IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

JULIEANNE AUSTIN, *et al.*, Plaintiffs, v. THE BOARD OF EDUCATION OF COMMUNITY UNIT SCHOOL DISTRICT #300, *et al.*, Defendants.	Case No. 2021-CH-500002 Judge Grischow
ROBERT GRAVES, *et al.*, Plaintiffs, v. GOVERNOR JB PRITZKER, *et al.*, Defendants.	No. 2021-CH-500003 Judge Grischow
MARK AND EMILY HUGHES, *et al.*, Plaintiffs, v. HILLSBORO COMMUNITY SCHOOL DISTRICT #3, a body politic and corporate, *et al.*, Defendants.	Case No. 2021-CH-500005 Judge Grischow
MATTHEW ALLEN, *et al.*, Plaintiffs, v. GOVERNOR JB PRITZKER, in his official capacity, *et al.*, Defendants.	Case No. 2021-CH-500007 Judge Grischow

TEMPORARY RESTRAINING ORDER

Case called for hearing on Plaintiffs' Motion for Temporary Restraining Order. The parties appear through counsel. Arguments were heard on January 3 and 5, 2022 and again on January 19 and 20, 2022. The Court took the matter under advisement. The parties were given until January 27, 2022 to submit proposed orders. This Court, having reviewed the record, pleadings, the parties' written and oral arguments, in addition to the applicable legal authority, finds as follows:[1]

BACKGROUND

The Governor declared an emergency due the coronavirus in March 2020 pursuant to statutory authority delegated to him under the Illinois Emergency Management Agency Act. ("IEMAA" 20 ILCS 3305 *et seq.*) Since that time, the Governor has issued 25 serial disaster proclamations and 99 executive orders related to COVID-19. Those executive orders have touched the lives of every citizen in the state of Illinois in some fashion.

Plaintiffs in the above-captioned matters are parents of students enrolled in schools across Illinois [*Austin* (2021-CH-500002), *Graves* (2021-CH-500003), and *Hughes* (2021-CH-500005)] and teachers working in Illinois schools [*Allen* (2021-CH-50007)]. They all seek entry of Temporary Restraining Orders ("TRO") enjoining certain school-related Covid-19 mitigation measures as set forth in Governor JB Pritzker's Executive Orders, namely: (1) Executive Order 2021-18 ("EO18")[issued on 8/4/21], ordering that school districts require the use of masks for students and teachers who occupy their buildings, provided they are medically able to do so, (2) Executive Order 2021-22 ("EO22")[issued on 9/3/21], requiring persons who are both unvaccinated from Covid-19 and work in Illinois schools to provide weekly negative results of an approved Covid-19 test in order to occupy school buildings, and (3) Executive Order 2021-24

[1] Pursuant to Supreme Court Rule 384, Case Numbers: 2021-CH-500002, 21-CH-500003 and 21-CH-500005 were consolidated before this Court. Subsequently, 21-CH-500007 was filed in Sangamon County. To the extent any portion of this TRO is appealed, any opinions expressed in this consolidated order applies to each case individually.

("EO24")[issued on 9/17/21], ordering that school districts refuse students and teachers admittance to their buildings for specified periods of time if the student or teacher is a "close contact" of a confirmed or probable Covid-19 case and if they refuse to test.[2]

EO22 and EO24 provide that "State agencies . . . may promulgate emergency rules as necessary to effectuate," and aid in the implementation of, the Executive Orders. Toward that end, on September 17, 2021, the Illinois Department of Public Health ("IDPH") and the Illinois State Board of Education ("ISBE") filed Emergency Rules, effective that day, amending portions of Title 77 of the Administrative Code relating to managing disease in schools, *see* 45 Ill. Reg. at 12123, and adding provisions to Title 23 of the Administrative Code relevant to supporting school districts in implementing EO22, *see* 45 Ill. Reg. at 11843, (collectively, the "Emergency Rules"). In August 2021, ISBE and IDPH issued Revised Public Health Guidance for Schools ("Joint Guidance") relating to school districts' efforts to combat Covid-19 and a safe return to in-person instruction.

The *Austin*, *Graves*, *Hughes,* and *Allen* Plaintiffs sued the Governor, IDPH, ISBE, IDPH Director Dr. Ngozi Ezike, ISBE Superintendent Dr. Carmen I. Ayala (collectively, the "State Defendants"), and nearly 170 Illinois school districts (collectively "Defendant School Districts") across Illinois. Their claims assert the theory that students and teachers cannot be required to wear masks while in school buildings and cannot be excluded from school premises after close contact exposure to Covid-19, absent consent and/or a full evidentiary hearing and a court order entered pursuant to the procedures contained in Section 2 (the "Section 2 Procedures") of the Illinois

[2] EO24 requires that schools "make remote instruction available [for students excluded] consistent with the requirements declared by the State Superintendent of Education pursuant to Section 10-30 and 30-18.66 of the School Code." On September 21, 2021, the Governor issued Executive Order 2021-25 ("EO25"), making minor amendments to EO24's school exclusion provision. On January 11, 2022, the Governor issued Executive Order 2022-03 ("EO3") which supersedes EO24 and EO25. The implementation of EO3 has no material impact on the merits of Plaintiffs' claims.

Department of Public Health Act (20 ILCS 2305/1.1 *et seq.* (the "IDPH Act")) because doing so constitutes an IDPH "quarantine" or "modified quarantine" under the IDPH Act. The *Allen* Plaintiffs also insist that unvaccinated teachers cannot be required to undergo weekly Covid-19 testing absent compliance with Section 2 Procedures because doing so constitutes IDPH "testing" under the IDPH Act.[3] The *Graves* Plaintiffs' complaint and motion include additional theories of relief, which the Court addresses below after analyzing the principal theory asserted by all of the *Austin*, *Graves*, *Hughes*, and *Allen* Plaintiffs relating to the Section 2 Procedures.

This Court acknowledges the tragic toll the COVID-19 pandemic has taken, not only on this State, but throughout the nation and globe. Nonetheless, it is the duty of the Courts to preserve the rule of law and ensure that all branches of government act within the bounds of the authority granted under the Constitution. There is no doubt that the public has a strong interest in stopping the spread of this virus, but such does not allow our government "to act unlawfully even in the pursuit of desirable ends." *Georgia v. Biden*, 2021 WL 5779939 (December 7, 2021)(citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585-86 (1952)).

PRELIMINARY MATTERS

As an initial matter, this Court needs to ensure it has jurisdiction over all the parties. Lack of jurisdiction is an issue which can be raised at any time, even by the Court on its own motion. In *Hughes v. Hillsboro Community School District #3*, Case No: 2021-CH-500005, this Court noted that the school district and not the board of education was sued as a defendant. "A board of education is designated as a district's governing body. *Veazey v. Board of Education of Rich Tp High School*, 2016 IL App (1st) 151795. "A board of education 'furnishes the method and

[3] The *Allen* plaintiffs also seek relief in their complaint under the Illinois Healthcare Right of Conscience Act, 745 ILCS 70/1 *et seq.* (HCRCA"). The parties agree that plaintiffs' Motion for Temporary Restraining Order does not implicate the HCRCA claim.

machinery for the government and management of the district.'" *Board of Education of District No. 88 v. Home Real Estate Improvement Corp.*, 378 Ill. 298, 303 (1941). Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time. *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). In light of the foregoing, the Board of Education for Hillsboro Community School District #3 is not sued, thus, this Court lacks jurisdiction over Hillsboro Community Unit School District #3, since it is not a properly named Defendant. Plaintiff is given leave to add the proper party within the next 14 days. Until such time, the Court reserves ruling as to the legal issues presented in that case, noting however, that any ruling issued herein would subsequently apply to those parties as well.

LEGAL STANDARD

A temporary restraining order or preliminary injunction may issue when plaintiff establishes: (1) a clearly ascertainable right that needs protection; (2) it will suffer irreparable harm in the absence of an injunction; (3) it lacks an adequate remedy at law; and (4) a likelihood of success on the merits. *Makindu v. Illinois High Sch. Ass'n*, 2015 IL App. (2d) 141201, ¶31, 40 N.E.2d 182. If the moving party establishes these elements, the Court must then balance the hardships to the parties and consider the public interest involved. *Id.* The issuance of an injunction is within the sound discretion of the trial court when plaintiff demonstrates that there is a fair question as to the existence of the right claimed and that the circumstances lead to a reasonable belief that the moving party will be entitled to the relief sought. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1089, 874 N.E.2d 959, 971 (2d Dist. 2007). The Court must determine whether a fair question is raised as to the existence of a right that needs protection and is not to, at this time, decide controverted facts or the ultimate merits of the case. *Id. at 1089.*

EMERGENCY RULES AND JOINT GUIDANCE

I. IDPH Emergency Rules

Section 690 of Title 77 of the Illinois Administrative Code has been around since 1977. All State actors and citizens have operated under those set standards up to and including a time period when our State (and Nation) was faced with another highly contagious disease. In 2014, Ebola reared its ugly head and caused a number of public health challenges. As a result, the IDPH passed Emergency Rules that added new definitions for "quarantine, modified" and "quarantine, isolated" and amended the definitions of quarantine and isolation to include those new concepts. The IDPH, at that time, believed exclusion from school, due to a highly infectious or contagious disease (such as Ebola), was a form of quarantine, subject to the due process procedures as found in the IDPH Act. Those emergency amendments noted that IDPH and local health departments needed to have clear authority to monitor and restrict persons who were potentially at risk.

Since 2014 and prior to the recent 2021 Emergency Rules, tests and vaccines were also considered a form of "modified quarantine" because they were a procedures "intended to limit disease transmission." Under the IDPH Act, individuals had the right to object to these procedures. If they objected, they were afforded due process of law. Likewise, "exclusion from school" was also a form of "modified quarantine" because it was considered a partial limitation on freedom of movement for those who may have been exposed to a contagious disease. At no time did the 2014 emergency amendments take away a person's due process rights.

On September 17, 2021, under the guise of an emergency, the Emergency Rules deleted or modified these terms and definitions.[4] Subsection (d) was added pertaining to schools and added a new provision which delegated authority to the local school districts to require vaccination,

[4] State Defendants' Exhibit 4, p. 12139-12143.

masking, and testing of school personnel, in addition to masking for all students regardless of vaccine status, exclusion from school, and testing for unvaccinated, healthy students who were deemed "close contacts" by the school.[5] The question before this Court is whether the Governor, under his executive authority, can require his agencies to promulgate emergency rules that go beyond what the Legislature intended or without utilizing the legislative branch of government.

To address this, the Court begins its analysis by looking at IEMAA. According to this Act, the Legislature granted the Governor a broad delegation of power. However, this broad delegation of power is not absolute. The manner in which this administrative agency [IDPH] promulgated this Emergency Rules gives this Court pause. At the time it issued this broad-sweeping Emergency Rules, COVID-19 had been in existence for well over one and a half (1 ½) years and vaccines had been around for at least nine (9) months. Based on this historical knowledge, this Court inquired repeatedly as to the emergency that necessitated the Emergency Rules in September of 2021 without adhering to the rulemaking process which provides for public comment and JCAR review prior to adoption.[6] The State Defendants responded that COVID-19 was "fluid,"[7] and it was within the agencies' discretion to assist the Governor and protect the public health and safety.[8] In IDPH's Notice contained in the Illinois Register, it stated the reasoning was "to support schools and school districts in implementing Executive Order 2021-22, which requires that all school personnel either receive the COVID-19 vaccine or undergo at least weekly testing."[9] In support of this emergency action, the IDPH cited to the Communicable Disease Report Act and the Department of Public Health Act.[10]

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[5] State Defendants' Exhibit 5, p. 12145 – 12151.

[6] All parties have been on notice of what was required by law for at least 550 days since the Governor issued the first disaster proclamation.

[7] Report of proceedings 1/3/2022 p. 16: 14-16.

[8] Report of proceedings 1/32022 p. 26: 16-19.

[9] State Defendants' Exhibit 4, p. 11843.

[10] 745 ILCS 45; 20 ILCS 2305.

The State Defendants argue under Section (m) of 20 ILCS 2305/2 all decisions regarding emergencies in the State of Illinois fall under the arm of the IEMAA and that since the IDPH did not issue the vaccine mandate for school personnel, such is a valid exercise of the Governor's authority under IEMAA.[11] The Court disagrees with this broad interpretation. Looking at subsection (b) of 2305/2, which is subject to the provisions in subsection (c), "no person shall be ordered to be quarantine or isolated .... [e]xcept with the consent of the person... or upon the prior order of the court of competent jurisdiction." The State Defendants argue that since the order was not issued by the IDPH, this section does not apply. The Executive Branch, however, fails to recognize or acknowledge that the Legislature granted IDPH the supreme authority in matters of quarantine and isolation. Moreover, subsection (f) of 20 ILCS 53305/5, the powers of IEMAA, includes the mandatory language of "shall," thus requiring the Governor to coordinate with the IDPH with respect to planning for and responding to public health emergencies.[12] These two statutes must be read together, making it clear the Governor cannot make public health decisions during a time of emergency independently and without coordinating with IDPH.

Furthermore, if the Governor did not want a certain statute to apply during a declared emergency, he certainly could have taken steps to suspend those provisions. Where the Governor seeks to suspend a regulation pursuant to his emergency powers, he must first show that the strict compliance with the statute would hinder his efforts to address the pandemic.[13] This authority rests solely with the Governor; not other agencies within the Executive Branch. Thus, the only way the due process provisions as found the IDPH Act (2305/2) would not apply is if the Governor

[11] See 20 ILCS 2305/5(m)... "Nothing in this Section shall supersede the current National Incident Management System and the Illinois Emergency Operation Plan or response plans and procedures established pursuant to IEMA statutes.

[12] 20 ILCS 3305/5(f)(2.6).

[13] 20 ILCS 3305/7(1), *see also, Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623, ¶41.

suspended them during his emergency declarations and corresponding Executive Orders, which he did not. The Governor did, however, for example, suspend various statutes in EO20-15, 20-25, 20-26 and 20-31, namely various portions of the School Code, Code of Civil Procedure and IDPH and Administrative Code, but not 2305/2.

The State Defendants also argue that the Governor has unlimited authority to do whatever is necessary. This Court finds this argument far reaching as the Legislature acknowledged limits which are set forth in 3305/7. Moreover, as pointed out by this Court during oral arguments, if the Governor's power was endless, then why would he instruct the State agencies to promulgate rules to effectuate his mandates? And, why would the Legislature have created specific powers as set forth in paragraphs 1-14 in 3305/7? If the Legislature intended for the Governor's powers to be endless, it simply could have deleted all those other paragraphs and said "during emergencies declared by the Governor, the Governor is authorized to do whatever is felt necessary without any restrictions." But, the Legislature never intended for that type of unfettered power, and therefore, the State's interpretation is unfounded. IEMAA makes it clear that the Governor does not have the authority to make final decisions on public health, which again illustrates the Legislature's intent for the two bodies to work together to come up with framework for health-related emergencies. IEMAA does not delegate authority to or provide deference to any other state agency other than IDPH and the Governor.

The Court cannot find (nor did any party provide) any law enacted by the State Legislature that grants the IDPH the authority to delegate or transfer its duties and responsibilities to ISBE and local school districts. Even the IDPH cannot support that arguments based on 690.1315 of Title 77 which provides that "certified local health departments shall, in conjunction with the Department administer and enforce the standards set forth this Subpart, which include: 1) investigating any

case or suspected case of a reportable communicable disease or condition; and 2) "instituting disease control…including testing… vaccinations… quarantine…" This administrative rule further provides that the certified local health department, … "[i]n consultation with local health care providers, … schools, the local judicial system, and any other entity that the certified local health department considers necessary, the certified local health department shall establish plans, policies, and procedures for instituting and maintaining emergency measures necessary to prevent the spread of a dangerously contagious or infectious disease or contamination." 77 Ill. Admin. Code 690.1315(f) (emphasis added). Based on IDPH's emergency passage, it is clear it violated its own administrative rules.

Moreover, the Governor's delegated authority regarding masks, identifying close contacts, testing and vaccines to another executive agency is beyond the scope of legislative authority. The IDPH is limited by law to delegating its authority only to certified local health departments and has not been authorized by the Legislature to delegate any of its authority to any other body of government, including school districts.[14]

II. ISBE Emergency Rules

On September 17, 2021, ISBE, an executive administrative agency, implemented an emergency "Mandatory Vaccinations for School Personnel." ISBE indicated that its authority for this Emergency Rule came from 105 ILCS 5/2-3.6 (the School Code) and EO22. According to this Executive Order, "…over 6.7 million Illinoisans have been fully vaccinated against COVID-19, in order to protect against the rapid spread of the Delta variant, additional steps are necessary to ensure that the number of vaccinated residents continues to increase and includes individuals working in certain settings of concern, including those who work around children under the age of

[14] 20 ILCS 2310/2310-15

12." Section 3 of EO22 outlines the vaccination and testing requirements for school personnel which includes exclusion from premises unless they comply with the testing requirement set forth in section (d) of EO22. According to section 3(f) of the Governor's OE22, the IDPH and ISBE may promulgate emergency rules as necessary to effectuate this Executive Order.

Prior to IDPH's emergency amendment on September 17, 2021, IDPH found that masks (a.k.a. "devices"), and tests and vaccines (a.k.a. "procedures") were a form of "modified quarantine" because they were a procedure "intended to limit disease transmission." Under the IDPH Act, people had the right to object to these procedures. If they objected, then they were afforded due process rights.[15] Similarly, IDPH concluded "exclusion from school" was also a form of "modified quarantine" because it was considered a partial limitation of freedom of movement or actions to those who may have been exposed to a contagious disease."[16]

Regarding the teachers' case, IDPH did not mandate the COVID-19 vaccine, nor did it issue Emergency Rules pertaining to vaccines or masks,[17] the Governor did and then ISBE promulgated its Emergency Rules to carry out the Governor's orders. The Court is left to question what authority ISBE has to mandate a vaccine that has not even been mandated by the IDPH. Section 690.138 of Title 77 outlines that IDPH, or a local health department, may order the administration of vaccines to prevent the spread of a dangerously contagious or infectious disease and specifies an individual's due process rights should they refuse vaccinations, medications or other treatments. One agency within the Executive Branch cannot delegate authority to another agency within the same Executive Branch absent legislative authority.[18] The Legislature granted

[15] 20 ILCS 2305/2.
[16] 77 Ill. Admin. Code 690.10, Definitions (prior to 9/17/21 amendments).
[17] The emergency mask mandate issued by IDPH expired on 6/4/21.
[18] See 20 ILCS 2310/2310-625, even in times of a disaster declaration, the Legislature did not authorize the Director of IDPH to delegate the health department's obligations to school districts.

IDPH the authority to order tests and vaccines. Nowhere in the School Code did the Legislature grant ISBE or the State Superintendent the authority to order or mandate vaccines and tests. Thus, absent a properly filed emergency rule from IDPH, the Governor's mandate is meaningless and ISBE's Emergency Rule exceeded its authority.

III. **Do the emergency amendments comply with Sec. 5-45 of the IAPA**?

The emergency rule making process is outlined in 5 ILCS 100/5-45. In adopting rules, administrative agencies must comply with the public notice and comment requirements set forth in the Procedure Act. *Champaign-Urbana Public Health District v. Illinois Labor Relations Bd.*, 354 Ill. App. 3d 482, 489 (4th Dist. 2004); *see also*, 20 ILCS 3305/18(a).[19] IDPH attached a certificate which stated the reason for the Emergency Rules was "in response to Governor JB Pritzker's Gubernatorial Disaster Proclamation issued related to COVID-19."[20] As indicated before, at the time IDPH implemented their Emergency Rules, without a formal hearing, the State of Illinois, namely the Governor, IDPH and ISBE had been aware of COVID-19 for 550 days. The need to adopt emergency rules at this junction seems suspect at best and not in compliance with the law. One of the several basis cited for the various executive orders was the Delta variant. The Delta variant has been around since December of 2020. The School Districts, through EO18 had known since August 4, 2021 that the local health departments, not the schools, had the authority to identify close contacts. Thus, the schools knew all summer what needed to be done. So, what emergency arose that had not already been present? By September 17, 2021, the State of Illinois had moved into phase 5 and was fully aware of the threat from COVID-19. Perhaps the threat was

[19] Orders, Rules, and Regulations (where the rule, regulation, order or amendment shall become effective immediately upon being filed with the Secretary of State accompanied by a certificate stating the reason as required by the Illinois Administrative Procedure Act)

[20] State defendants' Exhibit 1 Notice of Filing filed 1/3/2022 3:57 PM documents relating to Emergency Amendments to Ill. Adm. Code, Title 77, Part 690.

because the Courts were interpreting the law as written and the Executive Branch did not like the outcome. How is this a threat to public safety? It is not, it is a threat to a unilateral unchecked exercise of authority by the Executive Branch. Stated differently, IDPH's delegation of its authority was an end-run whereby IDPH passed the buck to schools so as not to trigger the due process protections under the IDPH Act. Courts should not be fooled or misled by this egregious conduct.

To illustrate this further, the Court notes on September 17, 2021, the IDPH issued eleven (11) additional emergency amendments to various administrative codes mandating vaccines or testing for various health care workers/professionals. IDPH could have done the same thing for school personnel under the emergency amended 690.361(1) whereby it added a new section for schools and COVID. It also could have added these requirements in Sec. 690.1380 and 690.1385, but chose not to do so. The delegation of authority to school districts regarding public health and safety is an abuse of power and was never contemplated by the Legislature.

No facts have been presented to show that without these Emergency Rules, the public would be confronted with a threatening situation. How did removing the words "Isolation, Modified" and "Quarantine Modified" and editing the definition of "Quarantine" assist in responding to a threatening situation? How did adding a section delegating the duties of the IDPH and local health departments to schools assist in responding to a threatening situation? What was the need to have this done on an emergency basis without input from the Legislative Branch? "Unless a rule conforms with the public notice and comment requirements, 'it is not valid or effective against any person or party and may not be invoked by an administrative agency for any purpose.'" *Champaign-Urbana Pub. Health Dist. v. Illinois Lab. Rels. Bd.*, 354 Ill. App. 3d 482, 488–89, 821 N.E. 2d 691, 696 (4th Dist. 2004)(citing *Kaufman Grain Co. v. Director of the*

Department of Agriculture, 179 Ill. App. 3d 1040, 1047, 534 N.E. 2d 1259, 1264 (4th Dist. 1988)). Based on the record before this Court, it is hard to see how the implementation of these Emergency Rules was necessary to counter the threat of the public interest safety or welfare. The Governor could have had the Legislature address this while in session, but he did not. The Governor could have suspended statutes, but he did not.[21] Where the Governor seeks to suspend a regulation pursuant to his emergency powers, he must first show that the regulation hinders his efforts to cope with a disaster.[22] No regulation was suspended because the reason for implementing the Emergency Rules was for administrative convenience and an attempt to circumvent the courts' involvement, not because of any stated emergent public threat. [23]

IV. IDPH/ISBE Joint Guidance

In 2003, IDPH and ISBE issued "Management of Chronic Infections Diseases in Children" and acknowledged the importance of substantive and procedural due process protections. These guidelines recognized that each student should have the right to due process, that each student with infectious disease should be educated in the least restrictive environment and extreme measures to isolate students with chronic infectious diseases was not necessary. It further stated that "many irrational fears can be mitigated through planned health education and health counseling programs."[24] Even though these agencies did not incorporate the same language in their revised 2021 Joint Guidance, it still does not change an individual's due process rights.

Fast forwarding to the Joint Guidance issued by the ISBE and IDPH in August of 2021, these agencies made it clear that "local health departments" were to make the final determinations

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[21] See page 9 above of statutes that were suspended.

[22] 20 ILCS 3305/7(1); *see also, Fox Fire Tavern, LLC v. Pritzker,* 2020 IL App (2d) 200623.

[23] The Court refuses to look forward at what transpired after the Emergency Rules were implemented regarding the Omicron variant and must base its analysis on what where the present facts known at the time to warrant such "emergent" conduct by the Executive Branch's administrative agencies.

[24] This Court recognizes the 2003 Guidance is not authoritative. However, it highlights these administrative agencies' understating of the law with regard to due process rights in addressing infectious diseases.

on issues of close contacts, as well as determinations as to who would be mandated to quarantine[25] and for how long.[26] This guidance permitted the schools to assist with contract tracing but did not give schools any authority to make final determinations on who was to quarantine and for how long. This Revised Guidance even acknowledged Test To Stay was a form of modified quarantine.[27] Just because these entities later deleted this reference in the subsequent Joint Guidance does not make it any less true that even IDPH and ISBE agreed that testing was a form of quarantine. Simple as that. The IDPH Act sets forth explicit procedures on what the agency is required to do if a person disagrees with the agency on the issue of quarantine.[28] The Legislature, in the implementation of the IDPH Act, specifically contemplated that people may object to quarantine and laid out procedural methods in which to address those objections. There is no question as to the promulgated statutory rights set forth in the IDPH Act that are due to citizens in matters of quarantine and isolation. Through the issuance of the above-noted Court rulings, these statutory rights have attempted to be bypassed through the issuance of Executive Orders and Emergency Rules.

The Illinois General Assembly had foresight when it created certain provisions limiting the authority of administrative agencies. When the Legislature created our laws, they did so knowing individuals have a fundamental right to due process when one's liberty and freedom is taken away by forcing them to do something not otherwise required of all other citizens. Illinois law prohibits ISBE from making policies affecting school districts which have the effect of rules without following the procedures of the IAPA. Absent this statutory provision, ISBE would be able to on

[25] To avoid this concept, ISBE and IDPH changed the word "quarantine" to "exclusion from school."

[26] Revised Public Health Guidance for Schools, Part 5- Supporting the full return to in-person learning for all students, August 2021, p. 17-18.

[27] Revised Public Health Guidance for Schools, Part 5- Supporting the full return to in-person learning for all students, August 2021, p. 19.

[28] 20 ILCS 2305(a)(b)(c).

impulse, and depending on who held the Executive Branch, mandate whatever it felt necessary in the most arbitrary and capricious manner without having to follow any due process under the IAPA. As for the matters at hand, it is clear IDPH/ISBE were attempting to force local school districts to comply with this guidance without any compliance with rulemaking. This type of evil is exactly what the law was intended to constrain.

Moreover, the Joint Guidance is attempting to cloak the local school districts with the authority to mandate masks and require vaccination or testing without compliance with any due process under the IDPH Act. The Court has already ruled masks are a device intended to stop the spread of an infectious/contagious disease, and thus are a type of quarantine, and vaccination and testing are specifically covered under the IDPH Act, and as such any attempt to circumvent the statutory due process rights of the Plaintiffs by this Joint Guidance is void. Under no circumstances can guidance be issued which violates a statute.

V. Independent Authority of School Districts

Repeatedly during oral arguments, the Defendant School Districts claimed they have independent authority to adopt and enforce all necessary rules for the management and government of the public schools of their district.[29] They claim this authority is provided to schools by the Illinois School Code, and, in the absence of a valid statewide mandate, the decision of which approach to take lies with the individual School Districts and their Boards.

This Court is in agreement that the Legislature did grant independent authority to school districts.[30] However, the Legislature specified that school districts still had to coordinate with

[29] 105 ILCS 5/10-20, 105 ILCS 5/10-20.5

[30] See 105 ILCS 5/10-21.11, 105 ILCS 5/34-18.13, and 105 ILCS 5/10-20.5, which were also cited to in the 2003 Joint Guidance referenced above. These statutes again make it clear that any health-related decisions must be consistent with Joint Guidance and with the input of the department of public health. Policies related to chronic diseases must be on a case-by-case basis according to the Legislature.

IDPH on health related issues. The fact remains, no school district had policies in effect that predated COVID-19 and the Governor's mandates that required masking, testing, exclusion from school for being a "close contact," quarantine, isolation or vaccinations. Any policies that were adopted were done in response to the pandemic and the Governor's emergency declarations. No School District has presented any evidence it would have taken this course of action but for the Executive Orders and Emergency Rules. This Court finds the policies of each School District will have to be addressed on a case by a case basis, be subject to school district's policies that were presented to the school board at a public meeting and subject to public comment, as well as the Open Meetings Act. Those issues are not before the court at this time.

The Defendant School Districts also argued that the Illinois Educational Labor Relations Act governs labor relations between educational employers and employees, including specific terms of employment. This Court is in agreement with the foregoing, along with the fact that any collective bargaining agreement governs the terms of employment. Individual collective bargaining agreements for each union will have to be analyzed to determine what has and has not been bargained. Again, those issues are not before the Court.

The Legislature took specific measures to address school authority during times in which the Governor has declared a disaster pursuant to section 7 of IEMAA. Under the provision for dismissal of teachers in Section 24-16.5, the Legislature amended the statute to toll these provisions until the Governor's proclamation is no longer in effect.[31] The Legislature also specifically amended 105 ILCS 5/27-8.1 as it pertains to health examinations and immunizations and inserted a provision that a school may not withhold a child's report card during a school year in which the Governor has declared a disaster due to a public health emergency pursuant to Section

[31] Public Act 101-643

7 of the IEMAA. Looking at 105 ILCS 5/27-6.5, physical fitness assessments in schools, again, this solidifies that the Legislature is well aware of IEMAA as it specifically amended the statute and stated that the requirements of this section do not apply if the Governor has declared a disaster due to a public health emergency pursuant to Section 7 of the IEMAA.

Further, reviewing the amendments under P.A. 101-643, the Legislature repeatedly declared that certain sections applied only during times when the Governor had declared a public health emergency under IEMAA. Had our Legislature intended that the various due process provisions, as argued by the Defendants were not to apply, the Legislature would have specifically done so. The Legislature certainly has had time to make any amendments, and has, in fact, made amendments when it deemed them appropriate during the pandemic. Thus, by the absence of any amendments to the statutes/codes argued in this case, the Court is left to conclude, the Legislature did not intend to restrict or take away individual due process rights.

INJUNCTION ELEMENTS

I. A Protectable Right In Need Of Protection

In review of this element, the Court is to determine if the Plaintiffs have "raised a fair question about the existence of [their] right and that the court should preserve the status quo until the case can be decided on the merits." *Buzz v. Barton Associates, Inc. v. Giannone*, 108 Ill. 2d. 373, 386 (1985). Plaintiffs have raised the following questions as to their rights: 1) do they have a statutory right to due process protection as set forth in the IDPH Act prior to being excluded from school until such time as a permanent injunction is heard; 2) do they have a statutory right to due process protection as forth in the IDPH Act prior to being forced to wear a mask in school, if they object, until such time as a permanent injunction is heard; 3) do they have right to in-person education free from undue governmental interference until such time as a permanent injunction is

heard; 4) do they have a statutory right to due process protection as set forth in the IDPH Act prior to being forced to test or be vaccinated; and 5) do they have a right to insist the Governor, and other State administrative bodies, act within the specific confines of their statutory authority until such time as a permanent injunction is heard.

The Legislature has made it clear that citizens have individual due process rights, specifically the due process right to object to being subjected to quarantine, vaccination, or testing which is alleged to prevent the spread of an infectious disease. This Court finds that masks are also a device intended to limit the spread of an infectious disease, and as such, is a type of modified quarantine covered under 20 ILCS 2305(2)(c).[32] The Court finds that 20 ILCS 2305(2)(d) and 20 ILCS 2305(2)(e) expressly provide a right for a citizen to refuse vaccination or testing. This Court finds that Plaintiffs have a protectable interest to not be subjected to any mandates by the Governor, ISBE or the School Districts which interfere with the due process protections provided to Plaintiffs under the IDPH Act in regard to masks as a type of quarantine, as well as vaccination or testing. The Plaintiffs have due process rights in need of protection which must be afforded before they can be excluded from the public school building and disallowed to perform their work duties for failure to wear a mask as a type of quarantine, be vaccinated for COVID, or submit to testing for COVID.

While Plaintiffs' filings contain constitutional due process language, their request for emergency relief is actually premised upon the statutory theory that the State Defendants do not have authority to require masking, close contact exclusion, vaccinations and/or testing in schools unless it is voluntary or an IDPH proceeding is initiated in compliance with Section 2 Procedures for each non-consenting student or teacher, resulting in court orders in compliance with Section 2

[32] 21 U.S.C.A §321(h)(1)(B)

Procedures.[33] Plaintiffs' lead counsel conceded this critical point during the TRO proceedings: "[Defense counsel is] making a constitutional, procedural, and substantive due process analysis when we're in here making a statutory, procedural, and due process request to you.... [Y]ou can decide for yourself whether or not ... the Department of Public Health Act applies."[34]

In accordance with EO24, the IDPH and ISBE proceeded to issue Emergency Rules that raise the following questions: 1) whether the IDPH Emergency Rules were passed in accordance with the procedures set forth in the IAPA; and 2) whether the Legislature has given ISBE the authority to implement Emergency Rules (such as masking, testing and vaccines). The IDPH failed to follow appropriate time frames as set forth in the Illinois Administrative Code in the issuance of the Emergency Rules. These Emergency Rules further removed the judiciary from appropriate judicial oversight in the decisions of arbitrary contract tracing and resulting exclusions and masking of students in Illinois. All these points raise fair questions as to the legality of the Emergency Rules as passed. The Legislature vested the IDPH with sole authority on issues of public health, including but not limited, to vaccinations, testing, quarantine, isolation and masking as set forth in the IDPH Act. This point raises a fair question as to whether the Emergency Rules set forth by the ISBE have any legal effect. Further, in the passing of the Emergency Rules, the due process procedures for each and every student subjected to exclusion from in-person education and quarantine based on being a close contact were completely removed. This continues to raise fair questions as to the legality of the Executive Orders and Emergency Rules in light of Section 2(c) of the IDPH Act and the separation of powers doctrine. The arbitrary methods as to contact tracing and masking in general continue to raise fair questions as to the legality of the Executive

[33] The Court is not suggesting that the IDPH could not later require COVID vaccines for all students and teachers, but those changes would be subject to input from the Immunization Advisory Committee. See 20 ILCS 2305/8.4

[34] Report of proceedings 1/5/22 p. 135: 20-24 and 136: 1-2.

Orders in light of violations of healthy children's substantive due process rights. For the above reasons, fair questions as to rights in need of protection have been satisfied.

II. Irreparable Harm

The injury alleged by the Plaintiffs is the laws of this State which controls these matters of public health are being violated. The Plaintiffs have due process rights under the law which provide them a meaningful opportunity to object to any such mitigations being levied against them, and it is these due process rights which are being continually violated. Under Illinois law, a citizen who refuses to mask or to submit to vaccinations or testing is only potentially subjecting themselves to an isolation or quarantine order. The Defendant School Districts have specifically adopted policies attached to the pleadings that have held children will be excluded from school in the event they do not wear a mask on school premises in violation of the Executive Orders, further preventing them from receiving an in-person education. Some schools do not even have remote learning established, thus, further denying children from an education.

"To demonstrate irreparable injury, the moving party need not show an injury that is beyond repair or compensation in damages, but rather need show only transgressions of a continuing nature." *Victor Township Drainage Dist. 1 v. Lundeen Family Farm P'ship*, 2014 IL App (2d) 140009 ¶ 50. The injury to a plaintiff "must be in the form of plaintiff's legal rights being sacrificed if plaintiff is forced to await a decision on the merits." *Hough v. Weber*, 202 Ill. App. 3d 674, 686 (2d Dist. 1990). The legal rights being sacrificed are the rights of due process under 20 ILCS 2305 *et seq.* which are further provided under 77 Ill. Adm. Code 690.1330. The Court finds the Plaintiffs' legal rights to procedural and substantive due process are being sacrificed each and every day. They have a right to insist compliance with 20 ILCS 2305 *et seq.* before the Defendant School Districts' masking, exclusion from school, quarantine, isolation,

vaccination or testing policies are being thrust upon them, especially when there has been zero evidence that those children are contagious or highly likely to spread a contagious disease. Due process of law is a guaranteed right to the Plaintiffs under the Illinois Constitution and has been specifically codified for circumstances such as these under 20 ILCS 2305 *et seq*. If the Legislature did not think due process rights and a method for objecting were important, they would not have created an entire statute on the issue. When a right such as the one being violated here is alleged, irreparable injury is satisfied. *Makindu v. Illinois High School Assn.*, 2015 IL App (2d) 141201 (2015). Continued deprivation of procedural and substantive rights that are protected by both statutory and constitutional law cannot be compensated in the form damages.

III. Inadequate Remedy At Law

There is no adequate remedy at law because the loss of the continuous sacrifice of legal rights cannot be cured retroactively once the issues are decided on the merits. See *Hough v. Weber*, 202 Ill. App. 3d 674, 686 (2d Dist. 1990). An "adequate remedy at law is one which is clear, complete and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *Cross Wood Products, Inc. v. Suter*, 97 Ill. App. 3d 282, 286 (1st Dist. 1981). Furthermore, where injuries are of a continuing nature, remedies at law are inadequate, and injunctions should be imposed. *See Fink v. Board of Trustees of Southern Illinois University*, 71 Ill. App. 2d 276, 281 (5th Dist. 1966).

There is no remedy available after trial in this cause which would compensate these Plaintiffs for the harm caused them by being forced to accept the masking mandate, which this Court finds are, by definition, a type of quarantine, as well as the vaccination or testing policies, being lodged against Plaintiffs at the whims and caprice of the Defendants, all without any procedural or substantive due process rights to object. The losses are not easily, if at all,

quantifiable as a remedy at law. For these reasons, the Court finds the Plaintiffs have no adequate remedy at law.

IV. A Likelihood of Success On The Merits

When addressing this motion, the Court should not attempt to decide issues of fact or the ultimate merits required at the final hearing, but instead should consider whether the plaintiffs have raised a "fair question" as to the likelihood of success on the merits. *Murges v. Bowman,* 254 Ill. App. 3d 1071, 1083 (1st Dist. 1993). A plaintiff need only "raise a fair question as to the existence of the right which it claims and lead the court to believe that it will probably be entitled to the relief requested if the proof sustains [its] allegations." *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 903 (2d Dist. 2009).

In review of the definitions of "quarantine" and "modified-quarantine" set forth in the Chapter 77 of the Illinois Administrative Code (both of which were in existence upon the issuance of EO18 and EO24), it is very clear that a child's exclusion from school, a teacher's inability to engage in their occupation, and a requirement for a child to wear a mask that is intended to limit the spread of an infectious disease, all fit within the confines of quarantine. In the event it is argued EO24 was to suspend section 2(c), the Governor must show that strict compliance with the IDPH would hinder his efforts to address the pandemic. To this point, it is important to note, upon the issuance of EO24, the State had been operating under the parameters of the IDPH for over one and a half years (1½) with the pandemic, and it was not until numerous Court rulings were issued mandating compliance with the IDPH that the Governor issued EO24. Further, at the time EO24 was issued, the Joint Guidance issued by both the ISBE and IDPH indicated the local health department was to make final determination regarding issues of close contact and quarantine and lengths of time as to quarantine or isolation. The Governor, in the issuance of EO18, mandated

schools follow this very Joint Guidance in its operations. Through the issuance of EO24, no reference is made to "suspension," nor is any reference made to any "hindrance" of the Governor's efforts through continued compliance with the IDPH in matters of quarantining children and/or teachers.

As noted in *In Re Bradwell*, 55 Ill. 535, 540 (1869), it is well established that the Legislative Branch is the branch of government to which the constitution has entrusted the power of changing the laws. In passing the IDPH Act, the General Assembly made clear the IDPH has "supreme authority in matters of quarantine and isolation."[35] The Legislature did not instruct IEMAA to delegate health issues to any other Executive Branch during health related emergencies. The Legislature further indicated only the IDPH could "amend rules . . . as it may from time to time deem necessary for the preservation of public health."[36] *Id.* The Legislature did not vest ISBE with such authority in matters of quarantine, isolation, vaccination and/or public health in general. In fact, the Legislature vested the IDPH with the authority to declare what vaccines and immunizations are required to attend school.[37] As outlined in paragraph d) of this Section, if a school decides to exclude a student from school for failure to have the health examinations or immunizations, then any such exclusion must comport with the School Code 5/27-8.1 which references Part 690 of Title 77 of the Illinois Administrative Code if an objection to the exclusion is presented. The ISBE's emergency administrative rules mandating issues of masking, vaccinations, testing and quarantine are outside the scope of any authority granted them by the Legislature.

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[35] 20 ILCS 2305/2.

[36] It should be noted that IDPH did not argue its Emergency Rules fell under any IEMAA provision. Even if IDPH had argued this, IDPH did not explain how the Emergency Rules were to preserve the public health. All IDPH did was take away individual due process rights and pass the responsibilities of health care issues to another administrative agency.

[37] 77 Ill. Admin. Code 665.230 School Entrance; *see also*, 105 ILCS 5/27-8.1.

Both the Illinois School Code and IDPH Act adopted the IAPA and the adoption of rule-making therewith. The necessary promulgated procedures set forth in the IAPA were not followed by the IDPH in the adoption of the word "exclusion" and stripping of "modified quarantine" from Title 77 of the Illinois Administrative Code. The mere purpose of implementing the rules was to vitiate the Court's oversight in matters of quarantine. The Joint Guidance issued by the ISBE and IDPH made clear that the local health departments had the final determination in these matters. Sections 2(c), (d), and (e) of the IDPH Act specifically require judicial oversight, if there is an objection, to prevent the arbitrary and predetermined decisions of removing healthy children from public, in-person learning. "The real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments . . . it may be irrelevant if an agency has legislative or judicial characteristics so long as the legislature or the judiciary can effectively correct errors of the agency." *City of Waukegan v. Pollution Control Board*, 311 N.E. 2d 146, 149, 57 Ill. 2d 170 (1974). The Governor, IDPH, and ISBE all attempted to remove the judiciary from oversight in matters related to all forms of "quarantine" through the issuance of the Executive Orders and Emergency Rules in question, which fail to maintain the separate branches of government clearly intended by the Legislature in the implementation of the IDPH Act.

The Court finds the Plaintiffs have satisfied their burden of raising a fair question of establishing a likelihood of success on the merits that the IDPH Act is the controlling law in regard to matters of masking, quarantine, isolation, vaccination or testing policies implemented by the school districts. No party has cited to any law authorizing schools to make independent health care decisions and rules absent input and guidance from IDPH or local health departments. Again, the Legislature made it clear that school boards were to develop rules relating to managing children

with chronic infectious diseases, not inconsistent with guidelines published by IDPH and ISBE.[38] In other words, this law makes it clear that there must be input from IDPH, but IDPH cannot delegate its duties and responsibilities to ISBE and then stand on the sidelines with its hands in the air, saying "It wasn't us. We didn't exclude kids. We didn't mandate vaccines. We didn't implement a mask mandate…the schools did."

V. Balancing Of Hardships

The Court is told by the Defendants, should this Court grant relief to the Plaintiffs, the students in the districts, and the public as a whole, will be harmed by the further spread of COVID. While the Defendants offer no direct evidence of such a proposition, attached to their pleadings were affidavits of medical professionals who opined that masking, vaccination or testing, and other mitigations are the best chance of controlling the spread of COVID. It is worth noting the Plaintiffs do not seek any order of this Court dismantling masking, vaccination or testing policies in their totality. Only that due process under the law be afforded to them should they choose to object to being quarantined, which by definition includes masks, as well as being subjected to vaccination or testing. These Plaintiffs are not asking for anything other than what the Legislature said they were entitled.

This Court has already found the Plaintiffs are entitled to this due process under the IPDH Act, so the question for the Court is what hardship this might create for Defendants or the public. It is not necessary for the Court to weigh these potential risks presented by the Defendants as such balancing has already been conducted by the Legislature. It is well established that the Legislature, not the courts, have the primary role in our democratic society in deciding what the interests of the public require and in selecting the measures necessary to secure those interests.

[38] 105 ILCS 5/10-21.11

The very essence of 20 ILCS 2305 is the Legislature balanced these competing interests and concluded that citizens may be subjected to masking, isolation, quarantine, vaccination or testing when necessary to protect the public against the spread of an infectious disease. The provisions of 20 ILCS 2305 and the relevant provisions found in 77 Ill. Adm. Code 690.1330 were meant for times such as our State currently finds itself. The Legislature understood that during times like these, liberty interests were at stake, and as such, provided due process under the law for citizens to rely upon should he or she choose to do so. If the certified local health departments utilize the law as it is written, the Legislature has concluded such measures are satisfactory to protect the publics' interests. It is not this Court's role to question the Legislature's balancing of the competing interests as being adequate or not. If the Legislature was of the opinion that the public health laws as written were not satisfactory to protect public health from COVID, it has had adequate opportunity to change the law since March 2020. Given the Legislature has changed the law and has chosen not change these relevant provisions, this Court must conclude the laws which have long been in place to protect the competing interests of individual liberty and public health satisfactorily balance these interest in the eyes of the Legislative branch of government. While the Defendants would seemingly ask this Court to second guess the Legislature's adopted measures to prevent the spread of an infectious disease, which measures include due process of law, it will not do so.

For these reasons, the Court finds the Plaintiffs will suffer irreparable injury should this Temporary Restraining Order not issue.

WHEREFORE, IT IS HEREBY ORDERED as follows:

1) The IDPH Emergency Rules enacted on September 17, 2021 changing sections 690.10 (Definitions); 690.361(d) (Schools), 690.1380 (Physical Examination; Testing and Collection of Laboratory Specimens), and 690.1385 (Vaccinations, Medications, or Other Treatments) of Title 77 of the Illinois Administrative Code is deemed null and void;[39]

2) ISBE Emergency Rule enacted on September 17, 2021, Part 6, Mandatory Vaccinations for School Personnel is deemed null and void;[40]

3) Defendants are temporarily restrained from:

    a. Enforcement of EO18, EO24, EO25 as they pertain to the issue before the Court and the Emergency Rules issued by the IDPH and ISBE;

    b. Ordering school districts require the use of masks for students and teachers who occupy their buildings, if they object, except during the terms of lawful order of quarantine issued from their respective health department, in accordance with the IDPH Act;

    c. Ordering school districts to require persons who are both unvaccinated and work in Illinois schools to provide weekly negative results of an approved COVID-19 test or be vaccinated if they object in order to occupy the school building without first providing them due process of law; and

    d. Ordering school districts to refuse admittance to their buildings for teachers and students for specified periods of time if the teacher or student is deemed a "close contact" of a confirmed probable COVID-19 case without providing due process to that individual if they object, unless the local health department has deemed the individual a close contact after following the procedures outlined in 20 ILCS 2305 and 77 Ill. Adm. Code 690.1330.

4) This temporary restraining order shall remain in full force and effect pending trial on the merits unless sooner modified or dissolved.

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[39] Although this Court denied Plaintiffs' request for Class Certification in Case No: 2021-CH-500002, this Court has declared IDPH's Emergency Rules void. Any non-named Plaintiffs and School Districts throughout this State may govern themselves accordingly.

[40] Although this Court denied Plaintiffs' request for Class Certification in Case No: 2021-CH-500007, this Court has declared IDPH and ISBE's Emergency Rules void. Thus, non-named Plaintiffs and School Districts throughout this State may govern themselves accordingly.

5) For good cause shown bond is waived as there are no set of facts under which the Defendants may suffer any significant financial harm as a result of the TRO.

6) This Temporary Restraining Order is entered at 4:45 pm on February 4, 2022.

7) This constitutes the Decision, Order and Judgment of the Court.

Raylene D. Grischow

Honorable Raylene DeWitte Grischow
Circuit Court Judge