STATE OF NORTH CAROLINA

NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 3915

DAVID A. PERRY,

Plaintiff,

v.

NEW HANOVER COUNTY BOARD OF EDUCATION,

Stephanie Adams, in her official capacity; Nelson Beaulieu, in his official capacity; Judy Justice, in her official capacity; Stephanie Kraybill, in her official capacity; Hugh McManus, in his official capacity; Stephanie Walker, in her official capacity; Peter Wildeboer, in his official capacity;

NEW HANOVER COUNTY SHERIFF'S OFFICE;

Edward McMahon, in his official capacity

Defendants.

BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

Defendants New Hanover County Board of Education ("Board"), and Stephanie Adams, Nelson Beaulieu, Judy Justice, Stephanie Kraybill, Hugh McManus, Stephanie Walker, Peter Wildeboer, in their official capacities (collectively, "School Board Defendants"), by and through their attorneys, submit this brief in support of their Motion to Dismiss the Complaint in this matter and in opposition to Plaintiff's Motion for a Preliminary Injunction.

STATEMENT OF THE CASE

Plaintiff filed this declaratory judgment action in New Hanover County Superior Court on October 14, 2021. School Board Defendants were served on or about October 19, 2021. In

addition to his petition for declaratory judgment, Plaintiff also seeks a preliminary injunction against all defendants. The School Defendants timely filed a motion to dismiss this action on October 27, 2021, and Plaintiff's motion for preliminary injunction and School Defendants' motion to dismiss have both been noticed for hearing for the November 2, 2021, session of the New Hanover County Civil Superior Court.

STATEMENT OF FACTS

North Carolina remains under a State of Emergency to coordinate the State's response to COVID-19.[1] In light of the continued spread of the COVID-19 Delta variant, on August 17, 2021, the New Hanover County Health and Human Services Board voted unanimously to mandate face coverings in all indoor public places within New Hanover County.[2] The mandate applies to offices and workplaces, business establishments, public transportation facilities and vehicles, and any place the public is invited or allowed to assemble. The mandate applies to everyone two years and older, regardless of vaccination status.

On August 30, 2021, Governor Cooper signed into law Senate Bill 654, which requires local boards of education to vote at least monthly regarding the Board's face covering policy.[3] Since S654 became law, the New Hanover County Board of Education has voted consistently to require face coverings in schools. The Board also requires that face coverings be worn by all attendees during its in-person meetings, although speakers giving public comment are allowed to remove their masks to address the Board. As an additional means of providing public comment, members of the public can email the Board their comments or leave voicemail messages. The Board has consistently enforced the face covering requirement and asked that members of the

[1] *See* Executive Order No. 116, 34 N.C. Reg. 1744-1749 (April 1, 2020).
[2] *See* https://health.nhcgov.com/wp-content/uploads/2021/08/Face-Coverings_Abatement-Order_081721.pdf.
[3] *See* SL 2021-130, *available at* https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S654v7.pdf.

public who refuse to comply with the requirement be removed from the meeting. As an alternative means of viewing its in-person meetings, the Board live streams each of its meetings on the district's YouTube channel.

Section 4.31 of Session Law 2020-3 allows public bodies, including the Board, to conduct remote meetings while North Carolina remains under a State of Emergency.[4] The Board has utilized this remote meetings provision for its regularly scheduled monthly meeting as recently as August 3, 2021.

Plaintiff disagrees with the Board of Education's requirement (and the New Hanover County Health Department's requirement) that attendees of Board of Education meetings wear face coverings while attending the Board's in-person meetings.

Plaintiff alleges that he is a resident of New Hanover County. The only other facts the Petition alleges about Plaintiff are that: (1) he emailed the Board of Education regarding its August 3, 2021 meeting (the Petition does not state the nature or substance of this email), and (2) that "it is likely" Plaintiff will wish to attend Board of Education meetings for the foreseeable future. Plaintiff does not allege that he has attempted to attend any specific Board of Education meeting and been denied admittance. Plaintiff does not allege that he has been denied the opportunity for public comment at any meeting. Plaintiff does not allege that he has suffered any injury because of any action or inaction by the Board.

Plaintiff seeks a declaratory judgment that the Board's requirement for face coverings at its in-person meetings is "null and void" and asks the Court to enter an injunction requiring the Board to admit to its meetings persons not wearing face coverings. Plaintiff also requests that the Court vacate all actions taken by the Board within the last 45 days.

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[4] *See* https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf.

STANDARD OF REVIEW

a. Preliminary Injunction

A preliminary injunction is "an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983); *see also VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004). The burden is on plaintiffs to establish their right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

Plaintiff asserts that he seeks a preliminary injunction pursuant to Rule 65 of the North Carolina Rules of Civil Procedure to maintain the status quo. He does not. Instead, Plaintiff seeks a mandatory injunction, or a writ of mandamus, to compel the Board to admit unmasked patrons to its in-person meetings.

In this state, "where the court exercises both legal and equitable jurisdiction, in a suit against a public official or board there is no practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction." *Sutton v. Figgatt*, 280 N.C. 89, 92, 185 S.E.2d 97 (1971). A writ of mandamus and likewise a mandatory injunction is "an order from a court of competent jurisdiction to a board, . . . commanding the performance of a specified official duty imposed by law." *Batdorff v. North Carolina State Board of Elections*, 2002 N.C. App. 408, 563 S.E.2d 43 (2002).

In this case, the status quo is that the Board continue to implement its face covering requirement in order to protect the health and safety of all meeting attendees. An order mandating that the Board reverse this course of action, exactly the remedy Plaintiff is seeking, would be a change in the status quo. Mandamus, the mandatory injunction requested by Plaintiff, is "an extraordinary remedy which the court will grant only in case of necessity." *Sutton v. Figgatt*, 280 N.C. 89, 92, 185

S.E.2d 97, 99 (1971). "In a case involving the exercise of discretion, mandamus lies to compel action by a public official but not to dictate his decision unless there has been a clear abuse of discretion." *Id.* Through a writ of mandamus, or a mandatory injunction, a court "cannot compel [a subordinate body] to do that which the law leaves them to decide according to their best judgment and discretion." *Edgerton v. Kirby*, 156 N.C. 357, 352, 72 S.E. 365 (1911) (emphasis added).

Further, before a court may grant a mandatory injunction, petitioners seeking such relief must also demonstrate that their injury without such relief "is immediate, pressing, irreparable, and clearly established." *Automobile Dealers Resources, Inc. V. Occidental Life Insurance Co.*, 15 N.C. App. 634, 639, 190 S.E.2d 729 (1972); *see also Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 400, 474 S.E.2d 783, 788 (1996) ("However, we note that under circumstances which indicate serious irreparable injury to the petitioner if the injunction is not granted, no substantial injury to the respondent if the injunction is granted, and predictably good chances of success on the final decree by the petitioner[,] a mandatory interlocutory injunction could properly be issued.") (citations and quotations omitted).

b. Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." *Id.* Dismissal is appropriate when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (citations and internal quotation marks omitted), and "a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved[,]" *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 531–32 (2009) (alteration in original) (citations and internal quotation marks omitted). "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002). It requires "'that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action.'" *Bruggeman v. Meditrust Co., L.L.C.*, 165 N.C. App. 790, 795, 600 S.E.2d 507, 511 (2004) (quoting *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986)). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005); see, e.g., N.C. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

ARGUMENT

I. PLAINTIFF HAS NOT BEEN PROHIBITED FROM ATTENDING ANY MEETING, AND THE BOARD HAS NOT VIOLATED THE OPEN MEETINGS LAW.

Plaintiff complains that the Board has violated the open meetings law by excluding certain members of the public from its meetings. This is not true. Plaintiff and other members of the public are invited to attend in-person meetings and are required to wear face coverings when doing so to protect the health and safety of all attendees. Plaintiff has stated no reason why he cannot comply with this reasonable requirement.

North Carolina remains under a State of Emergency due to the COVID-19 pandemic. During the State of Emergency, the Board is not required by the open meetings law to hold in-person meetings, much less in-person meetings with unmasked visitors.

Under the open meetings law, the Board is required "to take reasonable measures to provide for public access to its meetings," and it has done so by (1) allowing the public to attend in-person meetings when wearing face coverings; (2) allowing speakers to remove their masks when providing comment; (3) livestreaming meetings on YouTube; and (4) providing alternatives to providing comment in person, such as email, voicemails, and virtual comments. *See Garlock v. Wake Cnty. Bd. Of Educ.*, 211 N.C. App. 200, 174, 712 S.E.2d 158, 223 (2011) (internal quotations omitted).

Plaintiff complains that when the Board held an electronic meeting on August 3, 2021, that it violated the open meetings law by not providing a physical location for the public to listen to the meeting. N.C. Gen. Stat. Ann. § 143-318.13(a) states: "If a public body holds an official meeting by use of conference telephone or other electronic means, it shall provide a location and means whereby members of the public may listen to the meeting and the notice of the meeting required by this Article shall specify that location." The statute does not require the Board to provide a physical, in-person location for the electronic meeting. Indeed, such a requirement would contradict the purpose of an electronic meeting during the COVID-19 pandemic. The Board has provided a location for the public to listen and view its meetings live: the district's YouTube page. Plaintiff has not alleged that he has not been able to listen to and view any meeting of the Board using the district's YouTube page.

Plaintiff also asks this Court to take the extraordinary step of vacating all actions by the Board within the last 45 days. Even if Plaintiff could somehow demonstrate that the Board had

violated the Open Meetings Law, which it has not, vacating all of the Board's actions within the past 45 days would be an overbroad and unnecessary remedy. The Open Meetings Law sets forth factors for the court's consideration when this remedy is sought. N.C. Gen. Stat. § 143-318.16A(c). In *Garlock*, the court found no basis for invalidating the Wake County Board of Education's actions despite finding the Board had violated the law. *Garlock*, 211 N.C. App. at 232–33, 712 S.E.2d at 179–80. The court concluded that the violations did not affect the substance of the Wake Board's actions, the Wake Board did not act in bad faith, and the Wake Board had in the past made reasonable efforts to comply with the Open Meetings Law. *Id.* The same rationale would apply here.

Plaintiff's rights have not been violated, and the Board has complied with the Open Meetings Law in all respects. Plaintiff's claim should be dismissed.

II. PLAINTIFF'S FIRST AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED.

The Board's face covering requirement is a neutral and generally applicable rule that was established to reduce the transmission of the COVID-19 virus and protect public health in compliance with the New Hanover County Health and Human Services Board rule enacted on August 31, 2021. *See* https://health.nhcgov.com/wp-content/uploads/2021/08/HHS-Board-Health-Rule-August-31.pdf. The policy draws no distinction between citizens based on their perspective or intended message; its requirement that all meeting attendees wear masks is a classic example of a viewpoint neutral policy. It happens to be that the very safety regulation at issue here is in opposition to a viewpoint held by Plaintiff, but "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers of messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Although Plaintiff attempts to connect his personal viewpoint on mask policies with the Board's policy, his position on masks is irrelevant to the justification for the policy, which has no basis in speech. To accept Plaintiff's supposition would be to conclude that virtually all policies are content or viewpoint based, simply because someone disagrees. The Supreme Court in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), examined a similar First Amendment challenge wherein the petitioners who were opposing an injunction that established a buffer zone around an abortion clinic all happened to be anti-abortion protestors. The Court held:

> That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

Id. at 763. Thus, the Court concluded that the injunction was content-neutral. Id. at 764. Similarly, the Board policy at issue in this case draws no distinction based on groups and applies to protect all meeting attendees. See Resurrection Sch. v. Hertel, 11 F.4th 437, 456 (6th Cir. 2021) ("[B]ecause the requirement to wear a facial covering applied to students in grade K–5 at both religious and non-religious schools, it was neutral and of general applicability"). That Plaintiff personally opposes mask requirements does not make a mask requirement viewpoint-based. Furthermore, because the Board does not have unfettered discretion to grant exemptions, the policy is generally applicable. See Fulton v. City of Phila., 141 S. Ct. 1868, 1878 (2020).

Plaintiff's claims fail immediately because "[the policy] does not prohibit assemblies [or petition]; rather, it places a minor restriction on the way they occur." *Oakes v. Collier Cnty.*, 515 F.Supp.3d 1202, 1215 (M.D. Fla. 2021).

Face covering requirements are intended to curb the spread of COVID-19, and promotion of the public health is indisputably a legitimate governmental interest. The requirement that meeting attendees wear masks is reasonably related to that interest, regardless of Plaintiff's views on mask efficacy or its connection to public health. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect . . . When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." (internal quotations omitted)). Furthermore, because the policy does not actually interfere with any fundamental rights, as alleged, it overcomes Plaintiff's challenge.

The Board's face covering requirement also leaves open ample alternative channels of communication. The Board livestreams its meetings on a public YouTube channel. Moreover, although Plaintiff alludes to restrictions upon the fundamental rights of assembly and petition, Cmplt. ¶ 9, he is not prevented from attending meetings in person or providing comment, nor is he prohibited from assembling virtually. He simply is required to wear a cloth face covering should he choose to attend Board meetings in person. This requirement does not restrict his access to listen to or watch the meetings (which he could do in person or through the virtual forum), nor does it prevent him from offering public comment (during which he would be permitted to remove his mask to speak if he were physically present at the meeting).

The cloth face covering requirement does not interfere with Plaintiff's rights to petition and assemble in the available meeting forums—it does not ban assembly or petition, but rather appropriately limits it. *See Desrosiers v. Governor*, 158 N.E.3d 827, 844–47 (Mass. 2020) (holding that the Governor's prohibition of most gatherings of more than ten people was

sufficiently narrowly tailored to support the finding that the prohibition did not unconstitutionally burden the right to free assembly where all in-person assembly was not banned and there was an option for virtual assembly).

Finally, Plaintiff lacks standing to bring his claims to the extent he has not alleged that he has been individually harmed by the Board's face covering requirement. Plaintiff does not allege in his Complaint that he was removed from a meeting or deprived the opportunity for public comment. Plaintiff cannot bring a claim on behalf of any other member of the public who may have been removed from an in-person meeting due to not complying with the Board's face covering requirement.

III. PLAINTIFF'S OFFICIAL CAPACITY CLAIMS ARE SUBJECT TO DISMISSAL

Plaintiff's official capacity claims against Board members should be dismissed as redundant of Plaintiff's claim against the Board. Courts have repeatedly held that official-capacity suits are redundant because they are merely another way of pleading an action against an entity of which an officer is an agent. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21-22 (1997). "Suing a governmental employee in his 'official' capacity is simply another way of pleading an action against the governmental entity." *Davis v. Durham Mental Health Developmental Disabilities Substance Abuse Area Auth.*, 320 F. Supp. 2d 378, 399 (M.D.N.C. 2004) (dismissing official capacity claims against individual defendants where the governmental entity was also sued). *See also, e.g., May v. City of Durham*, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) ("[I]n a suit where the plaintiff asserts a claim against a government entity, a suit against those individuals working in their official capacity for this government entity is redundant."). As such, Plaintiff's claims against the Board members should be dismissed as redundant of his claims against the Board itself.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant its Motion to Dismiss the Complaint, deny Plaintiff's Motion for a Preliminary Injunction, and dismiss with prejudice all claims in this action.

Respectfully submitted, this the 29th day of October 2021.

THARRINGTON SMITH, L.L.P.

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CERTIFICATE OF SERVICE

I certify that a copy of the attached **NOTICE OF HEARING** was served upon plaintiff this date via Federal Express and electronic mail addressed to:

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This the 29th day of October 2021.

THARRINGTON SMITH, L.L.P.

COPY TO:

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