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VIA EMAIL

David A. Comsa
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Re: Ann Arbor Public Schools Mask Mandate

Dear Mr. Comsa:

We write in response to your letter of January 13, 2023, which contends that Ann Arbor Public School (“AAPS”) possesses the legal authority to impose an indoor mask mandate. We disagree. Your cited legal authorities do not establish such a basis. Moreover, while the temporary mask mandate which covered the period January 9-20th has ended, AAPS’ health policy provides that it may reinstate the mandate in the future:

The CDC Community Levels will still be used as a guide for masking, with weekly communication and signs at school entrances. We will continue to use a responsive approach, and as circumstances change, classrooms, groups or schools may be required to take additional mitigation steps to support health and attendance, including masking for a period of time.¹

Your letter cites to *Lewandowski v. Southgate Community School Board of Education*, No. 21-12317, 2022 U.S. Dist. LEXIS 6563 (E.D. Mich. Jan. 12, 2022), as support for the mask mandate. Therein, the court explained: “[t]he Court finds that Defendants have a rational basis for the mask policy that satisfies a legitimate state interest . . . The ongoing COVID-19 pandemic justifies a minor intrusion into the liberties of those who enter school facilities . . .” *Id.* at 6-7.

However, that court’s decision occurred in January 2022, during a time in which COVID-19 case detections in Washtenaw County were significantly higher than present. During January 2022, COVID-19 cases skyrocketed to 6,000 per week, and even higher.² This is in stark contrast

¹ January 20, 2023 - Superintendent Health Update, Ann Arbor Public Schools (Jan. 20, 2023), <https://www.a2schools.org/site/default.aspx?PageType=3&ModuleInstanceID=17841&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=25169&PageID=11460>.

² COVID-19 Integrated County View – COVID Data Tracker, CDC (Jan. 19, 2022), https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Michigan&data-type=CommunityLevels&list_select_county=26161.

to current conditions, as weekly COVID-19 cases are averaging less than 200 per week for the week ending February 1, 2023.³ As such, the court's stated justification for upholding the imposition of COVID-19 restrictions has since disappeared, given COVID-19 case and hospitalization rates are substantially lower, as per CDC's own indicators. Moreover, as emphasized in our prior letter, the AAPS Fall 2022 COVID and Health Guidance stated that masks would be "welcomed indoors" when Washtenaw County is rated low, "encouraged indoors" when the county is rated medium, and "strongly recommended" indoors when the county is rated high according to the CDC's Community Level.⁴ Thus, per your own guidance, even if the CDC's current community level were "high" for Washtenaw County, Michigan, the applicable corresponding guideline is masks "strongly recommended," not required.

Regardless of whether the CDC community level is medium or high, it is important to emphasize that CDC's community level indicator is neither accurate nor useful for school policy decisions. The data upon which CDC forms these community level determinations are significantly artificially inflated (hospitalizations much higher than they should be) due to the fact that CDC does not distinguish between hospitalizations *due to* COVID-19 and hospitalizations *with* COVID-19. This fact has been admitted by the CDC itself,⁵ and conceded by Dr. Anthony Fauci.⁶ Accordingly, AAPS' school health policies should not be based upon the CDC community levels.

Your letter also cites to *Stewart v. Manchester Community Schools*, No. 21-12392, 2022 U.S. Dist. LEXIS 171716 (E.D. Mich. Sept. 21, 2022), which explained in its holding:

[A] court in this district found "that [d]efendants have a rational basis for the mask policy that satisfies a legitimate state interest" . . . [t]he court also explained that [i]t is well-established law that actions aimed at protecting public health and welfare are only to be **invalidated if they lack real or substantial relation to the protection.** *Id.* at 21. (emphasis added).

The glaring issue is that the AAPS's past and potential future policy of indoor masking, aimed at protecting public health, **lacks real and substantial relation to the purported protection.** The European equivalent of the Centers for Disease Control states, "There is **no evidence that non-medical face masks or other face covers are an effective means of**

³ *Id.*

⁴ August 19, 2022 - Fall 2022 COVID and Health Guidance, Ann Arbor Public Schools (Aug. 19, 2022), <https://www.a2schools.org/site/default.aspx?PageType=3&ModuleInstanceID=17841&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=23609&PageID=11460>.

⁵ CDC admits, in response to this Firm's FOIA request, "The way that our data guidance defines COVID admission does not enable us to make a distinction between hospital admissions due to COVID-19 vs. hospital admissions for reasons other than COVID-19." <https://icandecide.org/wp-content/uploads/2023/01/Final-Response-No-Records-1.pdf>.

⁶ In this video, Dr. Fauci concedes, "since all hospital admissions are tested for COVID-19, many [people] are hospitalized with COVID, as opposed to because of COVID," where "[t]he real reason for hospitalization might be a broken leg, or appendicitis, or something like that." <https://www.msnbc.com/rachel-maddow/watch/reduced-severity-of-omicron-illness-shifts-focus-from-case-numbers-to-hospitalizations-129807429857>.

respiratory protection for the wearer of the mask.”⁷ Even the World Health Organization’s major meta-analysis found, “[T]here is a limited evidence base on the effectiveness of non-pharmaceutical community mitigation measures. There are a number of high-quality randomized controlled trials demonstrating that personal measures (e.g., hand hygiene and **face masks**) have **at best a small effect on transmission.**”⁸ In fact, a recent gold-standard Cochrane study analyzing only randomized controlled trials and cluster trials, could not find a benefit to masking – including surgical and N95 grade masking.⁹ Accordingly, there is no real or substantial relation between the mask mandate and the protection of the student body. The references to guidance from health departments are inapplicable. The Health Department of Washtenaw County’s recommendations were last updated on June 22, 2022, and are thus outdated by 7 months. COVID cases at the time of their update were approximately double what they are now in Washtenaw County.¹⁰ The Washtenaw County Health Department guidance for schools to which your letter refers contains little support for the decision to mandate masking, rather, it provides that in times of high community levels, masks be strongly encouraged. It further states that schools should support an individual if she/he desires to mask, but again, contains no explicit endorsement of universal mask mandates.¹¹

Several cases are cited by your letter attempt to establish the general point that schools should be afforded great deference in formulating, interpreting and effectuating their policies. However, the cited cases are factually distinguishable from the situation at bar. *Birdsey v. Grand Blanc Community Schools*, 344 N.W.2d 342 (Mich. Ct. App. 1983) concerned the school’s interpretation of its own rule prohibiting illegal drugs. *Mich. Gun Owners, Inc. v. Ann Arbor Public Schools*, 918 N.W.2d 756 (Mich. 2018), concerned the Legislature’s decision to allow schools to make their own rules regarding prohibition of firearms. Additionally, your citation and explanation of *Stansky v. Gwinn Area Community Schools & Michael R. Maino*, No. 305287, 2012 Mich. Ct. App. LEXIS 2150 (Mich. Ct. App. Oct. 25, 2012) also fails to properly contextualize, as the wide latitude and deference afforded to the school therein concerned rules regarding order and discipline. But even in that case, schools cannot act “arbitrarily or capriciously.” *Id.* at 3. All of these cases have little relation or relevance to a school’s arbitrary decision to periodically impose mask mandates based upon a highly dubious scientific justification.

Finally, your letter cites to, *Hiers v. Detroit Superintendent of Schools*, 136 N.W.2d 10 (Mich. 1965), emphasizing the quote, “a court . . . will not attempt to substitute its judgment for that of the board.” *Id.* at 234. But this excerpt conveniently omits the second portion of the court’s

⁷ *Using face masks in the community*, European Centre for Disease Control and Prevention (Apr. 8, 2020), <https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-use-face-masks-community.pdf> (emphasis added).

⁸ *Non-pharmaceutical public health measures for mitigating the risk and impact of epidemic and pandemic influenza*, World Health Organization (2019), <https://apps.who.int/iris/bitstream/handle/10665/329439/WHO-WHE-IHM-GIP-2019.1-eng.pdf?ua=1> (emphasis added).

⁹ Tom Jefferson, *et al.*, *Physical interventions to interrupt or reduce the spread of respiratory viruses*, Cochrane Database of Systematic Reviews (2023), <https://www.skirsch.com/covid/MasksCochrane.pdf>.

¹⁰ *See supra* note 2.

¹¹ COVID-19 Guidance 2022-23 for Schools and Childcares, Washtenaw County Health Department (Aug. 19, 2022), <https://www.washtenaw.org/DocumentCenter/View/27352/COVID-19-Guidance-2022-23-for-Schools-and-Childcares?bidId>.

statement, “[b]ut will inquire as to whether such acts are arbitrary and unreasonable.” *Id.* If AAPS decides to impose further masking, such action would be both arbitrary and unreasonable, given the current CDC guidance, community COVID levels, and scientific data on masking. Thus, none of the cited authority offers cogent justification for any periodic reinstatement of the mask mandate. Therefore, because any mask mandate would be imposed without sufficient legal authority, we again request that AAPS refrain from reinstating mask mandates.

Very truly yours,



Elizabeth A. Brehm, Esq.
Thomas Stavola, Esq.