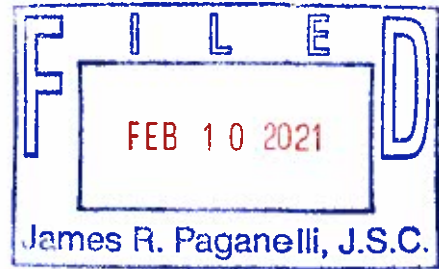


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MONTCLAIR BOARD OF	:	SUPERIOR COURT OF NEW JERSEY
EDUCATION,	:	CHANCERY DIVISION
	:	ESSEX COUNTY
Plaintiff,	:	
	:	DOCKET NO: <del>18-21</del> 18-21
vs.	:	
	:	Civil Action
MONTCLAIR EDUCATION	:	
ASSOCIATION,	:	<b>ORDER TO SHOW CAUSE</b>
	:	<b>WITH TEMPORARY RESTRAINTS</b>
Defendant.	:	<b>PURSUANT TO RULE 4:52</b>
-----X		

**THIS MATTER** being brought before the Court by Isabel Machado, Esq. of the Machado Law Group, attorney for Plaintiff, Montclair Board of Education (“Board”), seeking immediate relief pursuant to R. 4:52 based upon facts set forth in the Verified Complaint filed herewith; and it appearing that immediate and irreparable damage will probably result before notice can be given and a hearing held, and for good cause shown.

IT IS ON THIS 10<sup>th</sup> DAY OF February, 2021 ORDERED that Defendant, Montclair Education Association, appear and show cause before the Superior Court at the Essex County Courthouse in Newark (212 Washington Street 5<sup>th</sup> floor), New Jersey at 1:30 o'clock in the PM noon or as soon thereafter as counsel can be heard, on the 10<sup>th</sup> day of

March, 2021 why an Order should not be issued preliminarily enjoining and restraining Defendant, Montclair Education Association and its members, from:

- i. Engaging in, encouraging, or lending support or assistance of any nature to any strike, work stoppage, slow down, or concerted effort to deny the District the required manpower against the District, or otherwise interfering with the opening of in-person learning or orderly operation of the District's schools and programs;
- ii. Soliciting others, including students, their parents or guardians, District employees, and other unions, to engage in or participate in any strike, work stoppage, slow down, or concerted effort to deny the District the required manpower against the District;
- iii. Threatening or coercing any person from discharging normal or substitute duties for the District;
- iv. Interfering by picketing or otherwise inhibiting both the free ingress and egress of the District's employees, agents, students, and other authorized persons to and from the schools and facilities operated by the District; and
- v. Taking unjustified sick, personal, or other leave in concert with or in aid of any strike or slow down.

Plaintiff further requests an Order:

A. Granting such other relief as the Court deems equitable and just.

**AND IT IS FURTHER ORDERED** that pending the return date herein, the Defendant and its members are temporarily enjoined and restrained from:

*David*

- ~~i. Engaging in, encouraging, or lending support or assistance of any nature to any strike, work stoppage, slow down, or concerted effort to deny the District the required manpower against the District, or otherwise interfering with the opening of in-person learning or orderly operation of the District's schools and programs;~~ *Denial*
- ~~ii. Soliciting others, including students, their parents or guardians, District employees, and other unions, to engage in or participate in any strike, work stoppage, slow down, or concerted effort to deny the District the required manpower against the District;~~ *Denial*
- ~~iii. Threatening or coercing any person from discharging normal or substitute duties for the District;~~ *Denial*
- ~~iv. Interfering by picketing or otherwise inhibiting both the free ingress and egress of the District's employees, agents, students, and other authorized persons to and from the schools and facilities operated by the District; and~~ *Denial*
- ~~v. Taking unjustified sick, personal, or other leave in concert with or in aid of any strike or slow down.~~ *Denial*

**AND IT IS FURTHER ORDERED that:**

- ~~1. The Defendant may move to dissolve or modify the temporary restraints herein contained on two (2) days' notice to Plaintiff's attorney.~~ *Must*
2. A copy of this Order to Show Cause, Verified Complaint, Brief, and any supporting Affidavits or Certifications submitted in support of this application be served upon the Defendant, Montclair Education Association, 173 Bellevue Ave, Montclair, New Jersey 07043, within 5 days hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.

3. Plaintiff must file with the Court their Proof of Service of the pleadings on the Defendant no later than three (3) days before the return date.
4. Defendant shall file and serve a written response to this Order to Show Cause and the request for entry of injunctive relief and proof of service by March 1, 2021. The original documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at [http://www.judiciary.state.nj.us/prose/10153\\_deptyclerklawref.pdf](http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf). You must send a copy of your opposition papers directly to the Judge Pasquelli whose address is 210 Washington St, 8<sup>th</sup> Floor, Newark, New Jersey. You must also send a copy of your opposition papers to Plaintiff's attorney whose name and address appears above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of \$ \_\_\_\_\_ and serve your opposition on your adversary, if you want the Court to hear your opposition to the injunctive relief that Plaintiff is seeking.
5. The Plaintiff must file and serve any written reply to the Defendant's order to show cause opposition by March 5, 2021. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge Pasquelli.
6. If Defendant does not file and serve opposition to this Order to Show Cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the Plaintiff files a Proof of Service and a proposed form of Order at least three (3) days prior to the return date.


7. If Plaintiff has not already done so, a proposed form of Order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the Court no later than three (3) days before the return date.
8. Defendant take notice that Plaintiff has simultaneously filed and served a lawsuit against you in the Superior Court of New Jersey. The Verified Complaint attached to this Order to Show Cause states the basis of the lawsuit. If you dispute this Complaint, you or your attorney must file a written Answer to the Complaint and Proof of Service within 35 days from the date of service of this Order to Show Cause; not counting the day you received it.

These documents must be filed with the Clerk of the Superior Court in the County listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at [http://www.judiciary.state.nj.us/prose/10153\\_deptyclerklawref.pdf](http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf). Include a \$\_\_\_\_\_ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to Plaintiff's attorney whose name and address appear above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer (with the fee) or judgment may be entered against you by default. Please note: Opposition to the Order to Show Cause is not an Answer and you must file both. Please note further: if you do not file and serve an Answer within 35 days of this Order, the Court may enter a default against you for the relief Plaintiff demands.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is

available in the Civil Division Management Office in the County listed above and online at [http://www.judiciary.state.nj.us/prose/10153\\_deptyclerklawref.pdf](http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf).

10. The Court will entertain argument, but not testimony, on the return date of the Order to Show Cause, unless the Court and parties are advised to the contrary no later than 5 days before the return date.

  
\_\_\_\_\_  
THOMAS R. PAGANELLI J.S.C.

Statement of Reasons attached

Plaintiff has offered Executive Order No. 175 and correctly recites that:

WHEREAS, the Department of Education has determined that in-person instruction provides students with academic, social, emotional mental health supports that cannot be provided with the same level of efficacy in a remote setting; and

WHEREAS, the Department of Education has found that reopening schools for in-person instruction is critical in facilitating the social and emotional health of students and providing educators with the ability to actively participate in student learning, provide feedback, and promote active learning among students on a daily basis; and

WHEREAS, the American Academy of Pediatrics has determined that in-person instruction is preferred over other forms of instructional delivery for reasons such as addressing and preventing learning loss, attending to students social and emotional wellbeing, and minimizing education inequities resulting from the remote learning model; and

WHEREAS, New Jersey's schools serve a critical function for the State's workforce, in that they provide safe supervision of children during the day, allowing parents and guardians to work and move the economy forward; and

However, omitted from Plaintiff's presentation of the Executive Order is the following information:

WHEREAS, in order to provide the many benefits of in-person instruction, New Jersey public and private schools alike must ensure that the school environment is safe for both students and staff; and

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WHEREAS, a school district may need additional time to properly implement the health and safety precautions necessary to return any portion of the student population to in-person instruction, potentially making it necessary for such district to begin the 2020-2021 school year with remote instruction for all students; and

WHEREAS, those school districts that are unable to meet the necessary health and safety precautions must actively strive to address any deficiencies in order to return all or a portion of its student population to in-person instruction at the earliest possible date; and

\*\*\*

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. Effective immediately, Executive Order Nos. 104 (2020) and 107 (2020) are hereby supersede to the extent that they require all public, private and parochial preschool

program premises, and elementary and secondary schools, including charter and renaissance schools (collectively “school districts”), to remain closed.

2. All school districts that reopen for full or part-time in-person instruction must meet the following health and safety standards, delineated in the Department of Education’s “Checklist for Re-Opening of School 2020-2021” and detailed in “The Road Back: Restart and Recovery Plan for Education” which include, but are not limited to the following:

a. At least six (6) feet of distance between individuals in all settings to the greatest extent practicable or social distancing modifications, such as a physical barrier or turning desks to face the same direction, when six (6) feet of distance cannot be achieved;

b. Mandatory use of face coverings by staff, students, and visitors, except in the following circumstances:

i – x (intentionally omitted)

c. Routine cleaning and sanitization of classrooms, lunchrooms, gymnasiums, restrooms, high-trafficked areas such as hallways; high-touch areas such as light switches and door knobs, and shared surfaces;

d. The facilitation of student hand washing at frequent intervals, or use of alcohol-based hand sanitizer if soap and water are not readily available;

e. Use of face coverings and social distancing procedures to the extent practicable and cleaning protocols on school buses if students are bused to and from school;

f. Student and staff health screenings;

g. Implementation of enhanced social distancing and infection control protocols for music, choir, and physical education classes that are conducted in indoor spaces, particularly where students are not wearing face coverings;

h. A plan for response to students and staff that exhibit symptoms of COVID-19, which must include coordination with local health department and procedures for isolating symptomatic students and staff;

i. A plan detailing the response when students and/or staff test positive for COVID-19, which must include coordination with local health department and procedure for isolating any students or staff who learn of a positive test result while on school grounds;

j. Coordination with the local health department to support contact tracing efforts;

k. A plan to ensure that indoor facilities have adequate ventilation;

l. Implementation of social distancing and infection control practices during recess and physical education periods; and



m. Procedures for resumption of athletics programs and extracurriculars, if applicable.

3. Public preschool, elementary, and secondary schools, including county vocational schools, charter schools, and renaissance schools (collectively "public school districts"), shall resume partial or full-time in-person instruction during the fall of school year 2020-2021.

4. Public school districts shall submit a reopening plan (the "Plan") to the Department of Education at minimum thirty days prior to the first day of school. A public school district that has already submitted such Plan pursuant to the standards outlined in "The Road Back: Restart and Recovery Plan for Education" will be considered to have satisfied this requirement of this Order. In addition to the Plan, a minimum of seven days prior to the first day of school, the chief school administrator or his/her designee must also certify to the Department of Education that the district has policies and procedures in place to meet the minimum health and safety standards set forth in Paragraph 2.

5. Intentionally omitted.

6. School districts that resume partial or full-time in-person instruction shall permit students to engage in full-time remote learning upon the request of a parent or guardian...

7. Public school districts that are or become unable to satisfy the health and safety requirements for in-person instruction, as detailed in Paragraph 2 of this Order, may provide full time remote instruction to all students pursuant to N.J.S.A. 18A:7F-9.

Executive Order 175 has been extended by Executive Orders 180, 186, 191, 200, 210, 215.

#### **LEGAL ANALYSIS**

Plaintiff seeks an Order to Show Cause, pursuant to R. 4:52 and alleges, in that proposed order, that "it appearing that immediate and irreparable damage will probably result before notice can be given and a hearing held" that, Defendants be temporarily enjoined and restrained from:

- i. Engaging in, encouraging, or lending support or assistance of any nature to any strike, work stoppage, slow down, or concerted effort to deny the District the required manpower against the District, or otherwise interfering with the opening of in-person learning or orderly operation of the District's schools and programs;
- ii. Soliciting others, including students, their parents or guardians, District employees and other unions, to engage in or participate in any strike, work stoppage or slow down, or concerted effort to deny the District the required manpower against the District;
- iii. Threatening or coercing any person from discharging normal or substitute duties for the District;

iv. Interfering by picketing or otherwise inhibiting both the free ingress and egress of the District's employees, agents, students, and other authorized persons to and from schools and facilities operated by the District; and

v. Taking unjustified sick, personal, or other leave in concert with or in aid of strike or slow down.\*

New Jersey has long recognized, in a wide variety of contexts, the power of the judiciary to prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case. Our Court has recognized that the determination to authorize preliminary relief summons the most sensitive exercise of judicial discretion. In exercising that discretion, courts have been guided traditionally by certain fundamental principles. Crowe v. De Gioia, 90 N.J. 126, 132 (1982).

Each of these fundamental principles must be clearly and convincingly demonstrated. Waste Management of New Jersey, Inc v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008).

One principle is that preliminary injunction should not issue except when necessary to prevent irreparable harm. Crowe, supra, 90 N.J. at 132-133, citing, Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 202 (E. & A. 1878). Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury satisfying issuance of injunctive relief. Crowe, supra, 90 N.J. at 132-133, citing, Hodge v. Giese, 43 N.J. Eq. 342, 350 (Ch. 1887). Pecuniary damages may be inadequate because of the nature of the injury or of the right affected. Crowe, supra, 90 N.J. at 133, citing, Outdoor Sports Corp. v. A.F. of L. Local 23132, AFL, 6 N.J. 217, 229-230 (1951); Scherman v. Stern, 93 N.J. Eq., 626, 631 (E. & A. 1922).

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\*This court denies the Plaintiff's request, as articulated herein, and, therefore, does not address the merits of some of these reliefs. However, the court is concerned that they may implicate freedoms of speech and assembly. The parties are merely placed on notice.

In the matter at bar, Plaintiff claims irreparable harm because the employees may not lawfully strike; the loss of even one days of education that's constitutionally mandated to students, constitutes irreparable harm to those students; Defendant and its members do not have authority to dictate the modality of the District's education plan and any delay in the return of the District to in person instruction exposes the District to potential liability, including potential compensatory education claims.

For purpose of this application, this court accepts the arguments that the Defendant does not have the right to strike or "dictate the modality of education".

However, Plaintiff has failed to articulate how it has complied with the "health and safety standards, delineated in the Department of Education's "Checklist for Re-Opening of School 2020-2021" and detailed in "The Road Back: Restart and Recovery Plan for Education"". Except, perhaps, "k. A plan to ensure that indoor facilities have adequate ventilation".

Further, Plaintiff offers that:

The Charles H. Bullock School was not included in this assessment as it was constructed in 2010 and should have been designed and installed to have code compliant ventilation. Because all of the equipment at this school is relatively new, provided that it has been maintained and serviced in a manner consistent with the manufacturer's recommendations it, should be in good working order.

Unclear to this court is whether this school is integral to the matter at bar. Moreover, this court is left to guess regarding "should have been designed" and "provided that it has been maintained and service" and "should be in good working order".

Moreover, Plaintiff fails to explain how continued remote learning would not address the harm to the students. With the required remote learning there would not be the loss of "one days' education".

Finally, Plaintiff alleges, but fails to explain or support, the claim of its exposure to "potential liability, including potential compensatory education claims".

Therefore, this court does not find that Plaintiff has established, clearly and convincingly, irreparable harm.

A second principle, is that temporary relief should be withheld when the legal right underlying plaintiffs claim is unsettled. Crowe, supra, 90 N.J. at 133, citing, Citizens Coach Co. v. Camden Horse R.R. Co., supra., 29 N.J. Eq. at 304-305.

In the matter at bar, Plaintiff claims and the court accepts that Defendant does not have the right to strike.

However, for the same reasons as stated above, Plaintiff has not established clearly and convincingly that it has a settled legal right to return Defendant and its employees back to in-person teaching.

A third rule is that a preliminary injunction should not issue where all material facts are controverted. Crowe, supra, 90 N.J. at 133, citing, Citizens Coach Co. v. Camden Horse R.R. Co., supra., 29 N.J. Eq. at 305-306. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. Crowe, supra, 90 N.J. at 134. However, this requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. See, Waste Management, supra, 399 N.J. Super. at 520. Indeed, the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began. Crowe, supra, 90 N.J. at 134.

In the matter at bar, Defendant is apparently not on notice of this matter because Plaintiff offers that "it appearing that immediate and irreparable damage will probably result before notice can be given and a hearing held". Nonetheless, this court, itself, has sufficient factual questions that it determines that Plaintiff has not established, clearly and convincingly, there are no uncontroverted facts. Moreover, this court notes that a denial of Plaintiff's reliefs maintains the parties' status quo.

Finally, the court must, in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. Crowe, supra, 90 N.J. at 134.

At this stage, this court finds that the relative hardships weigh in favor of Defendants.

Therefore, this court denies the temporary restraints and sets the matter down in accord with the OTSC.