

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Greenville Division)**

Bonnie Kessler, individually and as guardian for minor children John Doe #1 and Jane Doe #1, Cindy Davis, individually and as guardian for minor children John Doe #2 and Jane Doe #2, Autumn Bible, individually and as guardian for minor children Jane Doe #3,

Plaintiffs,

v.

Greenville County School District and South Carolina Department of Education,

Defendants.

C.A. No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. As the Covid-19 pandemic rages on in South Carolina, the B.1.617.2 “Delta” variant has resulted in a surge in infections, hospitalization, and, tragically, the deaths of school children within Greenville County and the State of South Carolina.

2. According to the CDC, 46 of 46 counties in South Carolina – including Greenville County where approximately 23,000 children ride the school bus every school day – are recording “high” levels of community transmission of the virus. *See* Covid-19 Integrated County View for August 10, 2021 to August 16, 2021, CDC website (last visited August 18, 2021), available at <https://covid.cdc.gov/covid-data-tracker/#county-view>.

3. School children in South Carolina are now returning to school for the 2021-2022 school year while the Delta Variant is surging. Children are becoming infected at an alarming rate as this highly contagious variant moves through school communities. The rate of infection is so rapid that one school district – in the county adjacent to Greenville County – was forced to close all in-person instruction after only nine days of instruction. *See* Nathaniel Cary, “Pickens County Schools go all-virtual after exponential rise in COVID-19 cases in 2 weeks”, *The Post and Courier*, August 13, 2021, available at www.postandcourier.com/greenville/health/pickens-county-schools-go-all-virtual-after-exponential-rise-in-covid-19-cases-in-2/article_0a98dc56-fc81-11eb-9f21-c71a130d2dae.html.

4. To combat the spread of this highly contagious, deadly virus, governments at all levels have taken “unprecedented or exceedingly rare actions” to protect the public. 85 Fed. Reg. at 55,292. These include travel restrictions, border closures, and mask requirements. *Id.* One such requirement is the Centers for Disease Control and Prevention (CDC)’s January 29, 2021 Order (“CDC Order”) requiring the wearing of facial coverings on all public conveyances. This Order mandates the wearing of facial coverings on school buses and requires the operators of these buses to enforce this Order.

5. Unfortunately, the Greenville County School District and the South Carolina Department of Education have announced that they will not enforce the facial covering requirements of the CDC Order on school buses operating in Greenville County and throughout the State of South Carolina. Both the Greenville County School District and the South Carolina Department of Education have expressed that they are unable to enforce the requirements of the CDC Order – requirements designed to protect the health and lives of South Carolina’s children – because they are prevented from doing so by the restrictions contained in a Budget Proviso enacted by the South Carolina legislature.

6. The inability and/or failure of Greenville County School District and the South Carolina Department of Education to adhere to the requirements of the CDC Order puts the approximately 23,0000 children who ride school buses in order to attend Greenville County public schools at an increased risk of contracting the Delta Variant of Covid-19, transmitting it to other children and their families, becoming gravely ill, and potentially dying.

7. The Plaintiffs, all children enrolled in Greenville County Schools who are eligible to ride the school bus, seek to have this Court: (1) declare that the South Carolina Budget Proviso 1.108 presents an obstacle to the enforcement of the CDC Order and, as such, the CDC Order preempts Proviso 1.108; and (2) issue an injunction requiring the Greenville County School District and the South Carolina Department of Education to enforce the requirements of the CDC Order, including the requirement that all passengers and drivers on school buses wear facial coverings.

JURISDICTION AND VENUE

8. This Court has jurisdiction under 28 U.S.C. § 1331.

9. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 as well as Fed. R. Civ. P. 57 and 65, and the equitable powers of this Court.

10. Venue is proper in this district under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred in this district and because all Defendants reside here.

11. Under District of South Carolina Local Rule 3.01, the Greenville Division is the appropriate division for this action because a substantial portion of the events at issue occurred in that division.

PARTIES

12. Plaintiff Jane Doe #1 is a minor child who resides in Greenville County, South Carolina and attends public school within the Greenville County School District. Jane Doe #1 is eligible to ride a school bus to and from school.

13. Plaintiff John Doe #1 is a minor child who resides in Greenville County, South Carolina and attends public school within the Greenville County School District. John Doe #1 is eligible to ride a school bus to and from school.

14. Plaintiff Jane Doe #2 is a minor child who resides in Greenville County, South Carolina and attends public school within the Greenville County School District. Jane Doe #2 is eligible to ride a school bus to and from school.

15. Plaintiff John Doe #2 is a minor child who resides in Greenville County, South Carolina and attends public school within the Greenville County School District. John Doe #2 is eligible to ride a school bus to and from school.

16. Plaintiff Jane Doe #3 is a minor child who resides in Greenville County, South Carolina and attends public school within the Greenville County School District. John Doe #3 is eligible to ride a school bus to and from school.

17. Defendant Greenville County School District (“GCSD”) is a consolidated school district providing public school in Greenville County, South Carolina. It is the largest school district in the State of South Carolina and the forty-fourth largest in the United States. Upn information and belief, GCSD operates school buses that transport children throughout Greenville County, South Carolina.

18. Defendant South Carolina Department of Education (“Department”) is an agency of the State of South Carolina. The Department’s office is located in Richland County, South

Carolina; however, upon information and belief, the Department owns and operates school buses that transport children throughout Greenville County, South Carolina.

FACTUAL ALLEGATIONS

19. GCSD is responsible for the operations of the school district that comprises all of Greenville County, including bus transportation for approximately 25,000 children. GCSD school buses travel approximately five million miles each year, making the school system the state's largest transporter of school children.

20. Pursuant to S.C. Code Ann. § 59-67-410, "the control and management of all school bus transportation in the State shall be vested in the State Board of Education."

21. S.C. Code. Ann. § 56-5-190 specifically defines a "school bus" in South Carolina, stating: "Every motor vehicle that complies with the color and identification requirements set forth in § 59-67-30 and State Board of Education Regulations and Specifications Pertaining to School Buses which is used to transport children to or from public school or in connection with school activities, but not including buses operated by common carriers not exclusively engaged in the transportation of school students and vehicles having school bus markings temporarily removed or covered, is a "school bus".

22. S.C. Code. Ann. § 59-67-10 further provides that a "school bus" shall be construed to mean every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from school or privately owned and operated for compensation for the transportation of children to or from school."

23. Congress has authorized the Secretary of Health and Human Services (HHS), through the Centers for Disease Control and Prevention (CDC), to adopt "such regulations as in [the agency's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions [of the United

States], or from one State or possession into any other State or possession.” Public Health Service Act (“PHSA”), ch. 373, § 361(a), 58 Stat. 703 (1944) (codified at 42 U.S.C. § 264(a)). Invoking that authority, on January 29, 2021 the CDC has issued a temporary order that (with some exceptions) generally requires individuals to wear masks when traveling on public transportation conveyances. See www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf. The order was effective as of 11:59 PM on February 1, 2021 and was published in the Federal Register on February 3, 2021. See 86 FR 8025. The order was issued to prevent the spread of COVID-19.

24. The United States Department of Health and Human Services has repeatedly provided guidance that school buses are considered public conveyances under the CDC’s January 29, 2021 Order and, as such, “passengers and drivers on school buses must wear a mask, including on buses operated by public and private school systems.” See www.hhs.gov/guidance/document/requirement-face-masks-public-transportation-conveyances-and-transportation-hubs.

25. In June 2021, over four months after the CDC issued its order requiring masks on school buses, the General Assembly passed Budget Proviso 1.108 as part of the 2021-2022 Appropriations Bill. Proviso 1.108 specifically provides that “[n]o school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.”

26. On July 6, 2021, South Carolina Superintendent of Education, Molly Spearman, issued a Memorandum regarding Proviso 1.108 Guidance and Face Coverings on School Bus Update. The memorandum specifically provides:

The South Carolina Department of Education (SCDE) interprets [Proviso 1.108] to mean that school districts are prohibited from requiring students and employees to wear a facemask while in any of its educational facilities for the 2021-2022 school year. Educational facilities include all property owned and operated by the individual district.

The SCDE has previously enforced the Center for Disease Control and Prevention's January 29, 2021 order that requires the use of face coverings by people on public transportation conveyances and hubs, which includes school buses. Effective immediately, the SCDE will exercise its enforcement discretion granted within this order and will no longer enforce the face covering requirement on state owned school buses. The use of face coverings by students and staff on school buses and within school facilities remains a recommendation of state and federal public health officials and Proviso 1.108 does not prevent districts from encouraging the wearing of face coverings.

However, districts may not create or enforce any policy, which would require the wearing of face coverings. Should a district decide to act contrary to this law, state funding may be withheld.

27. GCSD has issued a statement that it does NOT require face coverings to be worn on school buses. GCSD specifically stated in its 2021 COVID-19 Questions & Answers: "The SC Department of Education recently removed the requirement to use face coverings on state-owned school buses. However, bus capacity has returned to 100%, which makes social distancing impossible. The CDC continues to recommend masking and parents are encouraged to review the advice of public health professionals before deciding what is best for the children." See <https://www.greenville.k12.sc.us/Parents/main.asp?titleid=returntoschool>.

28. Tuesday, August 17, 2021, was the first day of the 2021-2022 school year for public school children in Greenville County. Children rode to and from GCSD public schools on school buses owned and/or operated by GCSD and the Department. These school buses were operated at 100% capacity. The Defendants did not require passengers on the school bus to wear

masks as required by the CDC Order. The Defendants did not enforce the mask requirement in violation of the CDC Order.

29. The Defendants failure to comply with the requirements of the CDC Order is expected to continue throughout the remainder of the 2021-2022 school year as evidenced by the express statements of both Defendants.

30. The failure of the Defendants to comply with the requirements of the CDC Order puts the Plaintiffs, as well as all other public school children in Greenville County and the State of South Carolina, at increased risk of contracting Covid-19.

CLAIM FOR RELIEF – COUNT I
(DECLARATORY RELIEF)

31. Plaintiffs incorporate by reference all previous paragraphs as if fully set forth herein.

32. A justiciable case and controversy exists because Defendants’ failure to enforce the CDC Order under the pandemic conditions in effect in South Carolina imminently threatens the lives and safety of Plaintiffs and all other school children who ride public school buses in Greenville County.

33. This is a concrete legal dispute of great public health importance that will affect the Plaintiffs, as well as all school bus riders in the Greenville County School District as well as their families, and the faculty, staff, students, and families of students and faculty in the Greenville County School District and the surrounding community in Greenville County and the State of South Carolina.

34. If left uncorrected, the conflict between the CDC Order and the Budget Proviso, will continue to create an impediment to the enforcement of the facial covering requirements of the CDC Order.

35. Plaintiffs are entitled to a declaratory judgment that: (1) simultaneous compliance with the requirements of the CDC Order and Budget Proviso 1.108 is impossible; (2) Budget Proviso 1.108 presents an obstacle to the enforcement of the requirements of the CDC Order and impedes or interferes with the objectives of the CDC Order; and (3) the CDC Order preempts Budget Proviso 1.108.

36. Plaintiffs are entitled to a further declaratory judgment that, to the extent the CDC Order's requirement that operators of public school buses require and enforce the wearing of face coverings conflicts with South Carolina Budget Proviso 1.108, the requirements of CDC Order control.

37. The Court should enter a final judgment declaring these rights in favor of the Plaintiffs and against the Defendants.

CLAIM FOR RELIEF – COUNT II
(INJUNCTIVE RELIEF)

38. Plaintiffs incorporate by reference all previous paragraphs as if fully set forth herein.

39. The Defendants own and operate school buses that convey public school children within Greenville County on a daily basis.

40. The Defendants have publicly stated that they will not comply with the CDC's January 29, 2021 Order requiring that operators of public conveyances, including school buses, enforce the wearing of face coverings by passengers and drivers on school buses.

41. The school year has commenced and, in keeping with the conflicting requirements of Budget 1.108 prohibiting the enforcement of any rule requiring masks, the Defendants have not complied with the CDC's January 29, 2021 Order requiring that operators of public

conveyances, including school buses, enforce the wearing of face coverings by passengers and drivers on school buses.

42. The Plaintiffs are eligible to ride the school bus to and from school in Greenville County. Defendants failure to comply with the requirements of the CDC Order puts them and their families at increased risk for contracting Covid-19, becoming very sick and possibly dying, if they ride the school bus.

43. Plaintiff is entitled to an injunction requiring Defendants to comply with the requirements of the CDC Order and enforce the wearing of facial coverings by all passengers and drivers on public school buses owned and/or operated by Defendants.

PRAAYER FOR RELIEF

Wherefore, after an expedited hearing, this Court should:

1. Issue a declaratory judgement that, to the extent the Budget Proviso 1.108 is an obstacle or impediment to the enforcement of the CDC Order, the CDC Order preempts Proviso 1.108.

2. Declare that the requirements of the CDC Order are mandatory, including the requirement that the operators of school buses must enforce the wearing of facial coverings by all passengers on school buses, regardless of any conflict with Proviso 1.108.

3. Issue an injunction requiring the South Carolina Department of Education to enforce the requirement that all passengers wear masks on school buses owned and/or operated by the South Carolina Department of Education as provided by the CDC Order.

4. Issue an injunction requiring the Greenville County School District to enforce the requirement that all passengers wear masks on school buses owned and/or operated by the South Carolina Department of Education as provided by the CDC Order.

5. Grant such other relief as this Court deems just and proper.

Respectfully submitted,



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