

1. Petitioner J. T. (DOB: XX/XX/2012) resides in Douglas County, Kansas and is enrolled in the Baldwin School District. Petitioner J. T. is a minor child. Accordingly, efforts are being taken to maintain his privacy as a minor child.

2. Petitioner J. T. is 9 years old and is subject to the Order while attending special education speech services at Baldwin Elementary School.

3. Defendant Dr. Thomas Marcellino (“Dr. Marcellino”) is the duly appointed local health officer for Douglas County, Kansas.

4. Defendant Board of County Commissioners of Douglas County, Kansas (“Board”) is the governing body of Douglas County, Kansas.

5. The Order was issued by Dr. Marcellino on September 22, 2021 and approved by the Board the same day.

6. The Order states in part: “Any person in Douglas County the age of 2 to 11 (starting the day the person turns 2 until the day before the person turns 12) shall cover their mouth and nose with a mask or other face covering when they are in the following situations: Inside, or in line to enter, any indoor public space”

7. The Order is effective for three months, from September 23, 2021 until December 22, 2021, encompassing the remainder of the fall school semester at Baldwin Elementary School.

8. The previous Douglas County public health order mandating masks for children ages 2 to 11 was in effect from August 19, 2021 to September 22, 2021 (only 34 days in length).

9. Petitioner J. T. cannot wear a mask without triggering severe anxiety, stress, and a lack of concentration.

10. On September 8, 2021, Marie Taylor received an email from Daniel Wray, Director of Special Services of the East Central Kansas Cooperative in Educational Services

(“Mr. Wray”), confirming that Petitioner J. T. would be required to wear a mask when at the school building to receive speech services due to the “current county health recommendations” and that “this is not a special education requirement, but a district requirement.”

11. On October 12, 2021, Marie Taylor received an email response from Mr. Wray confirming that Petitioner J. T. must wear a mask in order to receive speech services at Baldwin Elementary School because the district “continue[s] to follow the county health department directive that students ages 2-11 must wear a mask inside public school facilities.”

12. Marie Taylor, Petitioner J. T.’s mother, has determined that it is in his best interest to refrain from wearing a mask, even though Petitioner J. T. cannot receive special education speech services at Baldwin Elementary School while not wearing a mask due to the Order.

13. The Petitioner is aggrieved by the Order because it imposes a legal obligation and burden on him. Additionally, the Petitioner is aggrieved by the order because he has been denied special education speech services as an enrolled student at Baldwin Elementary School due to the requirement that he wear a mask while receiving speech services.

14. The Order is an order issued by a local health officer and approved by the board of county commissioners, thus qualifying as an order under Senate Bill 40, Sec. 12(d).

15. The Order was issued, approved, and filed within 30 days of the filing of this Petition.

16. A copy of the Order is attached hereto as **Exhibit A**.

17. The Order mandates the wearing of face masks which expressly places the order under the purview of Senate Bill 40, Sec. 12(b)(1)(2).

18. In addition, the Petitioner is engaged in the civic activity of attending school and obtaining a primary education. The Order substantially inhibits the Petitioner's civic activity by interfering with Petitioner J. T.'s ability to receive special education speech services at Baldwin Elementary School.

19. The Petitioner requests the Court find the Order is not narrowly tailored in its current form under SB 40, Sec. 12(b)(1)(2), to the extent it is in effect for longer than 30 days, for the following reasons:

- Because the Order lasts longer than the period under SB 40 during which an aggrieved party may ask for court review of a county public health order mandating masks, regardless of the conditions on day 31 or after, the Order is not the least restrictive means by which the Board may achieve the purpose stated in the Order;
- There is no public health basis for issuing an order 90 days at a time rather than reviewing and reissuing an order every 30 days for three consecutive months;
- The only distinction between a 90-day order and a 30-day order reviewed and reissued for three consecutive months is that an aggrieved party is prevented from seeking judicial review of a 90-day order during days 31-90 of the order's term, whereas an aggrieved party can seek judicial review of a 30-day order under SB 40 at any point during the order's term based on the current public health conditions;
- Neither Dr. Marcellino nor the Board can possibly know the applicable conditions, least restrictive means, or even compelling governmental interest regarding the subject matter of the Order 90 days in advance;

- Neither Dr. Marcellino nor the Board can possibly know whether the stated purpose or specific findings in the order will be valid, applicable, or relevant on days 31-90 of the Order, including:
 - i. Whether children under the age of 12 will still “not [be] currently eligible for vaccines and the CDC recommends universal indoor masking for children under the age of 12, especially in in-person school settings;” or
 - ii. Whether children 2 to 11 will still be “await[ing] vaccinations;”
- A 30-day order is more narrowly tailored than a 90-day order, and a 30-day order still allows the Board adequate time to monitor changing conditions and provide for continuous and uninterrupted public health restrictions through successively issued orders as needed;
- Because neither Dr. Marcellino nor the Board knows the conditions, compelling interest, or least restrictive means that may be most prudent on December 22, 2021 or even October 23, 2021 (31 days after the issuance of the initial order), the Order as written is by definition more restrictive than necessary.

20. No other cases have been filed by the Petitioner related to the Order.

21. The Petitioner acknowledges the Judgment and Final Order After Intervention issued in *Butler, et. al. v. Shawnee Mission School District Board of Education*, Case Number 2021-CV-2385, issued by the Johnson County District Court and notes that it was stayed by the Kansas Supreme Court in Case Number 124205 on August 24, 2021. The case is currently set for oral arguments before the Kansas Supreme Court on October 26, 2021. Given that a Supreme Court decision applicable to the legal issues in the current matter is imminent, the Petitioner hereby WAIVES strict adherence to the statutory timelines outlined in SB 40, including but not

limited to: the commencement of a hearing in this matter within 72 hours; or the issuance of a written decision within seven days of hearing; but respectfully requests that this matter be heard and resolved as soon as possible by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court issue an Order narrowly tailoring Douglas County Emergency Order of Local Health Officer and Douglas County Commission Resolution No. 21-38 to limit its effective period to 30 days from issuance, subject to periodic review and reissue by the Douglas County Local Health Officer and approval by the Board of Douglas County Commissioners.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Respectfully submitted this 19th day of October 2021.

KRIEGSHAUSER NEY LAW GROUP

By:

/s/ Joshua A. Ney _____
Joshua A. Ney, KS Bar No. 24077
Ryan A. Kriegshauser, KS Bar No. 23942
Alan M. Vester, KS Bar No. 27892
15050 W. 138th St., Unit 4493
Olathe, KS 66063
Phone: (913) 303-0639
Fax: (785) 640-8446
firm@knlawgroup.com

ATTORNEYS FOR THE PETITIONER

VERIFICATION

I declare under penalty of perjury that the foregoing Verified Complaint has been examined by me and that the factual allegations therein are true to the best of my information, knowledge, and belief.

Dated: October 19, 2021



Marie Taylor, natural parent and next friend of J. T

EMERGENCY ORDER OF LOCAL HEALTH OFFICER AND
DOUGLAS COUNTY COMMISSION RESOLUTION NO. 21-38

Emergency Public Health Order issued on this 22nd day of September 2021, to mitigate the spread of the coronavirus (COVID-19) epidemic in Douglas County, Kansas, pursuant to the authority provided in K.S.A. 65-119, K.S.A. 65-129b, K.S.A. 65-201 and K.S.A. 65-202 and other applicable laws or regulations.

Medical, Scientific and Legal Justifications for Order

1. The Local Health Officer is authorized and required, pursuant to K.S.A. 65-119, K.S.A. 65-129b, K.S.A. 65-201 and K.S.A. 65-202 to exercise and maintain supervision over known or suspected cases of any infectious or contagious disease during its continuance, and to issue orders seeing that all such cases are properly handled and that the provisions of the Kansas public health laws as to isolation, quarantine and disinfection are duly enforced.
2. The United States Centers for Disease Control and Prevention (CDC), the Kansas Department of Health and Environment (KDHE) and the Douglas County Local Health Officer, all recommend implementation of community mitigation strategies to increase containment of the virus to reduce spread of COVID-19.
3. The worldwide outbreak of COVID-19 and the resulting epidemic in Kansas and Douglas County continue to threaten the life and health of our citizens and visitors, as well as the economy, and remains a public disaster affecting life, health, property and the public peace.
4. The Local Health Officer believes community mitigation strategies is necessary due to the continued influx of new cases and new strains, in order to allow the resources for contact tracing and exposure notification to be able to address the community spread of the disease and to ensure the capacity of other local resources is adequate to meet the need.
5. The purpose of this order is to provide community mitigation strategies to minimize the spread of COVID-19 in light of the continued influx of new cases and new variants, which may be more transmissible, including but not limited to the Delta variant.
6. The highly transmissible Delta variant of COVID-19 is now the dominant strain in Douglas County, resulting in a rapid increase in new cases and numerous outbreaks.
7. Children under the age of 12 are not currently eligible for vaccines and the CDC recommends universal indoor masking for children under the age of 12, especially in in-person school settings.
8. The mask mandate fulfills the stated purpose because research has demonstrated that mask mandates reduce the COVID-19 incidence rates for communities that implement them. (See, e.g., <http://dx.doi.org/10.15585/mmwr.mm6947e2>.)
9. The mask mandate also fulfills the stated purpose because youth age 2 to 11 wearing masks indoors in public settings will protect the health of those children while they

await vaccinations, as well as limiting the risk of incidence for those they may come in contact with.

7. The Local Health Officer has considered the least restrictive ways an order can meet its stated purpose and believes this order is narrowly tailored to meet its purpose.

8. The Local Health Officer deems it necessary to issue this order mandating the wearing of face masks as set forth below as the least restrictive method for meeting its purpose based upon the medical and scientific evidence.

10. A previous order was presented to the County Commission and became effective when approved by the Commission on August 18, 2021 but said order expires on September 22, 2021.

11. Pursuant to K.S.A. 65-201(b)(2), this Order has been presented to the County Commission and became effective when approved by the Commission on September 22, 2021 for approximately 90 days and is now being presented for approval on.

NOW, THEREFORE, BE IT ORDERED by the Local Health Officer and the Douglas County Commission, pursuant to the above authorities, that:

1. Mask Order for Youth ages 2 to 11: Any person in Douglas County the age of 2 to 11 (starting the day the person turns 2 until the day before the person turns 12) shall cover their mouth and nose with a mask or other face covering when they are in the following situations:
 - Inside, or in line to enter, any indoor public space;
 - Obtaining services from the healthcare sector in settings, including but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank (unless directed otherwise by an employee or healthcare provider);
 - Waiting for or riding on public transportation or while in a taxi, private car service, school bus, or ride-sharing vehicle;
2. Exceptions to Mask Order: The following are exempt from wearing masks or other face coverings in the situations described in paragraph 1:
 - Youth ages 2 to 11 with a medical condition, mental health condition, or disability that prevents wearing a face covering – this includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance;
 - Youth ages 2 to 11 who are deaf or hard of hearing, or communicating with a person who is deaf or hard of hearing, where the ability to see the mouth is essential for communication;

- Youth ages 2 to 11 who are obtaining a service involving the nose or face for which temporary removal of the face covering is necessary to perform the service;
- Youth ages 2 to 11 engaged in religious services, ceremonies or activities;
- Youth ages 2 to 11 who are seated at a restaurant or other establishment that offers food or beverage service, while they are eating or drinking;
- Youth ages 2 to 11 engaged in any lawful activity during which wearing a mask or other face covering is prohibited by law.

3. Mask Order Definitions:

- “Mask or other face covering” means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A mask or other face covering can be made of a variety of synthetic and natural fabrics, including cotton, silk, or linen. Ideally, a mask or other face covering has two or more layers. A mask or other face covering may be factory-made, sewn by hand, or can be improvised from household items such as scarfs, bandanas, T-shirts, sweatshirts, or towels.
- “Indoor Public space” means any indoor or area that is open to the public; this does not include private residential property or private offices or workspaces that are not open to customers or public visitors.

4. Nothing in this order shall restrict, limit or supersede the Secretary of Health and Environment or the Local Health Officer’s authority to make isolation, quarantine, or other orders pursuant to K.S.A. 65-129c.
5. This Order maybe supplemented or modified as required for the effective and efficient management and control of the coronavirus epidemic in the county by further order or direction of the Douglas County Commission, Lawrence-Douglas County Board of Public Health and/or by the Douglas County Local Health Officer.
6. If any portion of this order is found to be unenforceable or not to be the least restrictive means to achieve its purpose, that portion shall be regarded as removed from this order, while the remaining portions shall valid and the order shall be interpreted and enforced as if it did not contain said portion.

This order shall become effective as of 12:01 a.m. on September 23, 2021 and remain in force until 11:59 p.m. on December 22, 2021 unless it is otherwise rescinded or modified by the County Commission.

(signatures on next page)

IT IS SO ORDERED THIS 22nd DAY OF September 2021


Thomas Marcellino MD

Dr. Thomas Marcellino
Local Health Officer
Douglas County, Kansas

Approved and Adopted by:

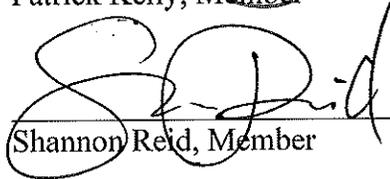
**BOARD OF COUNTY COMMISSIONERS OF
DOUGLAS COUNTY, KANSAS**

Attest:


Shannon Portillo, Chair


Jameson D. Shew, County Clerk


Patrick Kelly, Member


Shannon Reid, Member