STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

MASSAPEQUA UNION FREE SCHOOL DISTRICT, LOCUST VALLEY CENTRAL SCHOOL DISTRICT, JEANINE M. CARAMORE, individually and on behalf of her minor child, M.C.,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

KATHY HOCHUL, in her official capacity as Governor of the State of New York, NEW YORK STATE DEPARTMENT OF HEALTH, HOWARD ZUCKER, M.D., in his official capacity as Commissioner of the Department of Health, and the PUBLIC HEALTH PLANNING COUNCIL,

Respondents.

Special Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
Index No. 907979-21

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DECISION/ORDER

Zwack, J.:

Petitioners are two school districts, Massapequa Union Free School District and Locust Valley Central School, as well as Jeanine M. Caramore, individually and on behalf of her minor child, M.C., and they bring this Article 78 seeking a declaratory judgment. They argue that the Statewide Mask Mandate Policy, 10 NYCRR 2.60 ("the Emergency Rule") was made is in excess of Respondents' constitutional, statutory, and administrative authority, and that it is arbitrary and capricious.

In their petition, Petitioners specifically argue, as their first cause for the proceeding, that it is the Legislature, not the State, which should determine the policy regarding masking school-age children, as it is in the best position to do so. To this end, Petitioners argue that with the State mask policy, Respondents have usurped the legislative role and violated the doctrine of separation of powers. They argue that the State Legislature has demonstrated that it is the authority to issue further mandates, when it revoked the broad power it gave to the Governor under Executive Law 29 on March 3, 2020 to "issue any directive necessary to respond to a state disaster emergency." On March 2, 2021 the Legislature amended Executive Law 29, allowing the Governor to only

"temporarily suspend certain laws and rules during a state disaster emergency." Petitioners further note that the Legislature evinced its intent to enact it's own mask laws in what is known as the "HERO Act", Labor Law 218-b(1)(d), requiring employers to establish protocols to prevent the airborne spread of disease; Education Law 2801-a, requiring each school board of education to adopt a district-wide school and building safety plan; and Education Law 2801-a(2)(m), directing Boards of Education to comply with the provisions of Labor Law 27-[c].

As the second cause for this proceeding, Petitioners argue the Mask Mandate Regulation for schools is arbitrary and capricious, made without a rational basis. Petitioners assert that the efficacy of masking children is inconclusive, the mask mandate regulations only apply to certain locations, and the determination to require masks in school is one of "the most debated decisions on the world."

Respondents, New York State Governor Kathy Hochul, New York State Department of Health Commissioner Howard Zucker, MD, and the Public Health Planning Counsel, oppose the motion, and their legal arguments, beyond the proven efficacy of masking in preventing the spread of COVID-19, include that the school districts lack the capacity to sue the State Respondents; that none of the Petitioners have standing because they have not demonstrated any injury apart from the public at large; that Respondents have constitutional, statutory,

and administrative authority to enact the mask mandate; and that the emergency rule has a rational basis and its enactment was not arbitrary or capricious.

For the reasons that follow, this Article 78 petition is denied.

First, the petitioners do not have the capacity to sue. The capacity to sue or be sued concerns a litigant's power to bring a grievance to the court, while standing involves whether the litigant has suffered an injury and thus has an actual legal stake in the matter (*Silver v Pataki*, 96 NY2d 532 [2001]). " 'Board of Education' is an agency to which the state delegates power and duties controlling schools in school district" and therefore a municipal corporation (*Matter of Koch v Webster Cent. School Dist. Bd. of Educ.*, 112 Misc2d 10 [Sup Ct. Monroe County 1981]). Municipal entities — counties, towns and school districts — do not have the inherent power to sue the State itself, as they "are merely subdivisions of the State, created by the State for the convenient carrying out of State's governmental powers and responsibilities as its agents" (*City of New York v State of New York*, 86 NY2d 286 [1995]). A municipality lacks the capacity to challenge a state agency's interpretation of statutes and regulations where "the result impacts the municipality in its governmental capacity" (*Bethpage Water Dist. v Daines*, 67 AD3d 1088 [3d Dept 2009], citing *City of Utica v Daines*, 53 AD2d 922 [3d Dept 2008]).

Petitioners have likewise failed to establish injury in fact, which would have given them standing if they had capacity to sue in the first instance, and certainly have alleged no injury, much less one that is different from the public at large. "[I]n the absence of injury, there is no standing to bring an Article 78 proceeding" (*Matter of East Rampapo Cent. Sch. Dist. v King*, 29 NY3d 938, 940 [2017]).

If the petitioners had capacity and standing, their petition would fail because the Mask Mandate does not violate the doctrine of the separation of powers. As a general rule, the "Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in legislative product by prescribing rules and regulations consistent with the enabling legislation" (*Matter of Nicholas v Kahn*, 47 NY 2d 24, 31 [1970]). Public Health Law 225 imbues respondent Public Health Planning Council with the authority to "deal with matters affecting the life or health or the preservation of public health in the State of New York." Public Health Law 201 authorizes the Department of Health to supervise, report on, and control disease, promote education as to prevention and control of disease, and to exercise control over the abatement of nuisances likely to affect public health, such as COVID-19. The Commissioner of Health is granted the power by Public Health Law 206 to "investigate the causes of disease, epidemics...enforce the public health law [and]

sanitary code, annul, modify and order" or regulate.

Application of the four *Boreali* factors is used to determine if an agency has usurped the duties of the Legislature (*Boreali v Axelrod*, 71 NY2d 1, 11 [1987]) — which include: (1) whether the agency balanced costs and benefits according to pre-existing guidelines, or instead made complex value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) whether the agency merely filled in details of a broad policy, or if it wrote on a clean slate, creating its own comprehensive set of rules with legislative guidance; (3) whether the legislature had unsuccessfully attempted to enact laws pertaining to the issue; and (4) whether the agency used special technical expertise in the applicable field.

Here, the application of the *Boreali* factors shows that the respondents have not overstepped their bounds and waded into legislative territory. The Emergency Rule does not attempt to weigh competing interests unrelated to the public health goal. The respondents did not "write on a clean slate" — in fact, they merely filled in details of a broad policy of promoting public health in times of known health risks (*Garcia v New York City Dept. of Health and Mental Hygiene*, 31 NY3d 601, 609 [2018]). While it is true that the Legislature attempted, unsuccessfully, to pass bills regarding similar issues during the pandemic, not all factors are entitled to equal weight, and "[l]egislative inaction,

because of its inherent ambiguity, affords the most dubious foundation for drawing inferences (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation and Historic Preserv.*, 27 NY3d 174, 184 [2016], quotation and citation omitted). The fourth *Boreali* factor mitigates in favor of the respondents, who have "special expertise or competence in the field that developed the regulations" (*Greater N.Y. Taxi Assn.* v *New York City Taxi and Limousine Commn.*, 25 NY3d 600 [2015]).

While Petitioners suggest that they, and their respective Boards of Education, have made concerted efforts to alleviate the spread of the COVID virus in their schools, and their schools should be exempt from the broadly based mask mandate, their arguments are simply insufficient to establish that the New York State Health Department and the Board of Health arrived at the mask policy in an arbitrary and capricious manner. On review, courts must uphold the administrative exercise of discretion "unless it has no rational basis" or the action is "arbitrary and capricious" (*Matter of Pell v Board of Educ. Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). Arbitrary action is without sound basis in reason and taken without regard to the facts (*Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400 [1986]). "Where such administrative determinations are made by the agency responsible for the administration of the law, the court is not to

substitute its judgment for that of the agency. Even though the court might have decided differently..(and) the court may not upset the agency's determination in the absence of a finding ...supported by (the) record, that the determination had no rational basis" *(Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.,* 112 AD2d 72, 76 [1st Dept 1985]), citations omitted).

Petitioners rely heavily on the voluminous materials they have annexed to their petition to support their argument that the mask mandate is arbitrary and capricious. On review of an Article 78, the court's role is limited, and it may not substitute it's judgment for that of respondents, which have clearly relied on the recommendations from the Centers for Disease Control and the American Academy of Pediatrics.

No matter how the legal argument is couched, the result of lawsuits challenging the State's public health protection measures during this worldwide pandemic have all reached the same result, namely that mandatory health requirements do not violate substantive rights and properly fall within the state's police powers (*New York Municipal Labor Committee v City of New York*, 2021 WL 4484753 (Sup Ct, New York County 2021]; *Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. New York State UCS*, WL 4929983 [Sup Ct Albany County 2021]).

Accordingly, it is

ORDERED, that the Article 78 petition is denied.

This constitutes the Decision and Order of the Court. This original Decision and Order is filed by the Court with NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel for the respondents is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: November 23, 2021
Troy, New York

Henry F. Zwack
Acting Supreme Court Justice

Papers Considered, as filed with NYSCEF:

11/26/2021

1. Documents No. 1 through No. 50;
2. Documents No. 51 through 54;
3. Documents No. 57 through 61.