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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2021012160 08/16/2021

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
P. McKinley
Deputy

DOUGLAS HESTER ALEXANDER M KOLODIN

v.

PHOENIX UNION HIGH SCHOOL DISTRICT, ET AL. MARY R O'GRADY

JUDGE WARNER

MINUTE ENTRY

Plaintiff's August 2, 2021 Motion for Temporary Restraining Order, and Defendants' August 6, 2021 Motion to Dismiss, are under advisement following argument.

1. Temporary Restraining Order.

A.R.S. § 15-342.05 was enacted during the COVID-19 pandemic to prohibit school districts from requiring students and teachers to wear masks. Phoenix Union High School District cites no legal authority that this statute is beyond the Legislature's power. Indeed, Arizona law expressly limits school districts' authority to policies that "are not inconsistent with law." A.R.S. § 15-341(A)(1).

But A.R.S. § 15-542.05 has not yet become effective. Under Arizona law, new laws are effective 90 days after the legislative session ends, which is September 29 this year. Ariz. Const. Art. IV, Pt. 1, § 1. Although there is an exception for emergency measures, they require a two-thirds vote and this statute was not approved by a two-thirds majority.

Plaintiff argues that the statute's retroactivity clause makes it effective immediately. A retroactivity clause is not an emergency clause, and cannot be used to avoid the two-thirds vote requirement needed to make a statute immediately effective.

Plaintiff further argues that A.R.S. § 15-342.05 is an appropriations measure, which does not require an emergency clause and a two-thirds vote to be immediately effective. *See Garvey v. Trew*, 64 Ariz. 342, 354, 170 P.2d 845, 853 (1946) (requirements for emergency measure do not apply to appropriation measures). The statute is not an appropriation measure, it is a regulation of school districts. The inclusion of A.R.S. § 15-342.05 in a bill that also includes appropriations does not make the statute itself an appropriation measure.

Plaintiff argues in Reply that the District's mask policy violates existing law even without A.R.S. § 15-342.05. It does not. Arizona law gives school boards the authority to protect students and ensure the orderly operation of schools, subject to statutory limitations imposed by the Legislature. A.R.S. § 15-341(A)(1); *see also Pendley v. Mingus Union High Sch. Dist. No. 4 of Yavapai Cty.*, 109 Ariz. 18, 22, 504 P.2d 919, 923 (1972) ("There must, of course, be some authority to operate a school on a day-today basis and this statute amply supports the authority of the school board to pass reasonable rules and regulations for the orderly operation of the school."); *Kelly v. Martin*, 16 Ariz. App. 7, 9, 490 P.2d 836, 838 (1971) ("the legislature has delegated to the governing board of a high school district the control of the affairs of the district, subject to certain statutory controls").

IT IS ORDERED denying Plaintiff's August 2, 2021 Motion for Temporary Restraining Order.

2. Motion to Dismiss.

Because A.R.S. § 15-342.05 is not yet effective, the District argues that this lawsuit is premature and, therefore, should be dismissed. Plaintiff responds that he does not have to wait until A.R.S. § 15-341.05 becomes effective to challenge a policy that violates it. He notes that the Rules of Procedure for Special Action permit relief when a public body is "threatening to proceed" unlawfully. Ariz. R.P. Spec. Act. 3(b). He also argues that it is inevitable the law will come into effect on September 29, 2021 and that the mask policy will be illegal at that time.

Plaintiff is not required to wait until the day the statute becomes effective to seek relief. But its effective date is weeks away, and many things could change in that time. This far from the effective date, it cannot be said that a justiciable issue is inevitable, or that the District is threatening to proceed in violation of A.R.S. § 15-341.05.

The Court will not dismiss the case, however, without giving Plaintiff the opportunity to amend the complaint. *See Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, 990 P.2d 26, 33 (App. 1999) ("Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects."). This will make a new lawsuit unnecessary in the event Plaintiff needs to challenge the policy once A.R.S. § 15-341.05 becomes effective.

IT IS ORDERED denying Defendants' August 6, 2021 Motion to Dismiss, and granting Plaintiff leave to file a second amended complaint within 45 days.