

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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CHRISTIAN CENTRAL ACADEMY,

Petitioner/Plaintiff,

**VERIFIED PETITION  
AND COMPLAINT**

For Judgment Pursuant to  
Article 78 of the CPLR  
And The New York Constitution

Index No. \_\_\_\_\_

v.

KATHLEEN HOCHUL, GOVERNOR OF NEW YORK;  
NEW YORK STATE DEPARTMENT OF HEALTH;  
NEW YORK STATE PUBLIC HEALTH AND HEALTH  
PLANNING COUNCIL; HOWARD ZUCKER, NEW YORK  
STATE COMMISSIONER OF HEALTH; MARK POLONCARZ,  
COUNTY EXECUTIVE OF ERIE COUNTY; GALE BURSTEIN,  
ERIE COUNTY COMMISSIONER OF HEALTH; and ERIE  
COUNTY DEPARTMENT OF HEALTH,

Respondents/Defendants.

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Petitioner/Plaintiff CHRISTIAN CENTRAL ACADEMY, herein respectfully alleges:

**PARTIES**

1. At all times relevant hereto, Petitioner/Plaintiff CHRISTIAN CENTRAL ACADEMY (“Petitioner”) was, and is, a domestic 501(c)(3) not-for-profit corporation with a principal place of business located at 39 Academy Street Williamsville, New York 14221, whereat it operates a private pre-kindergarten through twelfth grade school.

2. At all times relevant hereto, Respondent/Defendant KATHLEEN HOCHUL, GOVERNOR OF NEW YORK (the “Governor) was, and is, the Governor of the State of New York. As used herein, the term “the former Governor” will refer to Ms. Hochul’s immediate predecessor in that office.

3. At all times relevant hereto, Respondent/Defendant NEW YORK STATE DEPARTMENT OF HEALTH (“NYSDOH”) was, and is, the department of the New York state government responsible for public health.

4. At all times relevant hereto, Respondent/Defendant NEW YORK STATE PUBLIC HEALTH AND HEALTH PLANNING COUNCIL (the “Council”) was, and is, an agency of New York State with the power to promulgate regulations as part of the sanitary code.

5. At all times relevant hereto, Respondent/Defendant HOWARD ZUCKER, NEW YORK STATE COMMISSIONER OF HEALTH (the “Commissioner”) was, and is, the lawfully appointed Commissioner of the NYSDOH.

6. At all times relevant hereto, Respondent/Defendant MARK POLONCARZ, COUNTY EXECUTIVE OF ERIE COUNTY (“Poloncarz”) was, and is, the County Executive or Erie County, New York.

7. At all times relevant hereto, Respondent/Defendant GALE BURSTEIN, ERIE COUNTY COMMISSIONER OF HEALTH (“Burstein”) was, and is, the lawfully appointed Commissioner of the Erie County Department of Health.

8. At all times relevant hereto, Respondent/Defendant ERIE COUNTY DEPARTMENT OF HEALTH (“ECDOH”) was, and is, an agency responsible for public health in Erie County.

9. Hereinafter, the Governor, the Council, the Commissioner, and NYSDOH will sometimes be referred to, jointly, as the “State Respondents.”

10. Hereinafter, Poloncarz, Burstein, and ECDOH will sometimes be referred to, jointly, as the “Erie Respondents.”

11. Hereinafter, the State Respondents and the Erie Respondents will sometimes be referred to, jointly, as the “Respondents.”

**NATURE OF THIS ACTION**

12. This is a special proceeding brought under Article 78 of the CPLR and/or a declaratory action brought under CPLR § 3001 seeking injunctive relief to enjoin Respondents from imposing an in-school mask mandate on Petitioner’s private school.

13. Respondents have purported to impose these mask mandates via (i) 10 NYCRR § 2.60 and the Commissioner’s guidance issued; (ii) Erie County Department of Health Guidance for PK-12 Schools, 2021-2022; and (iii) an Order of the Commissioner of Health, dated August 30, 2021.

14. Petitioner is in need of immediate injunctive relief from these mask mandates because its schoolyear begins on Wednesday, September 8, 2021.

**JURISDICTION AND VENUE**

15. This Court has jurisdiction over this proceeding under Article 78 of the CPLR, CPLR § 3001, the New York State Constitution Article 6, § 7, and the common law of the State of New York.

16. Erie County is a proper venue for this proceeding because a substantial part of the events giving rise to Petitioner’s claims occurred in Erie County, because Petitioner’s school is located in Erie County, and because the Erie Respondents reside in Erie County.

**GENERAL FACTUAL BACKGROUND**

17. This case concerns a regulation, guidance documents, and a health order, each of which has been (i) promulgated by or at the direction of and/or (ii) can purportedly be enforced by one or more of the Respondents.

18. The aforementioned regulation, guidance documents, and health order each purport to impose, and/or authorize the imposition of, an in-school mask mandate on Petitioner's private school and the staff and students that attend Petitioner's private school.

19. Those portions of the aforementioned regulation, guidance documents, and health order that purport to impose and/or authorize this in-school mask mandate will sometimes be referred to jointly as the "Mask Mandates."

20. Upon information and belief, Respondents, and each of them, purport to have the authority to issue, promulgate, enforce, apply, and/or impose penalties for violations of one or more of the Mask Mandates.

21. Petitioner brings this action because the Mask Mandates, and each of them, lack the necessary statutory basis, and are therefore legal nullities.

22. Additionally, the Mask Mandates are arbitrary and capricious.

23. The Mask Mandates severely threaten the economic viability of Petitioner's private school.

24. Relying on the assurances made by the former Governor and the Commissioner that individual schools would be able to develop and implement their own masking policies for the 2021-2022 schoolyear,<sup>1</sup> Petitioner developed a "parent-choice" masking policy, which it published to the parents of prospective students on July 30, 2021. A copy of Petitioner's mask policy is attached hereto as **Exhibit A**.

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<sup>1</sup> See, e.g., David Robinson and Nancy Cutler, "New York State Team "New York will let local schools set COVID guidelines, including on mask mandates" available at: <https://www.lohud.com/story/news/coronavirus/2021/08/05/new-york-covid-school-reopening-guidance/5496544001/>, August 5, 2021; Lexi Bruening, "State: school districts make the call on mask wearing, other COVID plans" available at <https://www.wwnytv.com/2021/08/05/state-school-districts-make-call-mask-wearing-other-covid-plans/>, August 5, 2021.

25. Dozens of parents have chosen to enroll their children as students in Petitioner's school on the basis of Petitioner's parent-choice masking policy. These parents did not want to have their children's education and development negatively impacted by masks, and a lack of normal human interaction, for a third consecutive schoolyear.

26. The Mask Mandates conflict with Petitioner's parent-choice masking policy by requiring that all children over the age of 2 wear a mask at all times when they are indoors at a school, regardless of whether the parents of such children desire such children to wear masks while at school.

27. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, Petitioner expects that 20-25% of its students will be removed from its school if it is forced to mandate mask wearing at its school. Petitioner has approximately 250 students enrolled for the 2021-2022 schoolyear.

28. Such an exodus of 50 to 60 students would result in as much as a \$500,000 loss of revenue to Petitioner given the \$7,250-\$11,250 tuition Petitioner charges for each student, depending upon the grade level a student is enrolled in.

29. A loss of revenue of this magnitude threatens to put Petitioner out of business.

30. This loss of revenue would be particularly crippling for Petitioner's finances given that Petitioner has expended \$200,000 on alternative COVID-19 mitigation measures as part of its parent-choice mask policy. These mitigation expenditures were made after Petitioner was told it would not be subject to any mask mandates.

31. First, because Petitioner was not planning on mandating mask wearing, it hired five additional teachers so that it could reduce its class size to 12-13 students per classroom in order to

afford six feet of social distancing between all students and staff. It is costing Petitioner approximately \$175,000 to employ these additional five teachers.

32. Second, because Petitioner was not planning on mandating mask wearing, Petitioner installed CDC recommended (but not required) air purification systems in each of its classrooms in order to provide an additional level of protection to its students and staff. These air purification systems cost approximately \$27,000.

33. Petitioner's decision to install CDC recommended air purification systems and reduce its class size to afford six feet of social distancing affords Petitioner's students and staff at least as much protection as Respondent's Mask Mandates, which only require the use of ineffective cloth masks that have been shown to only capture 9.8% of the exhaled aerosols which contain the COVID-19 virus. Attached hereto as **Exhibit B** is a study entitled "Experimental investigation of indoor aerosol dispersion and accumulation in the context of COVID-19: Effects of masks and ventilation," published in the scientific journal *Physics of Fluids*, which found that cloth masks only captured 9.8% of such aerosols. This study is also available at: <https://aip.scitation.org/doi/10.1063/5.0057100>.

34. This study also found that R95 and KN95 masks captured 60% and 46% of such aerosols. *See Ex. B*. KN95 are available for purchase at a cost of less than a \$1 per mask. *See, e.g.* <https://www.amazon.com/kn95-mask/s?k=kn95+mask>.

35. Numerous studies have been conducted regarding the vulnerability of children under 18 to COVID-19.

36. Specifically, the studies attached hereto as **Exhibits C, D, E, F, G, H, and I** found that children are less likely to (i) contract COVID-19; (ii) have severe symptoms from COVID-19; and (iii) spread COVID-19 to others, including school staff.

37. The State Respondents' own data tells the same story. The NYSDOH COVID-19 fatality tracking website, available at:

<https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n>, only records 31 COVID-19 fatalities amongst individuals aged 0-19 out of a total of 43,601 COVID-19 fatalities statewide. Thus, the State Respondents data shows that school-aged children account for 0.07% of all of New York's COVID-19 deaths.

38. At the same time, the recently conducted Census found that children under 18 account for 20.7% of New York State's population. See <https://www.census.gov/quickfacts/NY>.

39. "Masking is a psychological stressor for children and disrupts learning. Covering the lower half of the face of both teacher and pupil reduces the ability to communicate. In particular, children lose the experience of mimicking expressions, an essential tool of nonverbal communication. Positive emotions such as laughing and smiling become less recognizable, and negative emotions get amplified. Bonding between teachers and students takes a hit. Overall, it is likely that masking exacerbates the chances that a child will experience anxiety and depression, which are already at pandemic levels themselves."<sup>2</sup>

40. While there has not yet been time for the impacts of mask wearing on childhood development and education to be fully analyzed, teachers and parents report numerous negative impacts that masks have had on their children/students. These negative impacts include difficulties with communication and instruction; deteriorating teacher-student and student-student relationships; student anxiety and depression; reduced ability for students to maintain

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<sup>2</sup> Neeraj Sood, PhD and Jay Bhattacharya, MD, PhD, "Mandatory Masking of School Children is a Bad Idea", available at <https://healthpolicy.usc.edu/article/mandatory-masking-of-school-children-is-a-bad-idea/>, July 16, 2021.

concentration, particularly during warm weather; difficulty in learning foreign languages; and reduced English language acquisition, particularly amongst young children.

#### **PETITIONER DEVELOPS ITS PARENT-CHOICE MASKING POLICY**

41. On or about June 25, 2021, the former Governor ended the declaration of state disaster emergency related to the COVID-19 pandemic.

42. Previously, during the pendency of this state disaster emergency, there arguably was a statutory basis (i.e. under the prior version of Executive Law § 29-a) for the in-school mask mandates the State imposed during the 2020-2021 school year. However, last spring, Executive Law § 29-a was amended again (to its current form), removing any statutory authority for a new in-school mask mandate (such as that contemplated by 10 NYCRR § 2.60). Additionally, when the former Governor terminated the state of emergency, on June 25, 2021, the in-school mask mandate then in effect (which was permitted to continue as part of the latest amendment to Executive Law § 29-a) was terminated. Accordingly, as of June 25, 2021, is no statutory authority for an in-school mask mandate.

43. When the state of emergency was so ended, schools were reestablished as the controlling entity for in-school masking policies.

44. From June 25 until July 29, 2021, Petitioner studied the scientific literature related to children and COVID-19 and consulted with the parents of its students/potential students and its staff regarding the impact masks had on students' education and development.

45. As a result of this factfinding, Petitioner determined that the needs of its students, staff, and educational mission would be best served if it implemented a parent-choice masking policy.



46. Petitioner communicated that it was adopting this parent-choice masking policy to the parents of its students/potential students and its staff on July 30, 2021. *See Ex. A.*

47. On or about August 5, 2021, the former Governor and the Commissioner both confirmed that individual schools would be allowed to determine their own masking policies for the 2021-2022 schoolyear.

48. Dozens of parents signed contracts to enroll their children in Petitioner's school based on the fact that Petitioner had committed to such a parent-choice masking policy.

49. As referenced above, Petitioner coupled this parent-choice masking policy with non-mask COVID-19 mitigation measures in an effort to maximize the safety of its students and staff.

#### ERIE COUNTY ISSUES IN-SCHOOL MASK GUIDANCE

50. On or about August 23, 2021, the Erie Respondents issued a document entitled Erie County Department of Health Guidance for PK-12 Schools, 2021-2022 (the "Erie County Guidance"). A copy of the Erie County Guidance is attached hereto as **Exhibit J**.

51. In the introduction to the Erie County Guidance, Burstein characterizes the Erie County Guidance as a compellation of "recommendations" that provide "useful guidance." *See Ex. J* at p.2.

52. However, the actual text of the Erie County Guidance purports to establish a mask mandate for all schools in Erie County, despite the fact the Erie Respondents have no jurisdiction over schools, particularly a private school such as Petitioner's. Specifically, the Erie County Guidance provides:

ECDOH ***requires*** indoor masking for all individuals age 2 years and older, including students, teachers, staff, bus drivers, bus aides, vendors, and visitors, regardless of vaccination status. Appropriate ***masks must be worn*** at all times in all classroom and non-classroom

settings, including but not limited to hallways, school offices, restrooms, gyms, locker rooms, auditoriums, etc.

Ex. J at p.3 (emphasis added).

53. The Erie County Guidance expressly authorizes the use of cloth-based masks to comply with this mask mandate.

#### THE COUNCIL PROMULGATES 10 NYCRR § 2.60

54. On or about August 26, 2021, less than two weeks before the start of the 2021-2022 schoolyear, the current Governor announced that “we’re going to have a mask mandate. Get used to it.”<sup>3</sup>

55. The next day, August 27, 2021, the Council adopted 10 NYCRR § 2.60, which provides that the Commissioner may impose an in-school mask mandate on children older than 2 years. A copy of 10 NYCRR § 2.60 and the Regulatory Impact Statement that accompanied it is attached hereto as **Exhibit K**.

56. Upon information and belief, the Governor, herself or through her staff and/or through the Commissioner, lobbied the nominally independent Council to adopt 10 NYCRR § 2.60. It is unknown how else the Governor was so confident that the nominally independent Council would so rapidly prove her prediction correct.

57. The Regulatory Impact Statement for 10 NYCRR § 2.60 fails to consider any impact that masks may have on children’s education or development. *See generally* **Ex. K**.

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<sup>3</sup> See Johan Sheridan, “Hochul on school mask mandates: ‘Get used to it, my friends!’ available at: <https://www.news10.com/classroom-progress-report/hochul-on-school-mask-mandates-get-used-to-it-my-friends/>, August 26, 2021

58. Upon information and belief, neither the Council nor the Commissioner reviewed any studies relating to the negative impacts mask may have on children as part of the process when they adopted 10 NYCRR § 2.60.

59. 10 NYCRR § 2.60(e) expressly authorizes the use of cloth masks to comply with this mask mandate.

60. 10 NYCRR § 2.60(f)(i) includes a provision for \$1,000 fine for every violation of the mask mandate contained therein.

**BURSTEIN ISSUES A HEALTH ORDER MANDATING IN-SCHOOL MASKING**

61. The week before the 2021-2022 school year was set to begin, Burstein published an Order of the Commissioner of Health, dated August 30, 2021 (the “Erie County Health Order”), which purports to mandate in-school masking. A copy of the Erie County Health Order is attached hereto as **Exhibit L**.

62. The Erie County Health Order expressly authorizes the use of cloth masks to comply with this mask mandate. *See Ex. L* at ¶ 1.

**FIRST CAUSE OF ACTION**  
**(Declaring the Erie County Guidance Legally Non-Binding on Petitioner)**

63. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

64. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

65. There is no statutory or legal authority for the Erie Respondents to issue or enforce the in-school mask mandate contained in the Erie County Guidance.

66. Specifically, the Erie Respondents do not have the authority or jurisdiction to apply or enforce the mask mandate contained in the Erie County Guidance against Petitioner's private school.

67. Petitioner has a clear legal right to operate its private school without reference to the mask mandate contained in the Erie County Guidance, including but not limited to operating pursuant to its parent-choice mask policy.

68. Petitioner is suffering a per se irreparable injury and is threatened with irreparable injury in the future by reason of the Erie County Guidance purporting to override its parent-choice mask policy.

69. Specifically, as a result of the Erie County Guidance purporting to override Petitioner's parent-choice mask policy, dozens of parents of students enrolled at Petitioner's school have communicated that they will pull their children out of Petitioner's school if Petitioner follows the Erie County Guidance instead of its parent-choice mask policy.

70. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, it believed that 20-25% of Petitioner's students will be removed from Petitioner's school by their parents if Petitioner complies with the Erie County Guidance.

71. These parents have also communicated their intention to seek a full refund of the tuition they have paid Petitioner given that they only chose to enroll their children at Petitioner's school on the basis of the parent-choice mask policy that Petitioner told these parents would be in place for the 2021-2022 schoolyear.

72. Because of the forgoing Petitioner faces the loss of hundreds of thousands of dollars of revenue.

73. At the same time, Petitioner has expended over \$200,000 to implement alternative COVID-19 mitigation measures.

74. The combination of these increased costs and the loss of revenue Petitioner is facing will devastate Petitioner's finances and threaten to put Petitioner out of business.

75. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate its private school with a parent-choice mask policy exceeds any conceivable harm Respondents or the public would suffer if this Court found the Erie County Guidance to be non-binding on Petitioner.

76. This is particularly the case here, given that the Erie County Guidance only mandates the use of ineffective cloth-based masks.

77. Respondents cannot demonstrate that universal masking with ineffective cloth-based masks are necessary to protect the health and wellbeing of Petitioner's students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by the Erie County Guidance, notwithstanding the Erie County Guidance mandate for the wearing of ineffective cloth-based masks.

78. Petitioner is therefore entitled to a declaratory judgment declaring the Erie County Guidance is illegal and/or non-binding on Petitioner, together with a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Erie Respondents from applying or enforcing the Erie County Guidance on Petitioner, and such relief would not be contrary to the public interest.

**SECOND CAUSE OF ACTION**  
**(Declaring 10 NYCRR § 2.60 A Legal Nullity Because This Regulation Lacks A Statutory Basis In The Public Health Law)**

79. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

80. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

81. 10 NYCRR § 2.60(a) provides that “any person who is over age two and able to medically tolerate a face-covering may be required to cover their nose and mouth with a mask or face-covering when: (1) in a public place and unable to maintain, or when not maintaining, social distance; or (2) in certain settings as determined by the Commissioner, which may include schools.”

82. On September 2, 2021 the Commissioner issued “Interim NYSDOH Guidance For Classroom Instruction In P-12 Schools During The 2021-2022 Academic Year” (the “Commissioner’s Guidance”). A copy of the Commissioner’s Guidance is annexed hereto as **Exhibit M**.

83. The Commissioner’s Guidance provides that “all students, personnel, teachers, administrators, contractors, and visitors must wear masks at all times indoors, regardless of vaccination status.” **Ex. M** at ¶ 4.

84. There is no statutory or legal authority for the State Respondents to issue or enforce the in-school mask mandate provided for in 10 NYCRR § 2.60(a) or in the Commissioner’s Guidance.

85. Specifically, 10 NYCRR § 2.60 purports to be authorized by Public Health Law §§ 201, 206, and 225.

86. No provision of Public Health Law §§ 201, 206, and/or 225 provides statutory authority for the in-school mask mandate contained in 10 NYCRR § 2.60 and/or in the Commissioner's Guidance.

87. Petitioner has a clear legal right to operate its private school without reference to the mask mandate contained in 10 NYCRR § 2.60 and the Commissioner's Guidance, including but not limited to operating pursuant to its parent-choice mask policy.

88. Petitioner is suffering a per se irreparable injury and is threatened with irreparable injury in the future by reason of 10 NYCRR § 2.60 and the Commissioner's Guidance purporting to override its parent-choice mask policy.

89. Specifically, as a result of 10 NYCRR § 2.60 and the Commissioner's Guidance purporting to override Petitioner's parent-choice mask policy, dozens of parents of students enrolled at Petitioner's school have communicated that they will pull their children out of Petitioner's school if Petitioner adheres to 10 NYCRR § 2.60 instead of its parent-choice mask policy.

90. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, it believed that 20-25% of Petitioner's students will be removed from Petitioner's school by their parents if Petitioner complies with 10 NYCRR § 2.60 and the Commissioner's Guidance.

91. These parents have also communicated their intention to seek a full refund of the tuition they have paid Petitioner given that they only chose to enroll their children at Petitioner's school on the basis of the parent-choice mask policy that Petitioner told these parents would be in place for the 2021-2022 schoolyear.

92. Because of the forgoing Petitioner faces the loss of hundreds of thousands of dollars of revenue.

93. At the same time, Petitioner has expended over \$200,000 to implement alternative COVID-19 mitigation measures.

94. The combination of these increased costs and the loss of revenue Petitioner is facing will devastate Petitioner's finances and threaten to put Petitioner out of business.

95. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate its private school with a parent-choice mask policy exceeds any conceivable harm Respondents or the public would suffer if this Court found 10 NYCRR § 2.60 and the Commissioner's Guidance to be promulgated in excess of the State Respondents' statutory authority.

96. This is particularly the case given that 10 NYCRR § 2.60 and the Commissioner's Guidance only mandates the use of ineffective cloth masks.

97. Respondents cannot demonstrate that universal masking with ineffective cloth masks are necessary to protect the health and wellbeing of Petitioner's students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by 10 NYCRR § 2.60 and the Commissioner's Guidance, notwithstanding mandate for the wearing of ineffective cloth masks contained in 10 NYCRR § 2.60 and the Commissioner's Guidance.

98. Petitioner is therefore entitled to a declaratory judgment declaring that the mask mandate contained in 10 NYCRR § 2.60 and in Commissioner's Guidance is illegal and/or without statutory authority, together with a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the State Respondents from applying or enforcing 10 NYCRR §



2.60 and/or the Commissioner's Guidance against Petitioner, and such relief would not be contrary to the public interest.

**THIRD CAUSE OF ACTION**  
**(Declaring 10 NYCRR § 2.60 Unconstitutional Because It Violates  
The Separation Of Powers Inherent In The New York State Constitution)**

99. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

100. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

101. The in-school mask mandate contained in 10 NYCRR § 2.60 and the Commissioner's Guidance constitutes a critical policy decision and/or legislation/law-making by the Executive Branch.

102. Accordingly, 10 NYCRR § 2.60 and the Commissioner's Guidance violates Article III, §1 of the New York Constitution.

103. Petitioner has a clear legal right to operate its private school without reference to the mask mandate contained in 10 NYCRR § 2.60 and the Commissioner's Guidance, including but not limited to operating pursuant to its parent-choice mask policy.

104. Petitioner is suffering a per se irreparable injury and is threatened with irreparable injury in the future by reason of 10 NYCRR § 2.60 and the Commissioner's Guidance purporting to override its parent-choice mask policy.

105. Specifically, as a result of 10 NYCRR § 2.60 and the Commissioner's Guidance purporting to override Petitioner's parent-choice mask policy, dozens of parents of students enrolled at Petitioner's school have communicated that they will pull their children out of

Petitioner's school if Petitioner adheres to 10 NYCRR § 2.60 and the Commissioner's Guidance instead of its parent-choice mask policy.

106. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, it believed that 20-25% of Petitioner's students will be removed from Petitioner's school by their parents if Petitioner complies with 10 NYCRR § 2.60 and the Commissioner's Guidance.

107. These parents have also communicated their intention to seek a full refund of the tuition they have paid Petitioner given that they only chose to enroll their children at Petitioner's school on the basis of the parent-choice mask policy that Petitioner told these parents would be in place for the 2021-2022 schoolyear.

108. Because of the forgoing Petitioner faces the loss of hundreds of thousands of dollars of revenue.

109. At the same time, Petitioner has expended over \$200,000 to implement alternative COVID-19 mitigation measures.

110. The combination of these increased costs and the loss of revenue Petitioner is facing will devastate Petitioner's finances and threaten to put Petitioner out of business.

111. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate its private school with a parent-choice mask policy exceeds any conceivable harm Respondents or the public would suffer if this Court found 10 NYCRR § 2.60 and the Commissioner's Guidance to be promulgated in violation of the separation of powers inherent in the New York Constitution.

112. This is particularly the case given that 10 NYCRR § 2.60 and the Commissioner's Guidance only mandates the use of ineffective cloth masks.

113. Respondents cannot demonstrate that universal masking with ineffective cloth masks are necessary to protect the health and wellbeing of Petitioner’s students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by 10 NYCRR § 2.60 and the Commissioner’s Guidance, notwithstanding mandate for the wearing of ineffective cloth masks contained in 10 NYCRR § 2.60 and the Commissioner’s Guidance.

114. Petitioner is therefore entitled to a declaratory judgment declaring 10 NYCRR § 2.60 and the Commissioner’s Guidance is unconstitutional, together with a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Respondents from applying or enforcing 10 NYCRR § 2.60 or the Commissioner’s Guidance against Petitioner, and such relief would not be contrary to the public interest.

**FOURTH CAUSE OF ACTION**

**(Declaring The \$1,000 Fine Contained in 10 NYCRR § 2.60 To Be Unenforceable Because There Is No Statutory Basis For This Fine In Public Health Law §§ 201, 206, or 225)**

115. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

116. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

117. 10 NYCRR § 2.60(f)(i) provides that “[i]ndividuals or entities that violate this Section are subject to a maximum fine of \$1,000 for each violation. For purposes of civil penalties, each day that an entity operates in a manner inconsistent with the Section shall constitute a separate violation under this Section.”

118. There is no statutory basis for such a \$1,000 fine in Public Health Law §§ 201, 206, or 225.

119. An agency may not impose a fine, such as 10 NYCRR § 2.60 purports to do, without a statutory basis for such a penalty.

120. Petitioner thus faces the prospect of being fined \$1,000 a day if it does not mandate its students and staff wear ineffective cloth masks.

121. Petitioner has a clear legal right not to be subject to fines without a statutory basis.

122. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate without the fear of being subject to illegal fines exceeds any conceivable harm Respondents or the public would suffer if this Court found the fine contained in 10 NYCRR § 2.60 to be without a statutory basis.

123. This is particularly the case given that 10 NYCRR § 2.60 only mandates the use of ineffective cloth masks, and purports to subject Petitioner to a fine if it does not mandate its students and staff wear such ineffective cloth masks.

124. Respondents cannot demonstrate that universal masking with ineffective cloth masks are necessary to protect the health and wellbeing of Petitioner's students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by 10 NYCRR § 2.60, notwithstanding mandate for the wearing of ineffective cloth-based masks contained in 10 NYCRR § 2.60.

125. Petitioner is therefore entitled to a declaratory judgment declaring that the fine contained in 10 NYCRR § 2.60 is unconstitutional, together with a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Respondents from applying or enforcing the fine contained in 10 NYCRR § 2.60 against Petitioner, and such relief would not be contrary to the public interest.

**FIFTH CAUSE OF ACTION**  
**(Declaring The Erie County Health Order To Be Unenforceable  
Because There Is No Statutory Basis For This Order)**

126. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

127. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

128. The Erie County Health Order purports to be authorized by Public Health Law § 308.

129. Public Health Law § 308 does not provide a statutory basis for the mask mandate contained in the Erie County Health Order.

130. Petitioner has a clear legal right to operate its private school without reference to the mask mandate contained in the Erie County Health Order, including but not limited to operating pursuant to its parent-choice mask policy.

131. Petitioner is suffering a per se irreparable injury and is threatened with irreparable injury in the future by reason of the Erie County Health Order purporting to override its parent-choice mask policy.

132. Specifically, as a result of the Erie County Health Order purporting to override Petitioner's parent-choice mask policy, dozens of parents of students enrolled at Petitioner's school have communicated that they will pull their children out of Petitioner's school if Petitioner follows the Erie County Health Order instead of its parent-choice mask policy.

133. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, it believed that 20-25% of Petitioner's students will be removed from Petitioner's school by their parents if Petitioner complies with the Erie County Health Order.

134. These parents have also communicated their intention to seek a full refund of the tuition they have paid Petitioner given that they only chose to enroll their children at Petitioner's school on the basis of the parent-choice mask policy that Petitioner told these parents would be its policy for the 2021-2022 schoolyear.

135. Because of the forgoing Petitioner faces the loss of hundreds of thousands of dollars of revenue.

136. At the same time, Petitioner has expended over \$200,000 to implement alternative COVID-19 mitigation measures.

137. The combination of these increased costs and the loss of revenue Petitioner is facing will devastate Petitioner's finances and threaten to put Petitioner out of business.

138. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate its private school with a parent-choice mask policy exceeds any conceivable harm Respondents or the public would suffer if this Court found the Erie County Health Order to not be authorized by statute.

139. This is particularly the case given that the Erie County Health Order only mandates the use of ineffective cloth-based masks.

140. Respondents cannot demonstrate that universal masking with ineffective cloth-based masks are necessary to protect the health and wellbeing of Petitioner's students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by the Erie County Health Order, notwithstanding the Erie County Health Order mandate for the wearing of ineffective cloth-based masks.

141. Petitioner is therefore entitled to a declaratory judgment declaring the Erie County Health Order is illegal and/or not authorized by statute, together with a temporary restraining order,

preliminary injunction, and permanent injunction prohibiting the Erie Respondents from applying or enforcing the Erie County Health Order against Petitioner, and such relief would not be contrary to the public interest.

**SIXTH CAUSE OF ACTION**

**(Declaring The Erie County Guidance, 10 NYCRR § 2.60, And The Erie County Health Order To Be Unconstitutional Regulations On A Private School)**

142. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

143. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

144. The Erie County Guidance, 10 NYCRR § 2.60, the Commissioner's Guidance, and the Erie County Health Order each purport to apply to private schools, such as Petitioners.

145. It is unconstitutional "for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations [on private schools] as he or they should desire." *Packer Collegiate Inst. v. Univ. of State of New York*, 298 N.Y. 184, 191–92 (1948).

146. Thus, even if this Court were to determine that the mask mandates contained in Erie County Guidance, 10 NYCRR § 2.60, the Commissioner's Guidance, and/or the Erie County Health Order could be applied and enforced against public schools under a general grant of authority in the Public Health Law, it would still be improper for the mask mandates contained in Erie County Guidance, 10 NYCRR § 2.60, and/or the Erie County Health Order to be applied or enforced against Petitioner's private school in the absence of a specific grant of legislative authority for Respondents to impose a mask mandate on private schools.

147. Petitioner has a clear legal right to operate its private school without reference to the aforementioned Mask Mandates, including but not limited to operating pursuant to its parent-choice mask policy.

148. Petitioner is suffering a per se irreparable injury and is threatened with irreparable injury in the future by reason of the Mask Mandates purporting to override its parent-choice mask policy.

149. Specifically, as a result of the Mask Mandates purporting to override Petitioner's parent-choice mask policy, dozens of parents of students enrolled at Petitioner's school have communicated that they will pull their children out of Petitioner's school if Petitioner adheres to the Mask Mandates instead of its parent-choice mask policy.

150. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, it believed that 20-25% of Petitioner's students will be removed from Petitioner's school by their parents if Petitioner complies with the Mask Mandates.

151. These parents have also communicated their intention to seek a full refund of the tuition they have paid Petitioner given that they only chose to enroll their children at Petitioner's school on the basis of the parent-choice mask policy that Petitioner told these parents would be its policy for the 2021-2022 schoolyear.

152. Because of the forgoing Petitioner faces the loss of hundreds of thousands of dollars of revenue.

153. At the same time, Petitioner has expended over \$200,000 to implement alternative COVID-19 mitigation measures.

154. The combination of these increased costs and the loss of revenue Petitioner is facing will devastate Petitioner's finances and threaten to put Petitioner out of business.



155. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate its private school with a parent-choice mask policy exceeds any conceivable harm Respondents or the public would suffer if this Court found the Mask Mandates to be an unconstitutional regulation on private schools not authorized by the Legislature.

156. This is particularly the case given that the Mask Mandates only mandates the use of ineffective cloth masks.

157. Respondents cannot demonstrate that universal masking with ineffective cloth-based masks are necessary to protect the health and wellbeing of Petitioner's students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by the Mask Mandates, notwithstanding the Mask Mandates requirement for the wearing of ineffective cloth masks.

158. Petitioner is therefore entitled to a declaratory judgment declaring the Mask Mandates are an unconstitutional regulation on private schools not authorized by the Legislature, together with a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Respondents from applying or enforcing the Mask Mandates against Petitioner, and such relief would not be contrary to the public interest.

**SEVENTH CAUSE OF ACTION**

**(Declaring The Erie County Guidance, 10 NYCRR § 2.60, And The Erie County Health Order To Be Arbitrary and Capricious)**

159. Petitioner repeats and realleges each and every paragraph above with the same force and effect as if fully set forth herein.

160. Petitioner has commenced this proceeding pursuant to CPLR § 3001 and Article 78.

161. The Erie County Guidance, 10 NYCRR § 2.60, the Commissioner's Guidance, and the Erie County Health Order each purport to require that individuals over the age of 2 wear masks at all times while in school.

162. These Mask Mandates each provide that they can be complied with by wearing cloth masks.

163. The Mask Mandates are arbitrary, capricious, and irrational because they regulate those without any immunity to COVID-19 in exactly the same manner as they regulate individuals with immunity to COVID-19 (whether through vaccination or previous COVID-19 infection).

164. The Mask Mandates are arbitrary, capricious, and irrational because they purport to regulate all individuals over the age of 2 in an identical matter, ignoring the clear scientific evidence that children are less susceptible to COVID-19.

165. The Mask Mandates are arbitrary, capricious, and irrational because at the same time they purport to require universal, and constant, in-school masking—apparently based on the belief that COVID-19 poses a serious threat to children's health—these Mask Mandate can be complied with simply by wearing ineffective cloth masks.

166. Such Mask Mandates simply cannot be rational. If there was an actual public health need for children to wear masks in school, a rational policy would require the use of effective N95/KN95 masks, not ineffective cloth masks.

167. Conversely, there can be no rational basis for Respondents' draconian masking Mask Mandates if COVID-19 was such a minor concern for children that they were only required to wear ineffective cloth masks.

168. In sum, Respondents' Mask Mandates simultaneously treat the potential for in-school transmission of COVID-19 as a grave health threat, but only mandate an ineffective

mitigation measure. This internal inconsistency in the Mask Mandates is not rational and is arbitrary and capricious.

169. Petitioner has a clear legal right to operate its private school without reference to the aforementioned Mask Mandates, including but not limited to operating pursuant to its parent-choice mask policy.

170. Petitioner is suffering a per se irreparable injury and is threatened with irreparable injury in the future by reason of the Mask Mandates purporting to override its parent-choice mask policy.

171. Specifically, as a result of the Mask Mandates purporting to override Petitioner's parent-choice mask policy, dozens of parents of students enrolled at Petitioner's school have communicated that they will pull their children out of Petitioner's school if Petitioner adheres to the Mask Mandates instead of its parent-choice mask policy.

172. As a result of numerous conversations Petitioner, its board members, and its employees have had with parents, it believed that 20-25% of Petitioner's students will be removed from Petitioner's school by their parents if Petitioner complies with the Mask Mandates.

173. These parents have also communicated their intention to seek a full refund of the tuition they have paid Petitioner given that they only chose to enroll their children at Petitioner's school on the basis of the parent-choice mask policy that Petitioner told these parents would be its policy for the 2021-2022 schoolyear.

174. Because of the forgoing Petitioner faces the loss of hundreds of thousands of dollars of revenue.

175. At the same time, Petitioner has expended over \$200,000 to implement alternative COVID-19 mitigation measures.

176. The combination of these increased costs and the loss of revenue Petitioner is facing will devastate Petitioner's finances and threaten to put Petitioner out of business.

177. Absent an injunction, the harm to Petitioner in the loss of its legal right to operate its private school with a parent-choice mask policy exceeds any conceivable harm Respondents or the public would suffer if this Court found the Mask Mandates to be arbitrary and capricious.

178. This is particularly the case given that the Mask Mandates only mandates the use of ineffective cloth masks.

179. Respondents cannot demonstrate that universal masking with ineffective cloth-based masks are necessary to protect the health and wellbeing of Petitioner's students, staff, or anyone else given that Petitioner has implemented alternative COVID-19 safety measures, above and beyond what is required by the Mask Mandates, notwithstanding the Mask Mandates irrational requirement for the wearing of ineffective cloth masks.

180. Petitioner is therefore entitled to a declaratory judgment declaring the Mask Mandates are arbitrary and capricious, together with a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Respondents from applying or enforcing the Mask Mandates against Petitioner, and such relief would not be contrary to the public interest.

**WHEREFORE**, Petitioner demands judgment:

A. On its First Cause of Action, declaring that the Erie County Guidance is legally non-binding on Petitioner, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

B. On its Second Cause of Action, declaring that 10 NYCRR § 2.60 and the Commissioner's Guidance are legal nullities not authorized by statute, and permitting Petitioner

to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

C. On its Third Cause of Action, declaring that 10 NYCRR § 2.60 and the Commissioner's Guidance are unconstitutional because they violate the separation of powers inherent in the New York Constitution, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

D. On its Fourth Cause of Action, declaring that the fine contained in 10 NYCRR § 2.60 cannot be enforced because there is not a statutory basis for this fine in Public Health Law §§ 201, 206, and/or 225, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

E. On its Fifth Cause of Action, declaring that the Erie County Health Order is a legal nullity not authorized by statute, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

F. On its Sixth Cause of Action, declaring that the Erie County Guidance, 10 NYCRR § 2.60, the Commissioner's Guidance, and the Erie County Health Order are unconstitutional regulations on a private school not authorized by the Legislature, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

G. On its Seventh Cause of Action, declaring that the Erie County Guidance, 10 NYCRR § 2.60, the Commissioner's Guidance, and the Erie County Health Order are arbitrary

and capricious, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

H. Preliminarily during the pendency of this proceeding, and permanently thereafter, enjoining and restraining Respondents from enforcing or applying the mask mandates contained in the Erie County Guidance, 10 NYCRR § 2.60, the Commissioner's Guidance, and/or the Erie County Health Order against Petitioner, and permitting Petitioner to operate pursuant to its parent-choice mask policy with six feet of social distancing between students and CDC recommended air purifiers in each classroom;

I. Awarding Petitioner its costs and disbursements in this proceeding; and

J. Awarding such other and further relief as the Court deems just and proper.

Dated: September 3, 2021  
Buffalo, New York

/s/ Todd J. Aldinger  
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