**IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO**

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|---|---|---|
| **John Does 1-9 and Jane Does 1-3, *Minors,* by and through their Parents & Natural Guardians,** | ) | |
| **Plaintiffs,** | ) | **Case No. 20CV005150** |
| **v.** | ) | **Judge McIntosh** |
| **Upper Arlington Board of Education, et al.,** | ) | |
| **Defendants.** | ) | |

**NOTICE OF APPEAL**

Notice is hereby given that plaintiff, John Doe 1, appeals to the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, from the Decision and Entry on Plaintiffs' Motion for Preliminary Injunction filed by the Court on January 6, 2021. A copy of the Decision and Entry is attached hereto as Exhibit A.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Notice of Appeal was filed electronically and served electronically on the following counsel of record, this 28th day of January, 2021:

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/s/ Rex H. Elliott

# EXHIBIT A

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|---|---|---|
| JANE DOE, A MINOR CHILD BY AND THROUGH HIS/HER PARENTS & NATURAL GUARDIANS, | : | CASE NO. 20CV5150 |
| Plaintiff, | : | JUDGE MCINTOSH |
| vs. | : | |
| UPPER ARLINGTON BOARD OF EDUCATION, *et al.*, | : | |
| Defendants. | | |

**DECISION AND ENTRY ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

(FILED AUGUST 6, 2020)

**MCINTOSH, J.**

This matter was initially before the Court upon motion by Plaintiffs John Does 1-8 and Jane Doe 3 (hereafter "Plaintiffs") for preliminary injunction. After Plaintiff's partial dismissals of parties, the only remaining Plaintiff is John Doe 1. Plaintiff seeks to enjoin Defendants Upper Arlington Board of Education, Dr. Paul Imhoff, Nancy Drees, Scott McKenzie, Jenny McKenna, Carol Mohr, and Lori Trent (hereafter "Upper Arlington Defendants") from enforcing the Upper Arlington Board of Education's July 31st Resolution and failing to provide an in-person option for mode of instruction for the 2020-2021 school year. Plaintiff argues that the Upper Arlington School Board's July 31st Resolution violates Plaintiff's rights under the Ohio Constitution and deprives Plaintiff of the fundamental right to a basic minimum education. Defendants filed a Memorandum in Opposition to Plaintiffs' motion on September 3, 2020. Plaintiffs filed a Reply on September 15, 2020. This motion is fully briefed and ripe for review.

## BRIEF BACKGROUND

Plaintiff is minor child who attends and is enrolled to attend the Upper Arlington High School. Plaintiff is not on an Individualized Education Plan (IEP) and participates in and plan to participate in the athletic programs at Upper Arlington High School. In the Complaint, Plaintiff alleges that the Resolution passed by the Upper Arlington Defendants on July 31, 2020, withdrawing all in person educational learning methods, deprives them of a fundamental right to a basic minimum education. Plaintiff alleges that due to online-distance learning in the Spring of 2020, he has severely regressed in their learning process and continued on-line distance learning will cause severe and permanent damage to their educational, mental, emotional and physical well-being. Plaintiff further alleges that the Upper Arlington Defendants' decision to withdrawal in person learning was based on misleading advice and guidance provided by the Health Department Defendants.[1] Plaintiff seeks declaratory judgment and injunctive relief preventing the Upper Arlington Defendants from offering only Enhanced Distance Learning and compelling the Upper Arlington Defendants to provide in-person learning to students.

## LAW AND ANALYSIS

Plaintiff moves this Court for a preliminary injunction against Upper Arlington Defendants:

> enjoining the enforcement of the Upper Arlington School Board's July 31, 2020 Resolution which fails to provide an in-person option for mode of instruction for the 2020-2021 school year.

Under Ohio law, a party seeking a preliminary injunction "must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim." *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio

[1] Health Department Defendants were dismissed on August 15, 2020.

App.3d 786, 790 (1996), appeal not allowed, 76 Ohio St. 3d 1495, citing *Mead Corp., Diconix, Inc., Successor v. Lane*, 54 Ohio App.3d 59 (1988), jurisdictional motion overruled, 41 Ohio St. 3d 709 (1989). "In deciding whether to grant a preliminary injunction, a court must look at: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits, (2) whether plaintiff will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is granted, and (4) whether the public interest will be served by the injunction." *Vanguard Transp. Sys., Inc.*, at 790, citing *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St.3d 41 (1986); *Goodall v. Crofton*, 33 Ohio St. 271 (1877).

**I. Substantial likelihood of success**

Section 2, Article VI of the Ohio Constitution requires the state to provide and fund a system of public education and includes an explicit directive to the General Assembly stating that the general assembly "shall make such provisions, by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state." *Derolph v. State*, 78 Ohio St.3d 193, 1997-Ohio-84, 677 N.E.2d 733 citing Oh. Const. Art. VI, § 2. It is the proper function of the General assembly and expressly mandated by the Ohio Constitution to create a constitutional system for financing elementary and secondary public education in Ohio. *Id.* It is the role of the courts, pursuant to the Ohio Constitution, to determine the constitutional validity of the system of funding and maintaining of public schools in Ohio. *State v. Lewis*, 99 Ohio St.3d 97, 2003-Ohio-2476, 789 N.E.2d 195 citing *Derolph*, 78 Ohio St. 3d 193.

Plaintiff argues that they have a substantial likelihood to succeed on the merits of his constitutional claims because the Ohio Constitution provides for a fundamental right to a basic minimum education. Plaintiff argues that by failing to provide an option for hybrid or in-person

instruction, Defendants deprives Plaintiff of the fundamental right to a basic minimum education. Plaintiff maintains that a remote, online-only education that lacks buildings, equipment, laboratories, libraries, and opportunities for in-person instruction in music, art, and language classes burdens a student's right to a thorough and efficient education. In addition, Plaintiff argues that the Ohio Supreme Court has struck down statutes on the basis of their unconstitutional burden on the right to a thorough and efficient education. Plaintiff contends that this right does not relate only to funding or districting, but can encompass a "lackluster curricula or less-than-satisfactory mode of instruction." (Pl. Mtn. for Prelim. Inj. at p. 11.)

In their Memorandum in Opposition, Defendants argue that Plaintiff is unlikely to succeed on the merits of his claims because the Ohio Constitution does not provide for a fundamental right to a basic minimum education nor a right to participate in interscholastic athletics. Defendants further argue that Plaintiff has failed to state a claim under the Equal Protection Clause of the Ohio Constitution. Defendants maintain that Plaintiff's argument that school buildings are required to pass constitutional muster ignores the fact that online schools have been operating in Ohio since 2005.

In addition, Defendants argue that the Upper Arlington School Board is vest with statutory authority to determine how to deliver instruction. Under Section 3, Article VI of the Ohio Constitution, authority over the organization, administration and control of the public-school system lies with the General Assembly. Defendants maintain that the General Assembly has the power to provide for the creation of school districts, for changes and modifications and for the methods by which changes and modifications are made. Defendants argue that in passing H.B 164, the General Assembly conferred upon the Upper Arlington Board of Education the ability to "adopt a plant to provide instruction using a remote learning model for the 2020-2021 school year." Sub.

H.B. 164, Section 16(B). Defendants argue that with H.B 164 they have broad discretion with regard to school matters and policy.

**II. Irreparable Injury Factor Strongly weighs in the favor of an injunction**

Plaintiff argues that he is suffering immediate and irreparable harm by the limitation on education placed on him because of the Upper Arlington School Board's July 31st Resolution. Plaintiff argues that distance-only learning schools pose child safety concerns as it is likely that the risk of children being sexually abused will increase as shelter-in-place orders continue. Plaintiff maintains that teachers and educational staff are needed to help protect students from potential abuse.

In support of their Memorandum in Opposition, Defendants will not suffer irreparable harm from a four-week period of distance learning.

**III. Harm to Third Parties and the Public Interest**

Plaintiff argues that Defendants will suffer little to no harm if this Court enjoins them from providing remote-only learning. Plaintiff maintains that European Union member countries have been able to open schools without social distancing, mask wearing and other measures and have not experienced an increase in COVID-19 cases and spread of the virus among children. Plaintiff argues that the risk to third party teachers may be managed by offering choices and providing protection and the challenges posed by offering in person learning pales in comparison to the harm inflicted through the deprivation of their constitutional right to education.

In addition, Plaintiff argues that there is a strong public interest in a thorough and efficient public education. Plaintiff contends that this public interest is specifically enumerated in the Ohio Constitution. Plaintiff maintains that the public interest is best served by allowing all students the option to participate in an in-person education.

Defendants argue that third-parties will be unjustifiably harmed if a preliminary injunction is issued. Defendants maintain that they would be far more than inconvenienced by deaths, hospitalizations, or severe illnesses of District students, educators, and staff. Defendants argue that the Upper Arlington School Board made the determination that the safety risks inherent with in-person learning outweigh any negative effects of online learning and this decision was within the Boards discretion. Defendants further argue that there is a risk to the community with in-person instruction as death or serious illness due to a global pandemic represent a serious potential harm to students, educators and other community members. In addition, Defendants argue that the public interest would not be served by granting the preliminary injunction because reopening schools before the community has a chance to recover from a surge in COVID-19 cases would serve to increase the spread of the disease and potentially cause further deaths and shut downs.

**DECISION**

Upon review of the case law and arguments presented, Plaintiff's Motion for Preliminary Injunction is not well taken. Section 2, Article VI of the Ohio Constitution provides that the state's public-school funding system provide for a "thorough and efficient system of common schools throughout the state." *Derolph* citing Oh. Const. Art. VI, § 2.

In the case *Derolph v. State*, the Court reviewed Ohio's statutory scheme for financing public education, specifically the School Foundation Program as enacted under R.C. Chapter 3317. Under the statute, the revenue available to a school district comes from state revenue, provided through the School Foundation Program and local revenue, provided primarily through locally voted school district property tax levies. Under the School Foundation Program, the state basic aid is available for school districts that levy "at least twenty mills of local property tax revenue for current operating expenses." *Id.* citing R.C.3317.01(A.) In analyzing what a "thorough and

efficient" system of education could mean, the Court referred to its decision in *Miller v. Korns*, where it stated "a thorough system could not mean one in which part or any number of the school districts of the state are starved for funds. An efficient system could not mean one in which part or any number of the school districts in the state lacked, teachers, buildings, or equipment." *Miller v. Korns*, 107 Ohio St. 287, 140 N.E. 773 (1923.)

The Court found that the state's funding system was unconstitutional because of the operation of the School Foundation Program and emphasis of Ohio's school funding system on local property tax, the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs and the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings. The Court reasoned that the state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students with a safe and healthy learning environment. The Court found that the state funding system as it was currently written, failed to provide for a thorough and efficient education system throughout the state of Ohio.

Here, Plaintiffs are not challenging the constitutionality of the state's funding system as provided under Section 2, Article VI of the Ohio Constitution. Plaintiffs are alleging that the Upper Arlington School Board's July 31st Resolution violates Plaintiff's constitutional rights under Section 2, Article VI of the Ohio Constitution because it fails to provide for an in-person learning option for the 2020-2021 school year. It is the Courts view that Plaintiffs misinterpret the "Thorough and Efficient Clause" to be a mandate on individual school districts to provide a specific method of education for its students. However, review of the Ohio Constitution and relevant case law shows that this clause provides that the school funding system in the State of Ohio must provide for a system of education that is thorough and efficient throughout the state. It

does not create a fundamental right to a basic minimum education as argued by Plaintiff. In addition, the law is clear that the right to participate in interscholastic athletics is not a constitutionally protected right under the Ohio Constitution. Therefore, the Court finds that Plaintiff does not have a substantial likelihood of success on the merits of their constitutional claims.

Next regarding irreparable injury if the injunction is not granted. Plaintiff argues that he will suffer immediate and irreparable harm by the limitation on education placed on him because of the Upper Arlington School Board's July 31st Resolution but has failed to articulate specifically what harm he will suffer. Plaintiff refers to the Center of Disease Control's July 23, 2020 report on the Importance of Reopening America's Schools citing "the lack of in-person educational options disproportionately harms low income and minority children and those living with disabilities." (Pl. Mtn for Prelim. Injun. P. 13.) Plaintiff argues that distance-only learning schools pose child safety concerns as it is likely that the risk of children being sexually abused will increase as shelter-in-place orders continue. The Court finds that any injury would be speculative and that Plaintiff has failed to provide evidence of any concrete injury that would be suffered from distance only learning for the four-week period established in the Board's Resolution. The Court also finds that the risk to third-parties is great as the COVID-19 pandemic is ongoing and there is a substantial risk of spread of the virus within the community and to teachers with in-person learning. Therefore, the Court finds that Plaintiff has failed to meet the second prong.

Finally, the Court finds that the public interest will not be served by granting of the injunction. Plaintiff argues that the public interest in a thorough and efficient public education is monumental and would be served by granting of the injunction and allowing students to participate in an in-person education. The Court finds this argument unpersuasive. As stated prior, the

community is still in the midst of a global pandemic and with the substantial risk of spread within the community with in-person learning, the public interest would not be served by granting of the injunction and allowing in-person learning prior to when the Defendants are prepared to do so.

## CONCLUSION

For the aforementioned reasons, Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

This is a final order. There is no just cause for delay.

So Ordered

Copies to:

All Counsel (Electronically)

Franklin County Court of Common Pleas

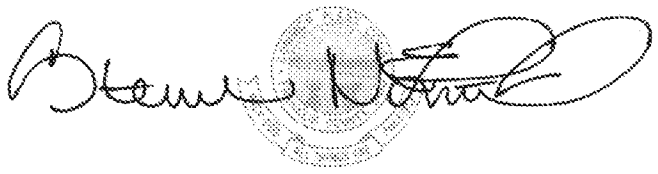
**Date:** 01-06-2021

**Case Title:** JANE DOE A MINOR -VS- UPPER ARLINGTON BOARD OF EDUCATION ET AL

**Case Number:** 20CV005150

**Type:** ENTRY

It Is So Ordered.



/s/ Judge Stephen L. McIntosh

Court Disposition

Case Number: 20CV005150

Case Style: JANE DOE A MINOR -VS- UPPER ARLINGTON BOARD OF EDUCATION ET AL

Final Appealable Order: Yes