

E-FILED
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CYNTHIA A. GRANT
SUPREME COURT CLERK

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JULIEANNE AUSTIN, as the Parent)	Petition for Leave to Appeal from
or Legal Guardian of T.L. and L.A., <i>et</i>	)	the Appellate Court of Illinois,
<i>al.</i> , ¹	)	Fourth Judicial District,
	)	Nos. 4-22-0090, 4-22-0092,
Plaintiffs-Respondents,	)	4-22-0093, 4-22-0094 (cons.)
)	
v.	)	There Heard on Appeal from the
	)	Circuit Court for the Seventh
THE BOARD OF EDUCATION OF	)	Judicial Circuit, Sangamon
COMMUNITY UNIT SCHOOL	)	County, Illinois
DISTRICT #300, <i>et al.</i> ,)	
	)	Nos. 2021-CH-500002
Defendants,	)	2021-CH-500003
	)	2021-CH-500005
(The Board of Education of	)	2021-CH-500007
Community Unit School District)	
300, <i>et al.</i> , Defendants-Petitioners).	)	The Honorable
	)	RAYLENE GRISCHOW,
	)	Judge Presiding.

**EMERGENCY MOTION FOR EXPEDITED CONSIDERATION
OF PETITION FOR LEAVE TO APPEAL AND ANY
SUBSEQUENT PROCEEDINGS ON APPEAL**

Defendants-Petitioners Governor JB Pritzker, the Illinois State Board of Education (“ISBE”), the Illinois Department of Public Health (“IDPH”), Dr. Ngozi Ezike, in her official capacity as IDPH Director, and Dr. Carmen I. Ayala, in her official capacity as ISBE Superintendent (collectively, “State defendants”), respectfully move, on an emergency basis, pursuant to Illinois Supreme Court Rule

¹ The appendix to this petition contains a list of all plaintiffs-respondents, defendants, and defendants-petitioners. *See* A80-111.

311(b), for an order expediting the Court’s consideration of their concurrently submitted petition for leave to appeal and all ensuing proceedings. In support of this motion, State defendants attach the verification by certification of Solicitor General Jane Elinor Notz and state as follows.

BACKGROUND

1. As described more fully in State defendants’ petition for leave to appeal and emergency motion for a stay pending appeal, this appeal concerns Governor Pritzker’s response to the Covid-19 pandemic, and specifically the public-health measures put in place between August and September 2021 to curb the spread of Covid-19 in Illinois schools.

2. As relevant here, in August and September 2021, the Governor issued a range of executive orders (“EOs”) intended to prevent Covid-19 from spreading in Illinois schools. Those EOs generally require schools to implement indoor masking requirements for students and employees, and required all school employees to be vaccinated against Covid-19 or to provide negative results of a Covid-19 test on a weekly basis. *See Allen* SR413-15, 1090, 1093.² They also provide for temporary exclusion from school premises of certain individuals, including those unvaccinated school personnel who do not comply with the testing requirement and students or school personnel who have or are suspected of having Covid-19. *Allen* SR1103,

² This declaration relies on the appendix filed with State defendants’ petition for leave to appeal (cited “A__”) and the supplemental record filed in the appellate court in *Allen v. Illinois Department of Public Health*, No. 4-22-0094 (cited “*Allen* SR”).

1627-28, 1630-33. These measures were extended in subsequent EOs and remain in effect.

3. Consistent with the EOs, ISBE and IDPH filed emergency rules. The ISBE Emergency Rule, 45 Ill. Reg. at 11843, *et seq.*, amended portions of Title 23 of the Illinois Administrative Code to implement the vaccination or testing requirement for school personnel, *see Allen* SR1227. The IDPH Emergency Rule, 45 Ill. Reg. 12123, amended portions of Title 77 of the Illinois Administrative Code related to managing disease in schools, *id.* at 12144-48. That rule also clarified that “requiring vaccination, testing, or the wearing of masks, or excluding a Student or School Personnel . . . shall not constitute isolation or quarantine under the [IDPH] Act,” and provided that those actions may be taken by schools “without a court order or order by a local health authority.” *Allen* SR1532. The IDPH emergency rule expired on February 14, 2022, and IDPH’s subsequent effort to renew it was later suspended by the Joint Committee on Administrative Rules.

4. This matter concerns the legality of the EOs and emergency rules described above. Plaintiffs in the four separate actions that give rise to this matter filed actions in the circuit court between September and December 2021 generally challenging the legality of the masking, testing, and exclusion requirements. They argued primarily that the EOs could not be enforced because the measures required by those EOs could not be implemented without following the procedures set out in section 2 of the IDPH Act—namely, an individualized hearing followed by a court order. They also contended that the emergency rules were invalid.

5. On February 4, 2022, the circuit court entered a temporary restraining order (“TRO”) in these actions. A1. The court agreed with plaintiffs that the public-health measures set out in the EOs could not be implemented absent the procedures set out in the IDPH Act, and that the emergency rules were invalid. The TRO prohibits State defendants and over 150 school boards named as defendants from enforcing the EOs as to the named parties.

6. On February 17, 2022, the appellate court entered an order, over a partial dissent, dismissing State defendants’ appeal from that TRO as moot. A33. That court held that plaintiffs’ challenges to the IDPH emergency rule were moot because that rule had expired. A35. And it reasoned that plaintiffs’ challenges to the EOs were likewise moot, because the IDPH emergency rule was “presumably necessary” to those EOs. A37-38. The dissenter stated that, in her view, only plaintiffs’ challenges to the IDPH emergency rule were moot. A38.

7. State defendants have filed a petition with this Court for leave to appeal the appellate court’s decision under Illinois Supreme Court Rule 315. They have also filed an emergency motion to stay the TRO pending disposition of the petition and potential appeal and an emergency motion for leave to file an oversize petition for leave to appeal and for the petition to stand as their opening brief in the event the petition is granted.

DISCUSSION

8. The Court should expedite its consideration of State defendants’ petition for leave to appeal and any ensuing proceedings in this matter. This appeal

concerns the validity of public health measures that State defendants implemented to protect Illinois schoolchildren, teachers, school administrators, and members of their communities from a deadly pandemic. The TRO entered in this case impairs State defendants' ability to protect the public health. Expedited consideration is thus warranted.

9. The TRO entered below impairs all defendants' ability to respond to the Covid-19 pandemic and thus exacerbates the effects of that pandemic for all Illinois residents. The circuit court enjoined defendants from implementing the public-health measures at issue here when the rate of Covid-19 among children was still unacceptably high. *Allen* SR1082. This consequence is especially problematic because children are currently vaccinated at lower rates than adults, and thus are more susceptible to contracting and spreading Covid-19, not only among themselves but also to their teachers, parents, and other community members. *Allen* SR1080.

10. Under the TRO, State defendants cannot require any mitigating measures with respect to the named plaintiffs without satisfying the procedures set out in section 2 of the IDPH Act. *Allen* SR3253. But that approach—premised on a serious misunderstanding of state law—will unacceptably hamper State defendants' efforts to prevent the spread of Covid-19. Among other things, under the Act, even an immediate order for a quarantine or isolation must be followed by a circuit court hearing within 48 hours. *See* 20 ILCS 2305/2(c). A Covid-19 outbreak in just one school district thus could require public health authorities to initiate and pursue hundreds or even thousands of hearings. *See Allen* SR915 (noting that Chicago

Public Schools has more than 330,000 students and 33,000 school-based employees); *Allen* SR828-31 (noting that Plainfield Community Consolidated School District 202 employs more than 3,200 people, and in the 2021-22 school year, 5,836 students and staff were identified as close contacts).

11. The TRO has also given rise to extraordinary uncertainty among parents, teachers, school administrators, and the public about which rules govern and why. As discussed more fully in State defendants' stay motion, school districts across Illinois—even those not formally affected by the TRO—have felt pressure to determine for themselves whether to continue to require students and employees to take steps to mitigate the risks posed by Covid-19 in line with the EOs that are the subject of this appeal. Some schools have stopped requiring masks and other mitigation measures, driven in part by concerns about legal liability.³

12. Other school districts have chosen to continue to enforce the EO, or implement analogous measures, but those districts, too, have incurred serious consequences from the TRO. The appellate court explained that the TRO does not “restrain[] school districts from acting independently . . . in creating provisions addressing COVID-19.” A34. But parents who believe themselves to be shielded by the TRO from *all* mitigation measures, no matter their source, have sought to hold

³ See, e.g., Glenbard District 87, *Superintendent Discusses Shift To Mask Optional*, Feb. 17, 2022, <https://www.glenbard87.org/news/superintendent-discusses-shift-to-mask-optional/>.

these districts and their employees in contempt of court, even threatening imprisonment.⁴

13. Given the seriousness of the issues raised by this appeal and the urgency associated with resolving the questions presented by it, State defendants request that the Court enter an order providing for expedited consideration of the petition for leave to appeal in this case and any subsequent proceedings on appeal.

14. To facilitate this process, State defendants have concurrently filed a motion for leave to file an oversize petition for leave to appeal, which they ask this Court to accept as their opening brief on appeal if the petition is granted. State defendants also request that the Court direct plaintiffs to file an answer on an expedited basis and provide that any such answer, not to exceed 13,000 words, would then stand as plaintiffs' response brief on appeal if the petition is granted. In addition, State defendants stand prepared to file a reply brief on whatever date the Court deems appropriate that would facilitate the scheduling of oral argument in this appeal during the second week of the March 2022 term of this Court.

⁴ See Tracy Swartz & Karen Ann Cullotta, *Two CPS Parents In School Mask Lawsuit Say Their Kids Were Told To Wear Masks Or Leave Mount Greenwood School, Want District Held In Contempt Of Court*, Chi. Trib., Feb. 14, 2022, <https://www.chicagotribune.com/news/breaking/ct-chicago-public-schools-mask-mandate-lawsuit-20220214-kdfbxpvvujd4fjwk2crutpuugm-story.html>; Greg Bishop, *Two School Districts Face Contempt Motion Over Claims They Are Violating Mask Restraining Order*, Center Square, Feb. 14, 2022, https://www.thecentersquare.com/illinois/two-school-districts-face-contempt-motion-over-claims-they-are-violating-mask-restraining-order/article_79bfc3cc-8dc9-11ec-a02d-e7d8280c3374.html

Alternatively, if the Court does not desire oral argument, State defendants stand ready to file a reply brief on any expedited date set by the Court.

15. State defendants specifically suggest that the Court enter an order providing that State defendants' opening brief be filed *instanter* as of the date that, and in the event that, this Court grants their petition for leave to appeal; and entering one of the following schedules, listed in order of preference:

- a. Plaintiffs' answer (to stand as a response brief) due by March 4, 2022; State defendants' reply brief due by March 11, 2022; and oral argument during the week of March 20, 2022; or, in the alternative to the above,
- b. Plaintiffs' answer (to stand as a response brief) and State defendants' reply brief due on any dates that would permit the Court to hear oral argument during the week of March 20, 2022; and oral argument to be held during that week; or, in the alternative to the above,
- c. Plaintiffs' answer (to stand as a response brief) and State defendants' reply brief due on any expedited dates the Court sets; and the case to be submitted without oral argument.

CONCLUSION

WHEREFORE, State defendants ask this Court to enter an order under Illinois Supreme Court Rule 311(b) providing for expedited consideration of the petition for leave to appeal as specifically set forth in paragraph 15 above, or on any other schedule the Court deems appropriate.

Respectfully submitted,

KWAME RAOUL

Attorney General
State of Illinois

JANE ELINOR NOTZ

Solicitor General

SARAH A. HUNGER

ALEX HEMMER

Deputy Solicitors General

/s/ Jane Elinor Notz

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Attorneys for State Defendants-
Petitioners

VERIFICATION BY CERTIFICATION

I, Jane Elinor Notz, state the following:

1. I am a citizen of the United States over the age of 18. My current business address is 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601. I have personal knowledge of the following facts. If called upon, I could testify competently to these facts.

2. I am the Solicitor General of the State of Illinois, and I am one of the attorneys representing State defendants in this matter. I submit this verification in support of State defendants' emergency motion for expedited consideration of the petition for leave to appeal and any subsequent proceedings on appeal, pursuant to Illinois Supreme Court Rule 311(b).

Background

3. This matter concerns Governor Pritzker's response to the Covid-19 pandemic, and specifically the public-health measures put in place between August and September 2021 to curb the spread of Covid-19 in Illinois schools.

4. On February 4, 2022, the circuit court entered a temporary restraining order ("TRO") in the four actions that give rise to this appeal. A1.¹ The TRO bars State defendants and over 150 school boards named as defendants from enforcing the executive orders ("EOs") challenged in the action—which require various public-health measures in school settings—to the named plaintiffs.

¹ This declaration relies on the appendix filed with State defendants' petition for leave to appeal (cited "A__") and the supplemental record filed in the appellate court in *Allen v. Illinois Department of Public Health*, No. 4-22-0094 (cited "*Allen SR*").

5. On February 17, 2022, the appellate court entered an order, over a partial dissent, dismissing State defendants' interlocutory appeal from that TRO as moot. A33. That court held that plaintiffs' challenges to the IDPH emergency rule were moot because that rule had expired. A35. And it reasoned that plaintiffs' challenges to the EOs were likewise moot, because the IDPH emergency rule was "presumably necessary" to those EOs. A37-38. The dissenter stated that, in her view, only plaintiffs' challenges to the IDPH emergency rule were moot. A38.

6. State defendants have filed a petition with this Court for leave to appeal the appellate court's decision under Illinois Supreme Court Rule 315. They have also filed an emergency motion to stay the TRO pending disposition of the petition and potential appeal and an emergency motion for leave to file an oversize petition for leave to appeal and for the petition to stand as their opening brief in the event the petition is granted.

Reasons for Seeking Expedited Consideration

7. The TRO entered below impairs all defendants' ability to respond to the Covid-19 pandemic and thus exacerbates the effects of that pandemic for all Illinois residents. The circuit court enjoined defendants from implementing the public-health measures at issue here when the rate of Covid-19 among children was still unacceptably high. *Allen* SR1082. This consequence is especially problematic because children are currently vaccinated at lower rates than adults, and thus are more susceptible to contracting and spreading Covid-19, not only among themselves but also to their teachers, parents, and other community members. *Allen* SR1080.

8. Under the TRO, State defendants cannot require any mitigating measures with respect to the named plaintiffs without satisfying the procedures set out in section 2 of the IDPH Act. A26. That will hamper State defendants' efforts to prevent the spread of Covid-19. Among other things, under the Act, even an immediate order for a quarantine or isolation must be followed by a circuit court hearing within 48 hours. *See* 20 ILCS 2305/2(c). A Covid-19 outbreak in just one school district thus could require public health authorities to initiate and pursue hundreds or even thousands of hearings.

9. The TRO has also given rise to uncertainty among parents, teachers, school administrators, and the public. As discussed more fully in State defendants' stay motion, school districts across Illinois—even those not formally affected by the TRO—have felt pressure to determine for themselves whether to continue to require students and employees to take steps to mitigate the risks posed by Covid-19 in line with the EOs that are the subject of this matter. Some have stopped requiring masks and other mitigation measures, driven in part by liability concerns.²

10. Other school districts have chosen to continue to enforce the EO, or implement analogous measures, but those districts, too, have incurred serious consequences from the TRO. The appellate court explained that the TRO does not “restrain[] school districts from acting independently . . . in creating provisions addressing COVID-19.” A34. But parents who believe themselves to be shielded by

² *See, e.g.,* Glenbard District 87, *Superintendent Discusses Shift To Mask Optional*, Feb. 17, 2022, <https://www.glenbard87.org/news/superintendent-discusses-shift-to-mask-optional/>.

the TRO from all mitigation measures have sought to hold these districts and their employees in contempt of court, even threatening imprisonment.³

11. Given the seriousness of the issues raised by this appeal and the urgency associated with resolving the questions presented by it, State defendants have therefore requested that the Court provide for expedited consideration of the petition for leave to appeal in this case and any subsequent proceedings on appeal.

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

Executed on February 22, 2022.

/s/ Jane Elinor Notz
Jane Elinor Notz

³ See Tracy Swartz & Karen Ann Cullotta, *Two CPS Parents In School Mask Lawsuit Say Their Kids Were Told To Wear Masks Or Leave Mount Greenwood School, Want District Held In Contempt Of Court*, Chi. Trib., Feb. 14, 2022, <https://www.chicagotribune.com/news/breaking/ct-chicago-public-schools-mask-mandate-lawsuit-20220214-kdfbxpvvujd4fjwk2crutpuugm-story.html>; Greg Bishop, *Two School Districts Face Contempt Motion Over Claims They Are Violating Mask Restraining Order*, Center Square, Feb. 14, 2022, https://www.thecentersquare.com/illinois/two-school-districts-face-contempt-motion-over-claims-they-are-violating-mask-restraining-order/article_79bfc3cc-8dc9-11ec-a02d-e7d8280c3374.html

Defendants-Appellants shall file any reply on or before March 11, 2022. Defendants-Appellants' reply shall be limited to 6,500 words. If the petition is granted, oral argument will be scheduled for the second week of the March 2022 term of court.

ENTER:

JUSTICE

DATED: _____

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 22, 2022, I electronically filed the foregoing **Emergency Motion to Expedite Consideration of Petition for Leave to Appeal and Any Subsequent Proceedings on Appeal** with the Clerk of the Court for the Supreme Court of Illinois, by using the Odyssey eFileIL system.

I further certify that the other participants in this case, named below, are not registered service contacts on the Odyssey eFileIL system, and thus will be served by transmitting a copy to all primary and secondary e-mail addresses of record designated by those participants on February 22, 2022.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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