

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

BRIGETTE HERBST, on behalf of herself
and her minor children, PH and BH,

Plaintiff,

Civil Action No. _____

v.

BERKELEY COUNTY SCHOOL DISTRICT,
and EDWARD INGRAM, in his official
capacity as Superintendent of the
Berkeley County School District,

Defendants.

SUMMONS
(Jury Trial Requested)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to said Complaint upon the subscribers at 1050 Johnnie Dodds Blvd. #83, Mt. Pleasant, SC 29465, within thirty days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in said Complaint.

[SIGNATURES ON NEXT PAGE]

Dated: May 3, 2021

LIBERTY JUSTICE CENTER

s/ Daniel R. Suhr

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

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and her minor children, PH and BH,

Plaintiff,

Civil Action No. _____

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BERKELEY COUNTY SCHOOL DISTRICT,
and EDWARD INGRAM, in his official
capacity as Superintendent of the
Berkeley County School District,

Defendants.

COMPLAINT
(Jury Trial Requested)

1. This action challenges the Berkeley County School District’s refusal to comply with the duly enacted law of the State of South Carolina requiring schools to provide in-person education to all students.

PARTIES

2. Plaintiff Brigitte Herbst is the parent and legal guardian of two children, PH and BH. Plaintiff and her children reside in Berkeley County, South Carolina.

3. Defendant Berkeley County School District is a public school district in Berkeley County, South Carolina. Its headquarters are located at 107 East Main Street, Moncks Corner, SC 29461, in Berkeley County.

4. Defendant Edward “Eddie” Ingram is sued in his official capacity as the Superintendent of Berkeley County Schools. On information and belief, he resides in Berkeley County, South Carolina.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to S.C. Const. Art. V, § 11 and S.C. Code Ann. § 14-5-350.

6. This Court has personal jurisdiction over Defendants because the Defendants live, reside, or do business in Berkeley County, South Carolina.

7. Venue is proper in this circuit under South Carolina Code § 15-7-30 because the Defendants live, reside, or do business in Berkeley County, South Carolina, and the acts and omissions that are the subject of this action occurred in Berkeley County, South Carolina.

FACTS

8. Plaintiff Bridgette Herbst is the parent of two children, PH, a 7th grader, and BH, a 6th grader.

9. Plaintiff's children both attend College Park Middle School in the Berkeley County School District.

10. Due to the COVID-19 pandemic, on March 16, 2020, Governor Henry McMaster ordered South Carolina public schools closed and all students to take part in remote learning.

11. The Herbst family moved to Berkeley County in the middle of the pandemic to escape the onerous pandemic restrictions of their previous home state. When they enrolled their children in Berkeley County Public Schools in March, 2021, they were told they would have to endure virtual learning because all of the in-person learning slots in their grades were already full.

12. As a result, PH and BH have been forced to attempt to learn remotely since March, 2021.

13. Unlike many schools in South Carolina and around the country, Defendants Berkeley County School District and Superintendent Ingram have not yet opened the schools in the district to all students.

14. Instead, Defendants have adopted a “hybrid” model in which some students are allowed back in classrooms, but others are relegated to continuing remote learning. PH and BH were not among those allowed back in the classrooms.

15. On April 23, 2021, the Governor signed into law S.704, and it took effect at that time. The Joint Resolution is entitled, “A JOINT RESOLUTION TO PROVIDE FOR A RETURN TO FIVE-DAY, IN-PERSON CLASSROOM INSTRUCTION FOR THE 2020-2021 AND 2021-2022 SCHOOL YEARS, TO SUSPEND THE EARNINGS LIMITATION UNDER CERTAIN TERMS AND FOR CERTAIN MEMBERS OF THE SOUTH CAROLINA RETIREMENT SYSTEM, AND TO PROVIDE REQUIREMENTS CONCERNING DUAL-MODALITY INSTRUCTION FOR THE 2021-2022 SCHOOL YEAR.”

16. Section 1 of S.704, titled the “Five-day, in-person classroom instruction mandate,” provides that “[f]or the 2020-2021 School Year, every school district in the State must offer five-day, in-person classroom instruction to students no later than April 26, 2021. For the 2021-2022 School Year, every school district in the State must offer five-day, in-person classroom instruction to students.”

17. Section 2 of S.704 provides a financial incentive for retired teachers to return to work.

18. Section 3 of S.704 bans “dual-modality instruction” (teachers simultaneously teaching students in-person and online) “unless it is reasonable and necessary due to extreme and unavoidable circumstances.”

19. It is therefore now illegal for school districts not to offer students like PH and BH in-person instruction.

20. Despite the State’s mandate, Defendants still refuse to provide all students the option to learn in person.

21. On April 26, 2021—the deadline set by the State—Plaintiff emailed her children’s school to inquire why her children were still relegated to remote learning.

22. A school official responded: “Currently the status of our face to face classes has not change [*sic*] and they are currently full. College Park Middle School has offered a face to face option 5 days a week since September, which is what the state is requiring all schools to have.”

23. Defendants apparently interpret the State’s mandate that all schools provide students in-person instruction to mean that as long as one student somewhere within the school district has the option to attend class in-person for five days per week, the statute is satisfied.

24. Defendants’ far-fetched interpretation is flatly inconsistent with the statutory language, which refers to “students” broadly.

25. Defendants’ interpretation is also inconsistent with the statutory context. Both the title of the Joint Resolution and the title of the statutory section reflect that the law is a “mandate” to “provide for a return to five-day, in-person classroom instruction.” Defendants’ interpretation would render all but meaningless this statutory mandate.

26. Defendants’ interpretation is further inconsistent with public understanding of the statutory text. For instance, it is inconsistent with the understanding of Governor McMaster in signing the bill, when he explained that “since July the 15th, I have been calling on the General Assembly to send me a bill to require school districts to give parents the option of five-day in-person instruction for their children. Today they have passed it.”¹

¹ Henry McMaster, *S. 704 Bill Signing*, Facebook, April 22, 2021. Available at <https://www.facebook.com/HenryMcMaster/videos/2944217945856670/>

27. Defendants' interpretation is inconsistent with the understanding of the State Superintendent of Education, whose statement regarding S.704 explained that,

Every family must be given the option of sending their child to school five days a week face to face and the science shows that this can be done safely in every community. I am thankful for the educators who have been making this option a reality for many throughout this school year and look forward to the Governor signing this bill into law, ensuring every school will be fully open for in-person learning now and into the future.²

28. In the same news release, the South Carolina Department of Education explained that "districts may offer virtual instruction to those families that have chosen it for the 2020-21 school year. The face to face instruction requirement in S.704 does not preclude a district from continuing to offer a virtual option."³ Under S.704, virtual instruction is at the option of the parent; in-person education is the default assumption and the responsibility of the district.

29. Defendants' interpretation is also inconsistent with the understanding of the Palmetto State Teachers Association, whose official statement supporting the bill argued that "[t]his legislation will benefit students" since "it ensures every family will have the option for a five-day, face-to-face instructional model for the remainder of this school year and for the entirety of next school year."⁴

30. Patrick Kelly, the Director of Government Affairs for the Palmetto State Teachers Association likewise explained that "our schools are better equipped to

² South Carolina Department of Education, "Update on School Operations, Full Face to Face Instruction, and S.704." Available at <https://ed.sc.gov/newsroom/news-releases/update-on-school-operations-full-face-to-face-instruction-and-s-704/> (April 21, 2021).

³ *Id.*

⁴ Patrick Phillips and Adam Mintzer, "SC lawmakers send 5-day in-person learning bill to governor," WIS (April 21, 2021). Available at <https://www.wistv.com/2021/04/21/sc-lawmakers-send-day-in-person-learning-bill-governor/>

manage a five-day instructional model and so, if that's what families want for their students, they should be able to opt for that."⁵

31. The State's judgment is consistent with the consensus around the country that in-person instruction is safe, and students will be best served by being back in school. Thirteen other states now have orders in place opening schools for some or all grades.⁶ Nationally, the majority of students are now receiving full time in-person instruction.⁷

32. This consensus makes sense: children are substantially less likely to get infected by COVID-19, or to be seriously harmed by infection. *See, e.g.,* Benjamin Lee and William V. Raszka, *COVID-19 Transmission and Children: The Child Is Not to Blame*, *Pediatrics*, Vol. 146 No. 2 (August 2020).⁸

33. Defendants' failure to provide PH and BH in-person instruction harms them by providing them a lower standard of education than they would receive in person. The South Carolina Educational Oversight Committee Report released in January found that due to the pandemic, approximately 70% of students will not meet grade-level standards for math and reading this spring, a significant increase over prior years.⁹

⁵ Jenna Kurzyna, "Senate passes bill requiring districts to offer 5 day, in-person learning," WLTX (April 1, 2021). Available at <https://www.wltx.com/article/news/education/senate-passes-bill-requiring-5-day-in-person-learning/101-fb838e20-64bd-456b-878b-c3387500a91e>.

⁶ Education Week, "Map: Where Are Schools Required to Be Open?" updated April 28, 2021. Available at <https://www.edweek.org/leadership/map-where-are-schools-closed/2020/07>

⁷ Lauren Camera, "Percentage of Students Learning in Remote or Hybrid Classes Drops Amid Reopenings," U.S. News and World Report (March 29, 2021). Available at <https://www.usnews.com/news/education-news/articles/2021-03-29/percentage-of-students-learning-in-remote-or-hybrid-classes-drops-amid-reopenings>

⁸ Available at <https://pediatrics.aappublications.org/content/146/2/e2020004879>.

⁹ The South Carolina Education Oversight Committee's Review of Remote Learning's Impact on South Carolina's Students. Available at <https://eoc.sc.gov/sites/default/files/Documents/remote%20learning%202021/Review%20of%20Remote%20Learning%20Impact%20on%20South%20Carolina%20Students%20Part%201.reduced.pdf>.

34. Defendants' failure to provide Plaintiff's children in-person instruction harms her by requiring her to provide additional care and educational support for PH and BH on top of her own work and personal responsibilities. *See, e.g.*, Nicole Bateman and Martha Ross, "Why has COVID-19 been especially harmful for working women?" Brookings (Oct. 2020).¹⁰

FIRST CAUSE OF ACTION
Violation of S.704 Section 1

35. To the extent they are not inconsistent with this cause of action, the allegations of the above paragraphs are incorporated into this cause of action.

36. S.704, Section 1 provides that "every school district in the State must offer five-day, in-person classroom instruction to students no later than April 26, 2021."

37. Defendants are not providing Plaintiff's children, PH and BH, with in-person instruction, as required by law.

38. Defendants' failure to require in-person instruction is *ultra vires* and should be enjoined by this Court.

39. By not providing in-person instruction, Defendants have harmed Plaintiff and her children.

¹⁰ Available at <https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/>

SECOND CAUSE OF ACTION
Constitutional Right to Education

40. To the extent they are not inconsistent with this cause of action, the allegations of the above paragraphs are incorporated into this cause of action.

41. Art. XI, § 3, of the South Carolina Constitution guarantees the right to a minimally adequate education. *Abbeville Cty. Sch. Dist. v. State*, 335 S.C. 58, 6 (1999).

42. In passing S.704, the legislative and executive branches affirmed that the opportunity for in-person learning was a vital element of a minimally adequate education. *See id.* at 69 (“[T]he constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government.”).

43. Defendants are not providing in-person instruction to all students.

44. By not providing in-person instruction for all students, Defendants have failed in their constitutional duty to provide Plaintiff’s children a minimally adequate education.

45. Defendants’ failure to provide a minimally adequate education harms Plaintiff and her children.

THIRD CAUSE OF ACTION
Privileges and Immunities, Equal Protection, Right to Travel

46. To the extent they are not inconsistent with this cause of action, the allegations of the above paragraphs are incorporated into this cause of action.

47. Art. I, § 3, of the South Carolina Constitution guarantees “[t]he privileges and immunities of citizens of this State and of the United States under this Constitution” and “the equal protection of the laws.”

48. The privileges and immunities and equal protection of citizens of the United States includes the right to travel between states, and “for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State” to which they move. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

49. Defendants are denying Plaintiff and her children the privileges and immunities and equal protection of the laws by denying equal access to in-person education because their family moved here from another state part-way through the school year.

WHEREFORE, Plaintiff respectfully requests that judgment be entered against Defendants: (1) DECLARING that Defendants have failed to comply with the in-person instruction mandate of S.704, (2) ENJOINING Defendants to offer in-person instruction to all students, (3) AWARDING Plaintiff damages for lost wages, childcare expenses, and other damages resulting from Defendants’ failure to provide in-person instruction, (4) AWARDING PH and BH damages for the lost educational opportunities resulting from Defendants failure to provide in-person instruction, and (5) AWARDING Plaintiff her attorney’s fees and costs.

Dated: May 3, 2021

Respectfully Submitted,

LIBERTY JUSTICE CENTER

s/ Daniel R. Suhr

s/ Christopher Mills

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