Jason Marks, District Judge
Fourth Judicial District, Dept. 4
Missoula County Courthouse
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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STAND UP MONTANA, *et al.*, Plaintiffs, vs. MISSOULA COUNTY PUBLIC SCHOOLS, *et al.*, Defendants.	Dept. 4 Cause No. DV-21-1031 ORDER RE: MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs' *Motion for Preliminary Injunction* (Doc. No. 12) came on for hearing on September 29. Plaintiffs appeared personally/by Zoom and through their attorney Quentin Rhoades. Defendant Schools appeared through attorneys Elizabeth Kaleva and Kevin Twidwell. The parties did not call witnesses.

As required by M.R.Civ.P. Rule 52(a), the Court hereby makes findings of fact and states conclusions of law.

Plaintiffs' motion for a preliminary injunction is **DENIED**.

I. FINDINGS OF FACT

1. Plaintiffs are a Montana non-profit corporation and 11 individuals. The individual plaintiffs are parents of minor children seeking injunctive relief on their

behalf as parents and on behalf of their minor children enrolled in the named schools.

2. Plaintiffs' *Complaint* alleges mask mandates for students imposed by Defendant Schools are not scientifically justified or effective and infringe upon parental or student rights to due process, equal protection, right to privacy, human dignity, freedom of expression and create a cause of action under SB 400 effective October 1, 2021.

3. Defendants are three Missoula County school districts ("Schools"). Missoula County Public School ("MCPS") has an enrollment of approximately 9,200 students and employs approximately 1,500 staff members. It operates a preschool, nine elementary schools, three middle schools, four high schools, an alternative program and an online academy. Defendant Target Range School District has an enrollment of approximately 555 students from pre-kindergarten through eighth grade and approximately 75 staff members. Defendant Hellgate Elementary has an enrollment of 1,485 students and employs approximately 185 staff members.

4. During the 2020-2021 school year, Defendant MCPS operated on a hybrid instruction model that included in-person learning and remote instruction. MCPS required students, staff, volunteers and visitors to wear face coverings. Face coverings were required during summer school.

5. On August 10, 2021, the Board of MCPS voted to continue the face

covering requirement for all its students, staff, volunteers and guests when indoors in all MCPS K-12 facilities and on buses, regardless of vaccination status, for a minimum of six weeks for the 2021-2022 school.

6. During the 2020-2021 school year, Defendant Target Range operated on a hybrid instruction model, with part-time in-person learning and part-time remote instruction. The District was later able to transition to in-person learning for student five days a week. Students, staff and visitors were required to wear face coverings during the 2020-2021 school year.

7. On August 16, Target Range's Board of Trustees approved a school re-opening plan for 2021-2022 that included rules regarding face coverings while indoors except while eating, drinking, and during vigorous physical activity.

8. During the 2020-2021 school year, the Hellgate Elementary school district remained open for in-person instruction five days a week. Students, staff and visitors were required to wear face coverings during the entirety of the school year.

9. On August 23, 2021, the Hellgate Elementary District Board of Trustees approved a requirement that all students, staff members and visitors be required to wear a face covering while indoors in a district facility and on district buses for six weeks following the start of the school year on September 1.

10. Plaintiffs filed their complaint challenging the Schools' face covering rules on August 24, 2021. Plaintiffs did not challenge the masking rule in effect

during the 2020-2021 school year or during summer school.

11. The Court takes judicial notice that as of Monday, September 20, Missoula County broke its previous COVID-19 hospitalization record, active case record and incidence rate record for the second week in a row.

12. The Court takes judicial notice that Key Metrics calculated by the Missoula City-County Health Department shows the 7-day average daily new cases per 100,000 people has risen from 49.00 on September 1st to 87 as of September 28. On July 1, the 7-day average daily new cases per 100,000 was 3. https://www.missoulainfo.com/copy-of-data-dashboard.

13. The Court takes judicial notice that on September 24, 2021, the CDC released three studies that found school districts without a universal masking policy in place were more likely to have COVID-19 outbreaks. According to the CDC, nationwide, counties without masking requirements saw the number of pediatric COVID-19 cases increase nearly twice as quickly during the same period.

14. The Court takes judicial notice that the Missoula City-County Health Department asks individuals with COVID-19 and their close contacts to quarantine.

15. The Court takes judicial notice that the Schools all purport to offer remote learning options for the 2021-2022 school year.

II. CONCLUSIONS OF LAW

1. Section 27-19-201 MCA provides when preliminary injunction may be granted:

> An injunction order may be granted in the following cases:
>
> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
>
> (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
>
> (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

2. District courts have broad discretion to grant preliminary injunctive relief on any one of the five grounds enumerated in § 27-19-201 MCA. The subsections are disjunctive and a court need find just one subsection satisfied in order to issue a preliminary injunction. *BAM Ventures LLC v. Schifferman*, 2019 MT 67, ¶ 14.

3. An applicant for a preliminary injunction must make a prima facie showing she will suffer a harm or injury under either the "great or irreparable" injury standard of § 27-19-201(2) or the lesser degree of harm implied within the other subsections of § 27-19-201. *BAM Ventures*, ¶ 16.

III. RULING

Plaintiffs do not identify which subsection(s) of § 27-19-201 they are proceeding under but it appears to the Court that they are applying for relief under § 27-19-201(2), that is, "when it appears that the commission or continuation of some act during the litigation would produce a great or irreparable injury to the litigant." The irreparable injury claimed is violation of the right to privacy and right to dignity, forcing a health care choice upon Plaintiffs by requiring their children to wear medical devices on their faces.

For purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15. In order to determine whether a constitutional right has been lost, a court must first determine which of the established levels of scrutiny is appropriately applied: strict scrutiny, middle-tier scrutiny or the rational basis. *Montana Cannabis Indust. Ass'n. v. State*, 2012 MT 201, ¶ 16 ("*MCIA I*"). Plaintiffs argue strict scrutiny applies because the rule implicates a fundamental right found in the Montana Constitution's declaration of rights. The Court disagrees.

Plaintiffs' underlying premise is unsupported by Montana law. Plaintiffs broadly interpret general concepts in Montana right to privacy jurisprudence to frame their objections to the Schools' face covering rules as constitutional in dimension. Their arguments go well beyond what the Montana Supreme Court has

recognized as encompassed in the right to privacy and the right to dignity. Further confounding Plaintiffs' analysis is their failure to distinguish between individual health care decisions and public health measures.

Plaintiffs rely on a myopic reading of *Armstrong v State,* 1999 MT 261*, Wiser v. State,* 2006 MT 20 and *MCIA I* in support of their thesis that the right to privacy is implicated by the Schools' face covering rules. The Montana Supreme Court has recognized the right to privacy is a fundamental right guaranteed by the Montana Constitution. *Gryczan v. State*, 283 Mont. 433 (1997). In *Armstrong*, the Montana Supreme Court concluded that the right to health care is a fundamental privacy right to the extent that it protects a woman's right to seek and obtain a pre-viability abortion from the qualified health care provider of her choice. In *Wiser*, the Court noted it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes the right to health care. *Wiser*, ¶ 15. The Court held there is not a fundamental right to obtain health care free from state regulation. Thus, a rule requiring a referral from a dentist for patients seeking treatment from denturists need only be rationally related to a legitimate state interest. *Wiser*, ¶ 20. In *MCIA I*, the Montana Supreme Court reversed the district court's preliminary injunction of parts of the Montana Marijuana Act. The Supreme Court concluded that the district court was mistaken in its reliance on *Armstrong* and its conclusion that the challenged provisions implicated plaintiffs' fundamental

constitutional rights triggering strict scrutiny analysis. The Supreme Court distinguished between the right to privacy in *Armstrong*, which rested on a constitutionally protected right to personal autonomy for women seeking abortion with the claimed affirmative right to access a particular drug, which was not recognized constitutionally as protected under the right to privacy. The Supreme Court remanded the matter to the district court with instructions to apply the rational basis test to determine whether sections of the Montana Marijuana Act should be enjoined. Plaintiffs invite this Court to make the same mistake.

Plaintiffs fail to establish a basis for their central claim that the right to privacy is implicated by a requirement that students wear face coverings while indoors at school during an outbreak of a communicable disease. Although Plaintiffs equate a face covering rule to a medical treatment or an individual health care decision and characterize a face covering as a "medical device", their characterizations are misguided. First, Plaintiffs' repeated assertion that the Montana Legislature has defined face coverings as "medical devices" is untenable. The Montana Legislature amended the criminal trespass statute to prohibit taxpayer funded public places from requiring proof of vaccination or the wearing of masks or other facial coverings, captured under the general description of "medical devices," as a condition of entering or remaining lawfully upon certain premises. Words and phrases used in the statutes of Montana are construed according to context. § 1-2-

107 MCA, *State v. Pinder*, 2015 MT 157, ¶ 18. The context in which "medical devices" is used in 45-6-203 (4) MCA is a criminal statute addressing lawful access to public places for unvaccinated persons and those who eschew personal protective equipment and is wholly unrelated to regulation of medical care or treatments. SB 65, signed into law this past session, wherein the Montana Legislature addressed COVID-19 related liability issues and included face shields and face masks along with other items intended to protect the wearer from injury or spread of infection or illness in the definition of "personal protective equipment." SB 65, Section 1, (5). In this COVID-19 specific legislation, the Montana Legislature specifically distinguished personal protective equipment from medical devices. SB 65. Section 1, (8). This distinction falls in line with common sense, as the Schools have argued, in that masks no more treat COVID-19 than helmets treat head injuries.

Second, the rights Plaintiffs claim are not rights recognized in the cases they cite. Plaintiffs do not seek access to constitutionally protected individual health care as in *Armstrong*. In *Wiser* and *MCIA* I, the Montana Supreme Court rejected freewheeling claims that the right to privacy identified in *Armstrong* encompassed access to individual medical treatment free from regulation. Thus, despite the broad guarantee of the individual right to medical judgments referenced in *Armstrong* at ¶ 75, the Montana Supreme Court has recognized rights may be limited by policies aimed at the protection of public health and safety.

Plaintiffs maintain the face covering rule violates students' right to human dignity because face coverings undermine individuality, interfere with the ability to read and show emotions, hinder interpersonal communication and relations and strips students of their autonomy in deciding the appearance they wish to present. Parents' rights to human dignity are alleged to be affronted by "arrogation of the parental right to make health care choices for their children." The Montana Supreme Court recognizes human dignity as fundamental meaning that the right is a significant component of liberty, any infringement of which will trigger the highest level of scrutiny. *Walker v. State, 2003* MT 134, ¶ 74.

Walker discusses human dignity in a context vastly different than presented here. In *Walker*, a prison inmate with an untreated serious mental illness was subjected to extreme "behavior modification plans," including isolation, food restrictions and denial of clothing, bedding and water supply. The Montana Supreme Court read two sections of the Montana Constitution together (Article II, sec. 4, Individual dignity, and sec. 28, Criminal justice policy) to conclude that the behavior modification plans and conditions of confinement constituted an affront to human dignity and constituted cruel and unusual punishment when it exacerbated the inmate's mental health. Protection of human dignity for inmates was described as including physical security and attention to the basic human needs of adequate medical care, humane rules for visitation, adequate exercise and opportunity for

education. *Walker*, ¶ 82. Plaintiffs rely on a discussion of general principles in *Walker* and include lengthy quotes from a concurring opinion in *Baxter v. State*, 2009 MT 499.

While the Court understands the frustrations of the parents in this case and the social impediments children in school may experience due to masking, masking in school during a pandemic is a far cry from an abuse of human dignity as recognized in Montana jurisprudence. Further, the claim of impairment of parental dignity is premised on the unsound notion that whether or not to wear a face covering is an individual or parental health care decision. The requirement for face coverings in schools is a public health measure implemented to control the spread of a communicable disease as one element of a multi-part strategy. Public health measures are distinguishable from private, individual health care decisions. Public health measures, such as face coverings, are directed at managing conditions which can reasonably be expected to lead to adverse health effects in the community and are not for the purpose of treating individual health conditions. The Constitution itself explicitly links the enjoyment of inalienable rights with recognition of corresponding responsibilities. Art. II, sec. 3.

Plaintiffs fail to establish the fundamental right to privacy and the right to dignity encompasses the claimed affirmative parental right to individually evaluate the necessity for their children to wear face coverings in schools. Plaintiffs further

fail to establish children's rights to privacy and dignity are infringed by the School's face covering rule. As the rights claimed do not arise to the level of fundamental rights, strict scrutiny review is not appropriate. "Middle tier" scrutiny is applicable when a law or policy affects a right conferred by the Montana Constitution but is not found in the Constitution's declaration of rights. *Snetsinger v. Mont. Univ. Sys*., 2004 MT 390, ¶ 17. If neither strict scrutiny nor middle tier scrutiny applies, the rational basis test is appropriate. Pursuant to the rational basis test, the statute must be rationally related to a legitimate government interest. *Snetsinger*, ¶ 19. The rational basis test is applicable to determine whether the Schools' face covering rule should be enjoined. When rational basis scrutiny is applied to the challenged rule, Plaintiffs cannot establish a prima facie case or show that it is at least doubtful whether or not they will suffer irreparable injury before their rights can be fully litigated.

Schools have adopted face covering rules as part of their school safety policies to require the use of personal protective equipment, including face coverings, when necessary to protect the safety of students, staff members and visitors from transmission of COVID-19. The face covering rule is subject to review and modification as circumstances change. Schools have a legitimate governmental interest in the safety of students, staff and visitors. The face covering rule is rationally related to safety of persons, many of whom are not eligible for vaccination

due to their age, who must congregate indoors, in close proximity for extended periods of time. Schools have based the face covering rules on guidance and recommendations from numerous reputable sources, including the Montana Medical Association, Center for Disease Control, Missoula City-County Health Department, the American Academy of Pediatrics, the Montana Chapter of the American Academy of Pediatrics, the Montana Governor's Office and the Montana Office of Public Instruction. The Schools' face covering rules are a rational response to the challenge of safely providing in-person education for all students during a pandemic.

A preliminary injunction does not resolve the merits of a case but prevents further injury or irreparable harm pending adjudication of the controversy on its merits. If an applicant establishes a prima facie case or shows that it is at least doubtful as to whether the applicant will suffer irreparable harm before an adjudication on the merits, courts are inclined to issue the preliminary injunction. If, however, a preliminary injunction will not preserve the status quo and minimize harm to all parties pending a full trial on the merits, it should not be issued. *Knudson v. McDunn*, 271, Mont. 61, 65, quoting *Porter v. K. & S. Partnership*, 192 Mont., 175, 181 (1981). In addition to Plaintiffs' inability to establish a prima facie case or showing that it is at least doubtful as to whether they will suffer irreparable harm by continuation of the Schools' face covering rule, the requested preliminary injunction

would not preserve the status quo and minimize harm to all parties.

Status quo is defined as the last actual, peaceable, noncontested condition which preceded the pending controversy. *Davis v. Westphal*, 2017 MT 276, ¶ 24. Plaintiffs maintain the status quo is "parental choice," or no rule, based on a letter from Douglas Reisig to Hellgate Elementary parents dated August 11, 2021. The letter indicated that no face coverings would be required for the 2021/2022 school year. Less than two weeks later, Hellgate Elementary District's Board of Trustees adopted a requirement for face coverings for the start of the 2021-2022 school year, following a recommendation by Douglas Reisig. Defendants counter that face covering requirements is the status quo as such rules were in place during the 2020-2021 school year and over the summer for each defendant school district.

The pending controversy is whether Schools may mandate universal face covering rules over the objections of individual parents. The requirement of face coverings was imposed by the Schools at the beginning of the 2021-2022 school year for the duration of the school year, maintained over the summer for summer school and imposed for the beginning of the 2021-2022 school year. Plaintiffs did not file suit until August 2021, after nearly a year of an operative face covering requirement in all Schools. Thus, the noncontested condition preceding the pending controversy was a universal face covering rule adopted by the respective boards.

Finally, enjoining the universal face covering rule would not minimize harm

to all parties. The spread of COVID-19 is not contained in Missoula County and persons of all ages, including unvaccinated children attending school in person, are at risk of acquiring the virus and of spreading it to other children and adults. Individuals with the disease and their close contacts are asked to quarantine by the Missoula City-County Health Department. Although Plaintiffs dispute the efficacy of face coverings, the Court is disinclined to strip Schools of the ability to utilize a recognized public health measure to control communicable disease and keep children in school.

During the September 29, 2021 hearing, it was discussed that Plaintiffs have the option of enrolling their children in the remote learning options offered by the Schools. Plaintiffs believe the current school environment is harmful to their children. Plaintiffs argue that the remote learning option is inferior to in person instruction. While the Court doesn't disagree that in person instruction is preferable, there is no indication that remote learning does not meet the requirement of the Schools to provide education to students in their districts.

In sum, when looking at potential harms, the Court is faced with the prospect of increased spread of a contagious disease, a significant harm in and of itself, and the corresponding quarantining of children and school staff if the requested preliminary injunction were to be granted. On the other hand, in denying the requested preliminary injunction the Court sees the harm to the Plaintiffs as their

children learning remotely if masking is intolerable. Clearly a preliminary injunction in this case would not minimize harm pending trial on the merits.

DATED this 1st day of October, 2021.

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Jason Marks
District Judge

cc: Elizabeth O'Halloran, Esq.
Elizabeth Kaleva, Esq.
Kevin Twidwell, Esq.
Quentin Rhoades, Esq.