

**COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION III
CASE NO. 19-CI-00357**

JEROME KUNKEL, et al.

PLAINTIFF

VS.

NKY INDEPENDENT HEALTH DEPARTMENT, et al.

DEFENDANTS

ORDER

The Court conducted a hearing on Plaintiffs' Motion for a Temporary Restraining Order/Preliminary Injunction on April 1, 2019. The Court heard testimony from Karen Kunkel, Jerome Kunkel, Zack Raney, Toni Bark, M.D. and Garry Marshall, M.D. The Court having reviewed the Plaintiffs' Motion, Defendants', Northern Kentucky Independent District Board of Health (NKIDHD), Boone County Local Board of Health, Zack Raney and Lynne Sadler, M.D., M.P.H., Memorandum in Opposition, having considered the testimony presented, and having heard argument from counsel, and the Court being in all ways sufficiently advised, finds as follows:

Prior to conducting the Hearing, the Court addressed Motions to Intervene filed by Seante Carter, Christina Bell, Maria Kunkel and David Kunkel as next friends and guardians of minors. There was no opposition to the Motions. The Court will utilize Jerome Kunkel as the Plaintiff in the following Order, however it will also apply to Intervening Plaintiffs.

Jerome Kunkel is requesting that this Court grant a Temporary Restraining Order and/or Preliminary Injunction to prevent the Northern Kentucky Independent District Health Department ("NKIDHD") from enforcing its Activity Ban and School Ban on Plaintiff. The

Court may only grant a restraining order under CR 65.03(1), or a temporary injunction under CR 65.04, if the movant sets forth through a verified complaint or affidavit specific facts that show the movant's rights are being, or will be violated by the adverse party, and that the movant will suffer immediate and irreparable injury, loss or damage before the adverse party or his attorney can be heard in opposition. These forms of relief cannot be granted on the grounds of mere anticipated danger, requiring a reasonable probability that injury will occur if the order is not granted. *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978).

Jerome Kunkel is an 18-year-old high school senior at Assumption Academy in Walton, Boone County, Kentucky. He has played basketball for Assumption since 2015 and is also on the Assumption baseball team. On February 5, 2019, Vanessa Dredger, the Registrar at Assumption, contacted NKIDHD to disclose that six cases of suspected Varicella ("chicken pox") had been reported by students enrolled at the school. She further reported that out of Assumption's approximately 240 students, only 18% of the student body had received all of their vaccinations. In response, Raney, the Epidemiology Manager and Carolyn Swisshelm, Communicable Disease Nurse with NKIDHD, informed Dredger and Assumption that they should monitor the school and its associations of symptoms to watch for and to request self-exclusion of those suspected of having chicken pox. They also drafted an advisory letter regarding outbreak safety to be distributed to the parents of Assumption students, which advised on the symptoms of the illness and a course of action should their child start to exhibit symptoms. Assumption distributed said letter to the parents on February 5, 2019. On February 13, 2019, Dredger emailed the NKIDHD and reported an additional four cases. As of February 21, 2019, there were a total of eighteen cases at the affiliated schools—sixteen in Our Lady of the Sacred Heart Elementary School, which is located across the street, and two at Assumption, which is located under the church.

Raney was concerned, noting a three-fold increase in the suspected cases at one site. He and Swisshelm met with Julie Miracle, R.N., Communicable Disease Nurse for Kentucky, Dr. Doug Thoroughman, Kentucky State Epidemiologist and Stephanie Vogel, NKIDHD Population Health Manager. They learned that Assumption was scheduled to engage in competitions, tournaments, and other extracurricular events with schools across Kentucky, Ohio, and Indiana in the following weeks, and fearing exposure that could lead to further outbreaks, felt it necessary to limit Assumption's interactions with other schools. NKIDHD drafted a second letter for distribution to the parents of children who attend Assumption on February 21, 2019, which reiterated the dangers of Varicella and the appropriate course of treatment should a child have symptoms. This letter also advised parents that, for a period of 21 days after the onset of a rash for the last ill student, all extracurricular events were postponed in an effort to limit exposure to other students they may come in contact with. This letter was sent by NKIDHD to Assumption's Registrar for distribution to parents and began the "Extracurricular Restriction."

On or about February 22, 2019, Father Muscha, the Principal and Priest for Assumption Academy contacted Raney to clarify the terms of the restriction. Raney explained that the restriction applied to all extracurricular activities in which "students from Assumption are going into other schools/public areas or the public/other schools are coming to Assumption." Shortly after their conversation ended, Father Muscha contacted Raney again to discuss the restriction, inquiring if the boys' basketball team could somehow compete in the state tournament despite the restriction. None of the team members had received a Varicella vaccination and were, therefore, presumed to be nonimmune and potential carriers for the disease. However, the NKIDHD staff came to an agreement with Father Muscha that each member of the basketball team could undergo a Varicella titer test and provide the results to the NKIDHD. If the test

indicated that a player was immune, he would be permitted to compete. The test results indicated that only two of the team's members were nonimmune. One of those was Jerome Kunkel and, therefore, he was not permitted to play in the tournament. He agrees he has not received the vaccine, opposing it on the religious ground that it is derived from aborted fetal cells.

On or about February 23, 2019, Kunkel was informed he could not attend or play in any basketball games or any other extracurricular activities involving other schools, including upcoming baseball games or scrimmages. At that time, he was permitted to attend school, and was not otherwise precluded from going out in public.

On February 25, 2019, NKIDHD staff received a copy of an email from Julie Miracle to Bill Kunkel, Jerome's father, summarizing a telephone conversation they had. She explained the rationale behind the restriction and provided copies of the relevant statutory and regulatory provisions authorizing NKIDHD to enact measures to control the outbreak.

On February 26, 2019, Jerome Kunkel and his parents met with Raney and Swisshelm to discuss the rationale and policy behind the restriction. Jerome Kunkel alleges the NKIDHD officials made derogatory comments regarding his religious opposition to the Varicella vaccine, and that the extracurricular activity ban was put in place to punish the parishioners at Assumption and at the school for their vaccination beliefs and not an actual concern for public health.

On March 9, 2019, NKIDHD received documentation confirming that a student at Assumption who had been treated at Cincinnati Children's Hospital with joint pain and difficulty moving limbs, was given a definitive diagnosis of Varicella. This child had developed symptoms suspected to indicate a superinfection developed secondary to the Varicella virus. As of March 14, 2019, Assumption's outbreak had grown to a total of thirty-two suspected cases, 13% of the

student body, and a 68% increase in the number of suspected cases.

On March 14, 2019, the NKIDHD staff, Raney, Vogel and Dr. Lynne Saddler requested a conference call with State Public Health officials, Miracle and Thoroughman, to discuss the next step to control the outbreak at Assumption. Based on the conference, NKIDHD drafted a third letter to Assumption parents, informing them that the school continued to experience an outbreak of an illness characterized by a blister-like rash, presumed to be Varicella, and implementing an Attendance Restriction for those students who could not show proof that they were vaccinated or immune from the disease. This letter was sent to the Registrar of Assumption on March 14, 2019 for distribution. The underlying case was filed that same day. Jerome Kunkel argues that this attendance restriction was put into place because of his threat to file suit.

Pursuant to CR 65.04, a temporary injunction may be issued when the evidence shows “that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.” The Kentucky Court of Appeals has interpreted this to require that the trial court engage in a three-step process before issuing an injunction. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978).

The first step requires Plaintiff to demonstrate he has suffered, or is suffering, irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). Under CR 65.04, irreparable harm exists only where a party has clearly shown the likelihood of injury to a concrete personal right. *Maupin* at 695. There must be a showing that the personal right is being immediately impaired, and that there is an urgent need for relief. *McCloud v. City of Cadiz*, 548 S.W.2d 158 (Ky. App. 1977). Here,

Jerome Kunkel argues that he is missing weeks of school, and, as it is his senior year, it may have lifelong consequences. He is missing school, and although he is doing homework and came to school to take a test on a Saturday, it is affecting his ability to learn the material. Kunkel also testified he was an important player on the basketball team, from which he was selected to participate in an all-star game, and in which he was unable to play. He also testified he is a member of the baseball team and has already missed time with the team. In *Washington v. Glucksberg*, the Supreme Court found *inter alia* that one of an individual's fundamental rights is the right to direct the upbringing and education of one's children. *Id.* 521 U.S. 702, 720 (1997), citing *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court finds Kunkel has met his burden in this prong as the Court finds the harm from being prevented from attending school is irreparable. The Court's finding on this issue does not extend however to Kunkel's participation extracurricular activities.

The second step evaluates "whether a substantial question has been presented," *Maupin* at p. 699. This requires a substantial possibility that the Plaintiff will ultimately prevail in the instant action. *Norsworthy v. Kentucky Board of Medical Licensure*, 330 S.W.3d 58 (Ky. 2009). Jerome Kunkel argues that he is likely to succeed as his constitutional rights under both the United States Constitution and the Kentucky Constitution have been violated. He further argues that the NKIDHD has acted outside their statutory authority, and that they acted in retaliation for his exercise of his religious beliefs. NKIDHD disagrees. They argue that the Non-Attendance Order was rendered in response to the outbreak of Varicella and was not in retaliation for Kunkel's exercise of his religious freedom not to receive the vaccination, and further that the Order does not infringe upon Kunkel's Constitutional rights. NKIDHD further argues that Kunkel does not have a Constitutional right to participate in extracurricular activities.

The Court will first address Kunkel's argument that there has been no laboratory diagnosis of Varicella, and as such the NKIDHD has not taken the necessary diagnostic confirmation steps required by statute and administration regulation to be able to take the actions it has taken at Assumption, up to and including the school ban. The Court does not find there is a substantial probability that Kunkel will succeed on this claim. The Statutes and Administrative Regulations applicable to the instant matter do not require a laboratory diagnosis. Additionally, one of the effected students at Assumption sought treatment for complications at Children's Hospital and was diagnosed with Chicken Pox.

The Court will next address Jerome Kunkel's retaliation claim that the NKIDHD only issued the ban on school attendance based on his exercise of his religious right not to receive the vaccination. After hearing the testimony at the Hearing, as well as a review of the timeline of the steps taken and the meetings/discussions held among members of both the NKIDHD and the State and correspondence to and from both Assumption and the Kunkels regarding the different steps, the Court does not find there is a substantial probability that Kunkel will succeed on this claim. Additionally, as agreed to by both parties, the NKIDHD is not mandating that Jerome receive the vaccine. K.R.S. 214.036 allows that no child shall be required to be immunized if the child's parents, or in this case the individual, as Jerome is now 18 years old, are opposed to medical immunization against disease, and who object by a written sworn statement to the immunization of such child on religious grounds. Karen Kunkel signed the Commonwealth of Kentucky Parent or Guardian's Declination on Religious Grounds to Required Immunizations form on behalf of Jerome as he was not yet 18 years of age when the school year began. The form notes "In the event that the county health department or state health department declares an outbreak of a vaccine-preventable disease for which proof of immunity for a child cannot be

provided, he or she may not be allowed to attend childcare or school for up to three (3) weeks, or until the risk period ends.”

Jerome Kunkel also argues the ban is not necessary as allowing the “wild” strain of the virus to progress through the community is more beneficial as the immunity achieved by contracting the virus in this manner provides longer lasting and more powerful immunity. Both Dr. Bark, who runs the Center for Disease Prevention in Evanston, Illinois, and whose practice focuses on pediatrics, and Dr. Marshall, who is the Chief of Pediatric Infectious Disease at the University of Louisville, School of Medicine, agree that Varicella is very contagious and that there is a prodromal period of approximately two days during which an individual can spread Varicella before being aware they have been infected. Dr. Bark testified that Varicella is not a serious public health threat and that the current situation at Assumption does not sound like an outbreak. Additionally, in her experience, the incidence of Shingles, a disease that normally occurs later in life in an individual who has had chicken pox and is caused by the same virus, is increasing in a younger population because the younger population has received the vaccine and immunity received from it is not as potent as that from the “wild” strain. She testified that in her opinion, the NKIDHD’s actions including the school ban were not necessary and that the individuals affected could voluntarily stay away and that would be sufficient in this case. Dr. Marshall disagrees, testifying that Varicella is a highly contagious disease that can have very serious complications up to and including death. He disagrees that the vaccine is not appropriate and further that the attenuated or weaker strain of the virus in the vaccine will create more severe cases of Shingles. He testified that the NKIDHD’s actions were appropriate in that certain juveniles cannot take the vaccine for medical reasons and that exposure to a pregnant mother can cause great harm to her unborn child. The Court does not find there is a substantial probability

that Kunkel will succeed on this claim.

Jerome Kunkel also argues the NKIDHD's school ban is not narrowly tailored to achieve its goal of reducing the spread of the Varicella outbreak at Assumption. The students who are prevented from attending school, are not prevented from interacting with each other outside of school and are still going out into the community and interacting with the general public. Additionally, he argues that the individuals are not prevented from church activities, including Confessions and attending Mass, where they receive Communion on the tongue, which could also lead to the spread of the Varicella. He cites to 446.350, which provides that "Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A 'burden' shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." Kunkel argues that when a restriction is placed on an individual's First Amendment Rights, that restriction must be narrowly-tailored in proportion to the interest served, citing *Kiser v. Kamdar*, 831 F.3d 784 (2016), and that the school ban is not narrowly-tailored to do so.

NKIDHD argues its actions were appropriate pursuant to its required duties and obligations under Kentucky Statutes and Administrative Regulations as applied to the facts at hand. K.R.S. 214.020 provides in part that when the Cabinet for Health and Family Services believes that there is a probability that any infectious or contagious disease will invade this state, it shall take such action and adopt and enforce such rules and regulations as it deems efficient in preventing the introduction or spread of such infectious or contagious disease or diseases within

this state, and to accomplish these objects shall establish and strictly maintain quarantine and isolation at such places as it deems proper. 902 KAR 2:030 mandates the Cabinet for Human Resources to implement a statewide program for the detection, prevention and control of communicable diseases. This administrative regulation insures delineation of authority and responsibility for proper investigation and control of communicable diseases throughout the Commonwealth. Section 1 (2) Control Procedures provides in part that Local Health Departments or the Cabinet for Human Resources shall: (a) Make or cause to be made such investigations as may be necessary for the purpose of securing data regarding clinical diagnosis, reservoir, and time, place and source of infection and contacts. (b) Establish and maintain quarantine, isolation or other measures as required by law or by administrative regulations of the Cabinet for Human Resources relating to communicable disease control... 902 KAR 2:050 provides in part and mandates in Section 1 that whenever any private or public property has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall take such measures as are necessary to secure adequate cleaning, disinfection, or other control procedures necessary to insure cessation of transmission. Additionally, Section 2 provides that whenever any person has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall employ such measures as are necessary to secure adequate isolation, restriction of employment or other control procedures that may be necessary to insure cessation of transmission of infection.

NKIDHD argues it took measured steps to control the outbreak of Varicella at Assumption, a duty required of it by Statute and Administrative Regulation. The initial activities' ban and the subsequent school ban were the required steps taken. They cite to *Phillips v. City of*

New York, wherein the United States Court of Appeals, Second Circuit, addressed the issue of students that were excluded from school after another student was diagnosed with chicken pox. The state has a statutory vaccination requirement and a state regulation allowing unvaccinated children to be excluded from public school based on an outbreak of a vaccine-preventable disease. The students had received religious exemptions from receiving the vaccine. The Court held that the statute did not violate substantive due process rights, did not violate the Free Exercise Clause and the parents failed to meet an equal protection claim. 775 F.3d 538 (2015).

The Court does not find Kunkel is likely to prevail on this claim. K.R.S. 214.020 requires the NKIDHD to take such action and adopt and enforce such rules and regulations as it deems efficient in preventing the introduction or spread of the Varicella and to accomplish this, it is required to establish and strictly maintain quarantine and isolation at such places as it deems proper. Additionally, NKIDHD was required to make or cause to be made such investigations as may be necessary for the purpose of securing data regarding clinical diagnosis, reservoir, and time, place and source of infection and contacts regarding the Varicella outbreak. The Administrative Regulations also require that whenever any private or public property has been implicated as a possible reservoir or possible source of infection of any communicable disease, NKIDHD shall take such measures as are necessary to secure adequate cleaning, disinfection, or other control procedures necessary to insure cessation of transmission. Also, whenever any person has been implicated as a possible reservoir or possible source of infection of any communicable disease, NKIDHD is required to employ such measures as are necessary to secure adequate isolation, restriction of employment or other control procedures that may be necessary to insure cessation of transmission of infection.

The third step in the analysis requires the Court to weigh the equities involved. *Maupin*

at p. 699. Jerome Kunkel argues that there is no harm implicated if the Court enters the injunction, basing this argument on the opinions of Dr. Bark that there is no public health threat in enjoining/prohibiting the NKIDHD's extracurricular activities and school ban, as it is sufficient to have infected students pulled from school during the pendency of their infection and symptoms. Furthermore, the extracurricular ban does not meaningfully advance public health when the supposedly seriously at-risk students still have significant public interactions. NKIDHD argues that granting the injunction will harm the public by placing individuals at risk of exposure to a serious infectious disease and, therefore, the injunction will have adverse consequences to public health. They argue that they have implemented a narrowly crafted, stepped, and scientifically-justified set of measures to advance a compelling government interest—prevention of the spread of an infectious disease that has serious public health risks. They further argue that the issuance of an injunction not only endangers public health, but also undermines the authority to protect communal health afforded to the Cabinet for Health and Family Services and local health departments by Kentucky's Legislature. The Court does not find that an injunction would be equitable.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for a Temporary Restraining Order/Preliminary Injunction is **DENIED**.

DATED this 2nd day of April, 2019.


JAMES R. SCHRAND, JUDGE
BOONE COUNTY COURT

CC: ALL ATTORNEYS AND PARTIES OF RECORD