

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

MATTHEW ALLEN, *et al.*,)
Plaintiffs,)
v.)
GOVERNOR ROBERT JAY PRITZKER,)
In his official capacity, *et al.*,)
Defendants.)

2021-CH-500007

FILED

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Clerk of the
Circuit Court

TEMPORARY RESTRAINING ORDER

This matter is before the Court on the Motion for a Temporary Restraining Order filed on March 10, 2022 brought by plaintiffs LENA CARRILLO, ASHLEY RAFALIN, YALILA ASSRIA-HERRERA, MARGARITA MAYAS, MARY KELLY and VANESSA RODRIGUEZ through their attorneys Thomas G. DeVore and William J. Gerber. The BOARD OF EDUCATION OF THE CITY OF CHICAGO, SCHOOL DISTRICT #299 appeared through counsel, William R. Pokorny. Arguments were heard on March 15, 2022. The Court took the matter under advisement. The Parties were given until March 25, 2022 to submit proposed orders. On March 18, 2022, the Court issued a Memorandum requesting clarification on certain issues and requested counsel provide responses on or before March 25, 2022. The Court extended the deadline to submit proposed order to March 28, 2022. This Court, having reviewed the record, pleadings, the parties' written and oral arguments, and applicable legal authority, finds as follows:

I. BACKGROUND

Executive Order 2021-20 ("EO") became effective on August 26, 2021 and required that school personnel be vaccinated. For those who were not fully vaccinated, they had to be tested. EO2021-22 became effective September 17, 2021 and extended the vaccine deadline to September 19, 2021. The EO stated that nothing prohibited public or private entities from implementing

vaccine/testing requirements that exceed the requirements of this EO. The EO further stated the Illinois Department of Public Health (“IDPH”) and the Illinois State Board of Education (“ISBE”) may adopt emergency rules to require facilities to conduct more frequent testing. Finally, the EO indicated that IDPH/ISBE may promulgate emergency rules to effectuate the mandate regarding vaccines. Notably, it was indicated that nothing in the EO was to supersede IDPH protocol. This EO has continually been readopted by subsequent executive orders.

Plaintiffs are teachers employed by the Chicago Board of Education (the “Board”), which operates the Chicago Public School System (“CPS”). Plaintiffs are represented for collective bargaining purposes by the Chicago Teachers Union (“CTU”). The Board has made compliance with its COVID-19 testing policy a condition of employment.¹ The Board also maintains that the adoption of the current COVID-19 vaccination and testing policy was a valid exercise of its inherent managerial authority under Section 4 of the Illinois Education Labor Relations Act (“IELRA”), 115 ILCS 5/4 and the management rights provision of the Collective Bargaining Agreement (“CBA”).

Plaintiffs object to having to submit to weekly COVID-19 testing. Two of the plaintiffs assert that they are not currently complying with CPS’s testing requirement and that they were warned by CPS that they may be placed on unpaid administrative leave if they do not comply with the policy. CPS has also warned that they could be subject to disciplinary action. As of the date of the hearing, plaintiffs’ counsel reported that plaintiffs have not yet been placed on unpaid leave status or suffered any other employment consequences for noncompliance with the testing policy. The remaining plaintiffs allege that they are currently complying with the testing requirement against their wishes because they do not wish to be placed on unpaid leave status.

¹ The Board adopted an amendment to Board Policy 6-4 on February 24, 2021. Final approval was granted on April 28, 2021.

Plaintiffs do not allege that they have exhausted their remedies under Article 3 of the CBA, nor do they contend that the CTU has breached its duty of fair representation. Instead, plaintiffs urge that the dispute before the Court is not subject to the grievance and arbitration process under the CBA because they challenge the Board's authority to adopt its COVID-19 testing policy for unvaccinated employees under the Illinois Department of Public Health Act ("IDPHA"). The Board counters that its policy is a valid exercise of its inherent managerial authority to establish work rules for teachers under Section 4 of the IELRA and the management rights language in Section 48-2 of the CBA. The Board further argues that the injunction plaintiffs seek implicates plaintiffs' employment rights as provided for in the CBA and IELRA, hence this Court lacks subject matter jurisdiction to hear this dispute. Plaintiffs claim the basis for seeking a TRO is the mandated vaccination and testing policy being forced upon them as employees is in violation of their Illinois constitutional and statutory rights of due process.

This Court recognizes it previously queried into the independent authority of school districts to adopt and enforce necessary rules for the management and government of their schools in its February 4, 2022 Temporary Restraining Order. At that time the school districts argued that the IELRA governed the relations between educational employers and employees, including specific terms of employment. The Court noted that those issues were not before the Court and refrained from any specific ruling on those issues. Those issues are now before this Court.

II. Analysis and Opinion

a. Subject Matter Jurisdiction

The Court acknowledges that there is a dispute between the parties as to whether the grievance and arbitration provisions of the CBA apply to the present dispute, as well as the substantive question of whether the Board had authority under the IELRA and the management

rights provision of the CBA to adopt the work rule at issue in this case. Before deciding those issues, the Court must decide whether it has jurisdiction to hear this dispute. A court has an independent duty to ensure it has jurisdiction. Subject matter jurisdiction refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334, 264 Ill. Dec. 283, 770 N.E.2d 177 (2002). With the exception of the circuit court's power to review administrative actions, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution. Ill. Const. 1970, art. VI, § 9; *Belleville Toyota*, 199 Ill. 2d at 334.

Labor relations between educational employers, such as the Board, and educational employees, such as plaintiffs, are governed by 115 ILCS 5/1 *et seq.* In this case, the Board is an educational employer within the meaning of Section 2(a) of the Act. The plaintiffs are members of CTU, an organization within the meaning of Section 2(c) of the Act. Both are parties to a CBA effective from July 1, 2019 to June 30, 2024.

On February 24, 2021, the Board adopted an amendment to Board Policy 6-4, authorizing the Chief Executive Officer or designee to require employees to report and show proof of a COVID-19 vaccination and to require COVID-19 immunization as a condition of hire or continued employment upon FDA approval of a COVID-19 vaccine. This policy was granted final approval on April 28, 2021. The policy specifically stated “consistent with all relevant laws” the Chief Executive Officer may require a COVID-19 immunization as a condition of hire or employment. At the time the policy was passed, there was no “law” that required COVID-19 immunization for school personnel. On August 13, 2021, CPS announced all CPS employees would be required to present proof of full COVID-19 vaccination by October 15, 2021 unless they had an approved medical or religious exemption. Staff who were not vaccinated were required to test weekly.

Plaintiffs raise a legitimate issue as to what authority the Board has to implement a policy that mandates vaccinations given the IDPH is the entity that has “general supervision of the interests of the health and lives of the people of the State, has supreme authority in matters of quarantine and isolation, and may declare and enforce quarantine and isolation when none exists and may modify or relax quarantine and isolation when it has been established.” See 20 ILCS 2305/2 (emphasis added). As this Court previously held, vaccines and testing are forms of quarantine which are subject to due process. Defendants have not cited to any statutory authority under the School Code or the Department of Public Health that authorizes the Board to create a policy and mandate vaccines and/or testing that have not been set out in an Executive Order, supported by rules, or mandated by the IDPH. At most, school boards may only implement policies that are not inconsistent with IDPH/ISBE’s Joint Guidance.²

At the time the Board implemented its vaccine/testing policy, there was no Joint Guidance from IDPH/ISBE that mandated vaccines and/or testing on school personnel. When the Board passed its policy, the Governor had not issued any Executive Orders to support that policy, nor were there any Emergency Rules in effect. Stated differently, when the Board passed its mandate in April 2021, it was not until four (4) months later the Governor issued EO 2021-20 requiring vaccinations for school personnel.

The Illinois Public Health Code 20 ILCS 2305/2(c) gives this Court jurisdiction over claims arising under that statute. The Legislature has already delegated matters related to vaccination, testing, masking, and other measures intended to mitigate infectious disease to IDPH. There is no independent authority granted to either the Governor or the collective bargaining organizations on this topic. Under the laws of the State of Illinois, the decision whether, when, and how to

² See and cf., 410 ILCS 315/1, 410 ILCS 315/2, 105 ILCS 5/27-8.1, and 105 ILCS 5/10-21.11.

require vaccination and testing of certain individuals is delegated to the IDPH. Plaintiffs' right to due process of the law is codified in 20 ILCS 2305 *et seq.* These rights belong to the individual by operation of Illinois statute. The Legislature has chosen to require that certain disputes surrounding working conditions can only be resolved through collective bargaining and arbitration. It has not chosen to treat the subjects of disease mitigation, vaccination and/or testing in the same way. Hence this Court has jurisdiction.³

III. Standard for a Temporary Restraining Order

A temporary restraining order is an emergency remedy intended to maintain the status quo, which is the "last, actual, peaceable uncontested status that preceded the pending controversy." *Makindu v. Illinois High School Ass'n*, 2015 IL App (2d) 141201 ¶ 45. Often maintaining the status quo means keeping all actions at rest, but sometimes it happens that the status quo is not a condition of rest but rather one of action and that the condition of rest is exactly what will inflict the irreparable harm. *Id.* Parties seeking a temporary restraining order are required to demonstrate (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006).

A. Plaintiffs Possess a Clear Right In Need Of Protection

The Legislature made it clear that plaintiffs have a due process right to object before being subjected to vaccination, testing, isolation, or quarantine, all of which are alleged to prevent the spread of an infectious disease. The Court finds that 20 ILCS 2305(2)(d) and 20 ILCS 2305(2)(e) expressly provide due process rights for plaintiffs to refuse vaccination and/or testing. This Court remains of the opinion that vaccines and testing are measures intended to limit the spread of an

³ Simply because defendants suggest this is solely a CBA dispute does not negate plaintiffs' right to pursue a separate and distinct statutory due process claim.

infectious disease and, as such, are a type of quarantine. The Court also finds that exclusion from one's place of employment is a type of modified quarantine. Plaintiffs have due process rights in need of protection which must be afforded to them before they can be excluded from the public school building and prevented from performing their work duties due to their decision not to be vaccinated or submit to testing for COVID-19 under a policy that, at the time it was implemented, was not mandated by the IDPH and was further not supported by any Executive Order, Emergency Rules and/or Joint Guidance.

B. Plaintiffs Will Suffer Irreparable Injury

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 policy/mandate being levied against them, and it is these due process rights which are being continually violated by the enforcement of the Board's policy that was passed without any authority under the IDPHA. Under Illinois law, a citizen who refuses to submit to vaccination or testing may only be subjected to an isolation or quarantine order from a local health department. In this cause, CPS is threatening to exclude plaintiffs from the facility and threatening "involuntarily termination" if school personnel refuse to comply.

The Board may claim there is no injury as the plaintiffs have not been placed on leave or been terminated. "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 Partnership*, 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 guaranteed under the Illinois Constitution, which have been further codified 20 ILCS 2305 *et seq.* and further provided for under 77 Ill. Adm. Code 690.1330.

Moreover, under 105 ILCS 5/34-85. Removal for cause; notice and hearing; suspension, under section (9), the Legislature specifically addressed removal of teachers if the Governor has declared a disaster due to a public health emergency pursuant to Section 7 of the IEMAA. Specifically, the prehearings and hearings are paused and do not begin to toll until the proclamation declaring a disaster is no longer in effect. The Governor issued his latest proclamation on April 1, 2022 pursuant to Section 7 of IEMAA and found that a disaster exists within the State of Illinois. The Legislature has spoken and told school boards that they cannot terminate teachers during times of disaster unless it has been mutually agreed upon by the parties. Hence pursuant to statute the Board is prohibited from taking the action it threatens.

Plaintiffs' legal rights to procedural and substantive due process are being sacrificed every day. They have a right to insist upon compliance with statutory requirements approved by the Legislature. 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).

C. Plaintiffs Have No Adequate 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*, 202 Ill. App. at 686. There is no remedy available which would compensate these plaintiffs for the harm caused to them by being forced to accept the Board's policy, all without any procedural or substantive due process rights to object. The losses are not easily measureable as a remedy at law.

D. Plaintiffs Are Likely To Succeed On The Merits Of Its Claim

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). 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 IDPHA is the controlling law regarding matters of vaccination and/or testing policies that are being implemented by the Board.

The Board argues they hold inherent authority under the school code to adopt such measures and that the IDPHA does not apply within the borders of the school buildings. The Court considered numerous specific provisions of the Illinois School Code. As outlined in 105 ILCS 5/10-20, “the board may exercise all other powers not inconsistent with this Act that may be a requisite or proper for the maintenance, operation, and development of any school or schools under the jurisdiction of the board.” The powers expressly granted to school boards include the power “[t]o adopt and enforce all necessary rules for the management and government of the public schools of their district” (105 ILCS 5/10-20.5). School boards also have the power “[t]o maintain the public schools under their jurisdiction as the good of the schools may require and in conformance with the code authorized in Section 2-3.12” (105 ILCS 5/10-20.6); the power “[t]o develop policies and adopt rules relating to the appropriate manner of managing children with infectious diseases, not inconsistent with guidelines published by State Board of Education and the Illinois Department of Public Health.” (105 ILCS 5/10-21.11)(emphasis added); the power to require students to submit to health exams “[i]n compliance with rules and regulations which the Department of Public Health shall promulgate,” (105 ILCS 5/27-8.1(1)); and protection from communicable disease (77 Ill. Adm. Code 665.120(a)); the power to exclude a student from school

if not fully vaccinated against various communicable diseases in accordance with IDPH rules under Part 690 of Title 77 of the Illinois Administrative Code (105 ILCS 5/27-8.1(8)); and the power to “adopt a school uniform or dress code policy ... that is necessary to ... prevent endangerment of student health or safety.” (105 ILCS 5/10-22.25b). None of the foregoing provisions expressly provide the Board with the independent authority to manage issues of public health, namely the control of an infectious disease.

The broad power referenced in the Illinois School Code gives the Board authority for the maintenance, operation, and development of their schools. While there is one referenced provision regarding infectious disease, this provision concerns children who actually have an infectious disease. The maintaining, operation, development, management, and governance of the school district does not encompass issues of vaccination or testing of school personnel in order to protect the public health from the spread of an infectious disease when it has not been mandated by the IDPH. Public health matters have been specifically delegated by the Legislature to IDPH.

E. Balancing the Equities

It has been suggested to this Court that should it grant relief to the plaintiffs, the students, staff, and the public as a whole will be harmed by the further spread of COVID. Plaintiffs do not seek any order of this Court undoing vaccination or testing policies in their totality, simply that due process be afforded to them should they object to being vaccinated or required to test (as opposed to termination or removal).

This Court previously found the plaintiffs are entitled to this due process under the IPDHA. The question for the Court is what hardship this might create for CPS or the public. The Legislature has already weighed the potential risks. It is well established that the legislators, 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. *People v. Kohrig*, 113 Ill. 2d 384, 498 N.E.2d 1158 (1986). Recognizing the Legislature's broad power to provide for the public health, welfare, and safety, the courts are hesitant to second-guess a legislative determination that a law is desirable or necessary. *Id.*

The very essence of 20 ILCS 2305 is the Legislature, having balanced these competing interests, has concluded that citizens may be subjected to vaccination or testing when necessary to protect the public against the spread of an infectious disease. If a citizen refuses to consent, only after due process has been provided, may the citizen be isolated or quarantined. The provisions of 20 ILCS 2305 and the relevant rules 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. If the certified local health departments utilize the law as it is written, the Legislature has concluded such measures are satisfactory to protect the public's interests.⁴ 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 insufficient to protect public health from COVID, it had since March 2020 to revise the law. Given the Legislature has chosen not to do so, 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 interests.

⁴ While defendants may argue the issue before the Court does not involve local health departments, this Court disagrees. It appears the Board's conduct directly circumvented the state and local health departments' role and required involvement in containing and controlling the spread of an infectious disease.

WHEREFORE, IT IS HEREBY ORDERED:

A) A temporary restraining order is entered enjoining The Board and CPS from taking any action against plaintiffs' employment for refusing to comply with the school district's vaccination or testing policy, alleged to prevent the spread of an infectious disease, unless the plaintiffs have first been given their procedural and substantive due process rights under 20 ILCS 2305, *et seq.* which procedures have been further outlined in 77 Ill. Adm. Code 690.1330.

B) This Order is binding upon all the parties to this action, including all of their officers, agents and employees.

C) Nothing in this Order shall be deemed to limit the certified local health department from enforcing all applicable provisions of 20 ILCS 2305 *et seq.* and 77 Ill. Adm. Code 690, *et seq.* as necessary to limit the spread of any infectious disease.

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

E) For good cause shown bond is waived as there are no set of facts under which defendants might suffer any significant harm as a result of the TRO.

F) This Order was entered on April 8, 2022 at 2:22 PM.

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



Honorable Raylene DeWitte Grischow
Circuit Court Judge