petition provides no science in support of McDonald's claim that such is the case. It is a very large assertion, and it is almost entirely on a topic irrelevant to this case.

McDonald's other sources even more clearly do not support his thesis. One article went so far as to call mask wearing "disconcerting". Some certainly said masks make things harder for kids. Most of the documents that address COVID-19 stuck to calling mask wearing "unnecessary". And several simply support the idea that facial expressions are particularly important to children.

Among the papers McDonald cited was a March 2020 Singapore study of 158 health care workers using the sealed N95 mask. It was published by the American Headache Society and found that most of the healthcare workers in the study developed a mild headache a couple of days a month from long-term mask use. Similarly, a Turkish study showed that while wearing masks certain surgeons may find some decrease in their oxygen saturation levels and a slight increase in their pulse.

None of what McDonald pointed to provides scientific support for the claim that mask wearing spells immediate disaster, catastrophe, and irreparable harm to children. And that's all that matters here.

The Alliance received even less support from its second witness, Knut Wittkowski, a PhD in computer science with education in biostatistics and epidemiology. Like McDonald, Wittkowski disagrees with the prevailing government view and believes that letting the disease spread will get rid of it the fastest. Indeed, his view is "let it accelerate"—while protecting the vulnerable as much as we can.

Despite the state's suggestions otherwise, Wittkowski is not insensitive for having truthfully pointed out in earlier statements that always "we are all at danger of death." The court is convinced that he is not merely a cynical ultra-Darwinist as the state seemed to imply but a scientist who believes that we should be making provision for the

weaker among us even while we are focused on ensuring progress for the stronger among us. He has said evolution is good, but he didn't mean we should intentionally infect people or intentionally let them die. After all, the disease doesn't need any help from us.

Wittkowski's experience with studies is also genuine. Unlike McDonald, he knows a lot about research because that is what he assists with for a living. He convincingly described what makes a good study versus what makes a weak study. Good scientific studies carry out predetermined experiments rather than involving only unstructured observations. They have control groups—people not given the thing being tested. They involve large enough groups of people so that the study might represent what might happen to most people faced with the same circumstances.

Using these criteria, Wittkowski concluded that the studies that say masks are good protection against disease are too often weak studies while studies that cast doubt on the effectiveness of masks are more often strong studies.

Wittkowski also said that a recent French study—not formally reviewed and approved by other scientists[2]— was important for its observation of lower infection spreading caused by children. The study is exhibit 23 and is on the court's docket along with the plaintiffs' other exhibits. Wittkowski used this study to support a relatively broad assertion that children have been proved to be "not relevant spreaders" of the disease to teachers.

[2] Wittkowski would doubtless recognize that "peer review" is another hallmark of a good study, but perhaps unintentionally he did not include peer reviews in his list of things that make a study of "high quality".

Unfortunately, the study doesn't say that. The study published in an online "preprint" instead "suggests" that COVID-19 spreads at a *lower* rate in primary schools. It notes that for older children—in middle school and high school for instance—the children pass along the disease just as much as adults do.

The study was based on a pretty small sample size. Only three primary school children in three different schools were noted to have had COVID-19 while at school. The study's conclusion hangs entirely on the fact that these three children didn't give the disease to anyone else while at school. As the study itself says, this is interesting, but merits no more than further investigation and careful consideration about school re-openings. The study recommended social distancing, hand washing and —*at least* for older children—mask wearing.

While stimulating, the study not only fails to support Wittkowski's claim that it shows children "are not relevant spreaders" of COVID-19 to adults, it has nothing to do with the Alliance's claim that mask wearing isn't merely unnecessary but instead threatens immediate "severe, irreparable physical and emotional harm" to substantially all of the school children in this state.

For this proposition, Wittkowski provided the Alliance with no support at all. He said he is not an expert on masks. He agreed that masks work. He said that people caring for the vulnerable in particular should wear them.

The state's expert witness agreed with Wittkowski. He said masks work, and that they do protect the vulnerable. His name is Robert Dudley, and he is president of the Connecticut chapter of the American Academy of Pediatrics.

Dudley was the first witness who had anything to do with schools. He is the medical advisor to the 10,000-student New Britain school system. The Alliance challenges his testimony because, unlike McDonald, he is not a psychiatrist. But to the extent McDonald's theme was the ineffectiveness of masks and how they reduce oxygen, Dudley knows as much about this as McDonald. The court will consider his testimony and recognizes that he also has considerable generalist involvement with children's mental health while McDonald has specialist involvement that the court has already acknowledged.

Dudley said there is no emergency. He said he did not believe masks are dangerous to children from a medical point of view. He found this view confirmed by and aligned with what he called the "gold standard" in pediatric guidance, the views of American Academy of Pediatrics that recommends mask wearing for children as a safe means of limiting transmission of the disease. It might have been even more convincing had Dudley or some other state witness gone into the science behind this consensus, but the state chose—as was its right— the narrow path to victory by rebutting the claim of emergency rather than defending the science behind mask wearing.

Dudley said his belief in the absence of emergency was confirmed by communications among 88 school medical planners who have discussed school reopening experiences in Connecticut and have reported no emergencies and also by his direct interaction with New Britain's lead district nurse. He did not doubt that there are individuals who may have troubles, but he said the schools are ready to help them with reasonable accommodations.

Dudley's unruffled view of the mask-wearing landscape aligns with another piece of evidence from the state offered by Stephanie Knutson. Knutson works at the Department of Education. Her job at the department is to provide information to and gather information from school health administrators across the state. Knutson saw no emergency because, if there were one, she said she would be one of the first to know about it. Indeed, for this lawsuit she surveyed school health administrators in districts across the state with 118 of 166 districts responding—that is, 71% of them. She compiled the results in state exhibit F. It shows that of the 390,000 students in the school districts represented 221 students have asked for and received an exemption from mask wearing and 37 have been refused.

The Alliance objected to this exhibit on several grounds. But there is no question that it is an authentic public record under Code of Evidence §9-3 and General Statutes §1-210(a). Furthermore, as a public record it is an exception to the hearsay rule under Code of Evidence §8-3(7) because it was part of Knutson's job to compile health feedback from school districts. Anyway, what the document really is about is explaining why one of the most relevant school health officials in the state says there is no emergency in the public schools requiring a ban on face masks.

The exhibit's broad reach across the districts distinguishes it from other evidence the court hasn't heard—that is individual anecdotal evidence. Doubtless children and parents could have been lined up in considerable numbers to praise or condemn mask wearing, but without many thousands of them testifying we couldn't have gotten a representative sample of the state. We can consider statistics of problems across the state that cut either way, but the Alliance hasn't assembled any that show a broad

sample of problems while the state has shown a broad sample showing few problems. Information that is representative is useful to consider. Information that is anecdotal may represent real individual problems. But the court has already ruled that real individual problems can and must be presented by the state with real individual and reasonable accommodations—not a statewide solution like the one being sought here.

No witness has claimed that the existing statewide solution of mask wearing is without drawbacks. Voices are muffled. Faces are hidden. Breathing is less free. Fear may be instilled in some. Indeed, for some children these drawbacks may have serious repercussions, and the state seeks to address this possibility by allowing exemptions. But the other branches of government—the ones whose job it is to do so—have judged that these mostly minimal burdens on children are outweighed by the certainty that over 213,000 American grandparents, parents, and children are dead from COVID-19 and that it is a good thing to try to reduce the death rate.

After all, the crisis isn't small. In World War II 291,000 Americans were killed in four-years of battle.[3] Covid-19 has killed 213,000 Americans in less than one year of peacetime.[4] One would think some level of action from the government—even something imperfect— might be expected. And, as noted earlier in this case, the United States Supreme Court commands that responsibility for choosing the level of that action is—in "especially broad" terms—vested in the other branches of government, not in the judiciary.[5]

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[3] https://census.gov/history/pdf/wwi-casualties112018.pdf (at page 2).
[4] https://www.cdc.gov/nchs/nvss/vsrr/COVID19/index.htm
[5] *S. Bay United Pentecostal Church v. Newsom* 140 S. Ct. 1613, 1613-14 (2020).

Based on the evidence in this case, the Connecticut Department of Education has not exceeded this especially broad power. Nothing the Connecticut government has done about school mask wearing has been shown as irrational and dangerous rather than, like all human action, in some ways imperfect. Indeed, it aligns with ordinary expectations.

A year ago you could have stopped anyone on the street and they would have told you that masks, gloves, hand washing, and distance are all ways to reduce the spread of disease. The court could have taken judicial notice of it without even hearing evidence. That is a far cry from what is in front of the court now—a claim that mask wearing is so dangerous to children that it must be stopped at once because it is a "recipe for medical disaster."

That claim in front of this court has not been proved. There is no emergency danger to children from wearing masks in schools. Indeed, there is very little evidence of harm at all and a wide ranging medical consensus that it is safe.

Therefore, there is no reason for the court to rule immediately on the claim that the department exceeded its authority over mask wearing in the schools. That legal claim will have to take its place among the ordinary proceedings before the court.

The Alliance's motion for an emergency injunction is denied.

BY THE COURT

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Moukawsher, J.