IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN NIEHLS, ELIZABETH WEIR AND ANDREW AND KATE AMRHEIN Plaintiff, **v.** **MONTGOMERY COUNTY OFFICE OF PUBLIC HEALTH AND MONTGOMERY COUNTY BOARD OF HEALTH** Defendants/Respondents.	**No. 2:20-cv-05855**

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF AND TEMPORARY RESTRAINING ORDER

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Respondents, Montgomery County Office of Public Health ("OPH") and Montgomery County Board Of Health (the "Board, and collectively, "Respondents"), by and through their undersigned counsel, submit this Brief in Opposition to the Plaintiffs' Motion for Injunctive Relief and Temporary Restraining Order and aver as follows:

I. INTRODUCTION

Hours after the Montgomery County Court of Common Pleas rejected the very same relief sought herein, Plaintiffs filed this federal action seeking to preliminarily enjoin the Board and OPH from enforcing its Order requiring all schools in Montgomery County to support virtual education only for the period November 23, 2020 through December 6, 2020 and cancelling all school sanctioned extra-curricular activities due to the widespread outbreak of COVID-19. As the Honorable Richard P. Haaz has already found, Plaintiffs in this case have failed to prove irreparable harm necessary to warrant a special or preliminary injunction prohibiting the enforcement of this Order. Faced with this fatal obstacle, Plaintiffs now execute an end-run route to this Court.

The fact that Plaintiffs proffer new legal theories does not fix their inability to establish irreparable harm. Respondents decided in the midst of an ever-worsening pandemic to require all-virtual learning for a brief, defined period. The Order does not close schools. The Order is not unlimited. The Order does not treat schools differently. The Order simply requires all virtual learning for a two-week period over the Thanksgiving holiday -- some five to eight actual school days depending on a given school's calendar. The decision was made in the face of an alarming rise in COVID-19 positivity rates and incidents of linked-transmissions in school systems, the very real prospect of staff shortages leading to functional school closings, the upcoming Thanksgiving holiday that heralds the return of college-age students to the County and in the

hopes that this short fix would lead to what the entire community desires – all students back in person in all schools.

As Justice Roberts noted in his *South Bay United Pentecostal Church* concurrence,

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]the safety and health of the people" to the politically accountable officials of the States "to guard and protect." Where those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

South Bay United Pentecostal Church v. Newsom, -- U.S. ---, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J. concurring) (citations omitted).

Similarly, the decision of the Board and OPH in the midst of this health crisis should not be second-guessed.

In addition, the Complaint and the Motion are fatally deficient in just so many ways: the Plaintiffs lack standing, none of the factual predicates are verified, the emergent relief sought is barred by collateral estoppel, doctrines of comity should compel this court to abstain from re-litigating the issue of irreparable harm and none of the constitutional claims are viable as a matter of law. Finally, this action was part of a strategically planned two-pronged attack. Should Plaintiffs fail to succeed in state court, they planned to immediately seek redress in federal court. As a result, despite the fact that the Board's decision was made on Thursday November 13th, Plaintiffs did not file their Complaint until late Friday November 20th, have yet to serve their papers and did not properly file their TRO until 1:30 p.m. today. And all this to stop virtual learning that started today. Under these circumstances, Plaintiffs have failed to act promptly and the relief requested should be denied.

II. FACTS SUPPORTING THE RATIONAL BASIS FOR THE ISSUANCE OF THE ORDER

From the start of the school year until the beginning of October, Montgomery County schools had thankfully experienced a low incidence of positivity for COVID-19. (Declaration of Janet Panning, MS filed in support hereof (the "Panning Decl."), at ¶2). However, as the weather got colder, things started to change. (Panning Decl., ¶3).

Up until three weeks ago, while schools within Montgomery County had not shown a significant spread of the virus within the school, the County did have many positive cases occurring; for example, on youth sports teams, on cheerleading teams, as a result of sleep overs, car pools and pizza parties after youth sports games. There were also instances of spread from coaches to athletes and vice versa. (Panning Decl., ¶4).

Approximately three weeks ago, the County saw two schools with cases of linked transmissions – where the point of infection can be traced back to have occurred within the school. (Panning Decl., ¶5). In addition, the number of students infected with COVID-19 increased exponentially from early October to Halloween. Then there was a big surge in positive cases after Halloween in the County. (Panning Decl., ¶¶ 6-7).

The data bears this out. Between September 7, 2020 and November 9, 2020, 268 students and staff in Montgomery County schools tested positive for COVID-19. (Panning Decl., ¶8). As of November 9, 2020, 100 of the 268 cases were school staff. (Panning Decl., ¶9). In the week following November 9, 2020, an additional 110 individuals tested positive in Montgomery County Schools (for a total of 378 cases). This represents a 41percent increase in the number of cases since September 7, 2020, in just a one-week period. These additional 110 cases included 38 staff members. (Panning Decl., ¶10). 180 of the 378 cases are from religious

or independent schools. (Panning Decl., ¶11). 198 of the 378 cases are from public schools. (Panning Decl., ¶12).

Further, since Halloween, investigations into linked transmissions within the schools have significantly increased. (Panning Decl., ¶13). Since Halloween, there was a COVID-19 outbreak in one school district among the bus drivers that caused the shut-down of transportation for students. That same school district switched to 100 percent virtual learning last week because it was discovered that three different buildings within the district had linked transmissions. (Panning Decl., ¶14). Since Halloween, three different parochial and independent schools switched to 100 percent virtual learning because too many students had tested positive. At least one of those schools had evidence of a linked transmission. (Panning Decl., ¶15). And within the past two weeks, one additional public-school district "functionally closed" -- meaning the school did not have enough staff to open its doors to in-person instruction. (Panning Decl., ¶16).

At the time the Board met on November 12 -13, 2020, the Children's Hospital of Philadelphia's ("CHOP") public recommendation was that all schools go virtual as of Monday, November 16, 2020. (Panning Decl., ¶17). Also at that time, the Pennsylvania Department of Education COVID-19 guidelines for in-person education stated that schools should go to a 100 percent virtual learning environment if the County in which the school is located is exhibiting either: (1) an incidence rate of transmission greater than 100 cases per 100,000 residents, ***or:*** (2) a positivity rate greater than 10 percent, for two consecutive seven-day periods. (Panning Decl., ¶18). At the time the Board of Health met on November 12-13, 2020, eleven of the 23 public school districts within Montgomery County were already operating in a full virtual model. (Panning Decl., ¶ 19). For the week ending November 6, 2020, Montgomery County had an

incidence rate of transmission of 105.90 per 100,000 residents. (Panning Decl., ¶20). For the week ending November 13, 2020, Montgomery County had an incidence rate of transmission of 177.27 per 100,000 residence. (Panning Decl., ¶21) (See also "Level of Community Transmission Chart" posted by the Pennsylvania Department of Health for week ending November 20, 2020, a true and correct copy of which is attached hereto as Exhibit "A").

In addition to increasing concerns of incidences of transmission within individual schools or school buildings, the OPH has become increasingly concerned about community spread among school-aged children living in the same neighborhood but attending different schools. (Panning Decl., ¶22). Based upon experience with other holidays, the OPH anticipates that the traditional celebrations associated with the Thanksgiving Holiday, coupled with the high incidence of COVID-19 in Montgomery County, have the potential to dramatically increase the spread of COVID-19 across this community, including within the schools. (Panning Decl., ¶23). In part, this concern is elevated due to the anticipated influx of college-aged students returning to Montgomery County for the Thanksgiving Holiday. (Panning Decl., ¶24).

In contrast to the schools, the incidence of transmission within restaurants, bars and other commercial establishments within Montgomery County has been extremely limited to date. (Panning Decl., ¶25). To date, there are no known cases of transmission from hair salons, barber shops or gyms. (Panning Decl., ¶26). To date, there has been only two cases of transmission linked to restaurants and bars within Montgomery County, and both of those cases involved employee to employee transmission. In Montgomery County, there have been zero cases of transmission in restaurants and bars from employees to patrons or vice versa. (Panning Decl., ¶27).

The implementation of virtual schools during this limited two-week period is designed to reduce the spread of COVID-19 in schools is essential to ensure the protection of children, teachers, school staff and others who are impacted, and in turn, to those in the general community. (Panning Decl., ¶28). OPH's recommendation to the Board to implement virtual schools during this limited two-week period was based, in part, on the data noted above, which was presented in summary form to the Board prior to its meeting of November 12-13, 2020. (Panning Decl., ¶¶29-30).

On November 13, 2020, the Board passed a resolution authorizing OPH to issue an Order requiring all schools to support all-virtual learning for limited, two-week period. Thereafter, OPH issued an Order entitled "Montgomery County School COVID-19 Risk Reduction and Mitigation Order" (the "Order")[1] which provides, in part that:

> All schools, both public and private in Montgomery County are required to support virtual education only, for the period November 23 through December 6, 2020. This requirement includes virtual education only for special education and canceling of school sanctioned extra-curricular activities.

The Order further notes that:

> The implementation of virtual schools during the period of peak contagion is designed to reduce the spread of COVID-19 and is essential to ensure the protection of children, school staff, and others who are impacted, as well as those in the general community. (Order, ¶¶ 5-6).

On November 18, two of the four Plaintiffs in this action filed a Petition in the Court of Common Pleas for Montgomery County seeking a special and preliminary injunction enjoining the Board from enforcing its Order based on alleged violations of the Sunshine Act. An evidentiary hearing was held via Zoom on Friday, November 20, 2020, and included six witnesses appearing and testifying. At 4:23 p.m. on the 20th, the Honorable Richard P. Haaz

[1] A true and correct copy of the Mitigation Order is attached hereto as Exhibit "B."

denied the motion for special and preliminary injunction and issued a decision (the "State Court Decision").[2] Judge Haaz specifically found that the plaintiffs therein had failed to establish irreparable harm should the Order be enforced. (State Court Decision, Exhibit "C," p. 6, ¶¶10-11).

Plaintiffs filed this action after Judge Haaz' decision issued, on Friday November 20. Plaintiffs have yet to serve their papers and did not properly file their TRO until approximately 1:30 p.m. today, November 23.

The Order is in effect and, as of Monday, November 23, all schools throughout Montgomery County are conducing all-virtual learning for the two-week period.

III. LEGAL ARGUMENT

A. Plaintiffs Lack Standing Under Article III.

Article III standing requires a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Bognet v. Secretary Commonwealth of Pennsylvania*, 2020 WL 6686120, at *6 (3d Cir. Nov. 13, 2020) (*quoting Spokeo, Inc. v. Robins*, -- U.S. --, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)). The plaintiff bears the burden of establishing standing. *Lujan v. Sherwin-Williams Co. v. Cty. of Delaware, Pennsylvania*, 968 F.3d 264, 268 (3d Cir. 2020) (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Injury in fact requires "the invasion of a concrete and particularized legally protected interest resulting in harm that is actual or imminent, not conjectural or hypothetical." *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016). As such, the alleged injury must "affect the plaintiff in a personal and individual way." *Bognet*, 2020 WL 6686120, at *6.

[2] A true and correct copies of Judge Haaz's decision and order are attached hereto as Exhibit "C".

In general, "[i]njuries to a parent resulting from violations of their child's constitutional rights are not sufficiently personal for purposes of the parent's individual standing." *Howard v. Chester Cty. Office of Juvenile Prob. & Parole*, 365 F. Supp. 3d 562, 571 (E.D. Pa. 2019) (*quoting Delbridge v. Whitaker*, 2010 WL 1904456, at *3 (D.N.J. May 10, 2010)); *Hannah v. City of Dover*, 152 F. App'x 114, 116–17 (3d Cir. 2005)). Where an injury results to a minor child, the child is the proper party to the action and must be represented through a guardian. *Ciarrocchi v. Clearview Reg'l High Sch. Dist.*, 2010 WL 2629050, at *1 (D.N.J. June 25, 2010) (*citing* Fed.R.Civ.P. 17(c)).

That has not happened here. Rather, the Complaint alleges only that Plaintiffs are four individuals who reside in Montgomery County and who have been impacted by Respondents' Order.[3] (Complaint, at ¶¶ 19 to 21). The Complaint is devoid of any allegations that Plaintiffs have children, let alone children of school age or who attend school in the County as opposed to a home school. (*See generally* Complaint, at pp. 1 to 31). Plaintiffs have failed to allege any irreparable harm to them (or to their children should they exist) because of the Order. Even if Plaintiffs can be said to allege irreparable harm to their own children – which they do not -- that would not be sufficient to convey standing to assert their children's claims in their own capacity. *Howard,* 365 F. Supp. 3d at 571.

Indeed, Plaintiffs overwhelmingly focus on the irreparable harm that the general student population will purportedly suffer because of the Order. (Plaintiffs' Brief in Support of Motion for Injunctive Relief and Temporary Restraining Order ("Plaintiffs' Brief"), at pp. 31-39).

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[3] Despite certain references in the complaint to the "Plaintiff School," and measures taken to combat COVID infection in the school, there is no plaintiff entity or school named in the Complaint.

Plaintiffs contend that children in general will suffer irreparable harm, such as "immeasurable impacts on [their] mental and emotional health as well as the children's long-term academic performance[,]" because of the two-week, all-virtual Order. (*Id.* at p. 39).

As such, Plaintiffs lack standing to assert the claims in their Complaint.

B. The Court Should Abstain from Ruling on Plaintiffs' Motion Based on the *Younger* Abstention Doctrine.

The *Younger* abstention doctrine "reflects a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Rahman v. Borough of Glenolden*, 2020 WL 1676399, at *9 (E.D. Pa. Apr. 6, 2020) (*quoting Gwynedd Props., Inc., v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1199 (3d Cir. 1992)). Under *Younger*, "federal courts should abstain from exercising jurisdiction over a claim where resolution of such claim would interfere with an ongoing state proceeding." *Id.* (*citing Miller v. Mitchell*, 598 F.3d 139, 145 (3d Cir. 2010)). The specific elements that warrant *Younger* abstention are that "(1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims." *Gonzalez v. Reichley*, 2020 WL 6562049, at *2 (E.D. Pa. Nov. 9, 2020) (*quoting Schall v. Joyce*, 885 F.2d 101, 106 (3d Cir. 1989)).

All three elements for abstention under the *Younger* doctrine are present here. First, there is ongoing litigation before a Pennsylvania state court over whether Respondents properly issued the Order. Second, that litigation implicates an important state interest concerning education. *O'Neill v. City of Philadelphia*, 32 F.3d 785, 792 n. 14 (3d Cir. 1994) ("We have held that the states have a substantial interest in education"); *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1017-18 (3d Cir. 1981). Third, Plaintiffs could have filed the Constitutional claims presented in this litigation in the pending state court action but chose not to do so. *Kise v. Department of*

Military, 832 A.2d 987, 996 (Pa. 2003) (state courts maintain concurrent jurisdiction to consider federal constitutional questions.); *Pew v. Pennsylvania Dep't of Corr.*, 2013 WL 3978339, at *3 (Pa. Commw. Ct. Apr. 9, 2013) (same). All three elements for abstention are present and this Court should abstain from interfering in the litigation currently pending before the court in Montgomery County.

While there are exceptions that preclude application of the *Younger* doctrine, they do not apply here. "Exceptions to the *Younger* doctrine exist where [1] irreparable injury is both great and immediate, [2] where the state law is flagrantly and patently violative of express constitutional prohibitions, or [3] where there is a showing of bad faith, harassment, or…other unusual circumstance that would call for equitable relief." *Vurimindi v. Anhalt*, No. 2:20-CV-5368, 2020 WL 6395466, at *3 (E.D. Pa. Nov. 2, 2020). *Younger* exceptions are to be narrowly construed. *Id.* None of these exceptions are applicable here. In fact, the Pennsylvania court has already concluded that Plaintiffs will not suffer any irreparable harm because of the Order. There are no state laws at issue that would flagrantly run afoul of the Constitution -- such as a complete ban solely on religious education -- nor any bad faith or harassment caused by the Respondents. As such, there are no exceptions that would bar the application of the *Younger* abstention doctrine and the Court should abstain from ruling on Plaintiffs' motion for preliminary injunctive relief.

C. Plaintiffs Are Not Entitled to Preliminary Injunctive Relief.

1. Standard for Preliminary Injunction

Plaintiffs have requested the issuance of both a temporary restraining order and a preliminary injunction to prevent the Order from going into effect. Temporary restraining orders and preliminary injunctions are governed by "nearly identical factors," the principal distinctions being in procedure and effect. *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 236 n.4

(3d Cir. 2011). Unlike a preliminary injunction, a temporary restraining order can issue without notice to the adverse party and will dissolve on its own, unless extended by the court or with consent of the adverse party under Rule 65(b)(2) of the Federal Rules of Civil Procedure. *Id.*

As stated by the Third Circuit Court of Appeals in 2019 in *Fulton v. City of Philadelphia*:

> When evaluating a motion for preliminary injunctive relief, a court considers four factors: (1) has the moving party established a reasonable likelihood of success on the merits (which need not be more likely than not); (2) is the movant more likely than not to suffer irreparable harm in the absence of preliminary relief; (3) does the balance of equities tip in its favor; and (4) is an injunction in the public interest? *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Reilly*, 858 F.3d at 179. If a plaintiff meets the first two requirements, the District Court determines in its sound discretion whether all four factors, taken together, balance in favor of granting the relief sought. *Id.*

Fulton v. City of Philadelphia, 922 F.3d 140, 152 (3d Cir. 2019), *cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania*, --- U.S. ---, 140 S. Ct. 1104 (2020). A preliminary injunction is an extraordinary remedy. It should not be granted unless the movant carries its burden of persuasion by a clear showing. *See Kelly v. PA DOC*, No. 20-CV-4413, 2020 WL 6504566, at *5 (E.D. Pa. Nov. 5, 2020) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

According to the Third Circuit Court of Appeals, the first two factors of this analysis – likelihood of success on the merits and irreparable harm—are "gateway factors." *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 675 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019) (*citing Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). Thus, a court must first analyze whether the movant has met these threshold factors before considering the last two—balance of harms and public interest. *Id.* (*citing Reilly*, 858 F.3d at 179).

With respect to the first prong, the movant need only prove a "prima facie case," not a "certainty" he will win. *Issa v. School District of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017) (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001)). The

right to a final decision after trial need not be "wholly without doubt"; the movant need only show a "reasonable probability" of success. *Id*. (quoting *Punnett v. Carter*, 621 F.2d 578, 583 (3d Cir. 1980)) (internal quotation marks omitted). *See also Victory v. Berks County*, 355 F.Supp.3d 239, 248 (E.D. Pa. 2019) (quoting *Borough v. Middletown Water Joint Venture LLC*, No. 18-861, 2018 WL 3473972, at *5 (M.D. Pa. July 19, 2018) ("To establish a likelihood of success on the merits, a movant must produce sufficient evidence to satisfy the essential elements of the underlying cause of action").

With respect to the irreparable harm prong, a plaintiff must demonstrate a "significant risk" of harm that cannot be compensated monetarily. *Cigar Ass'n of Am. v. City of Philadelphia*, 2020 WL 6703583, at *6 (E.D. Pa. Nov. 13, 2020) (*quoting Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000)).

2. Plaintiffs Cannot Establish Irreparable Harm

a. *The limited scope and nature of the Order compels the conclusion that there is no irreparable harm.*

The Order provides for all-virtual learning for a two-week period during a pandemic. This translates to between five and eight days of virtual learning depending on a given school's calendar. Eleven of the 23 school districts are already engaged in all-virtual learning. In addition, many of the remaining schools conduct in-person learning through a hybrid model where students only attend in-person two days a week. Thus, the Order would impact these students even less – some four days. The Order does not "shutter schools" or deprive anyone of an education. It simply alters the manner of education for a matter of days during a time of a serious increased health risk for the school community. Such incidental and temporary impact does not equate to irreparable harm. *See, e.g., Erlbaum v. New Jersey Dep't of Envtl. Prot.*, 2017 WL 465466, at *15 (D.N.J. Feb. 3, 2017) (holding that plaintiffs failed to establish irreparable

harm where the government's repair of beach dunes only denied their "ability to access and enjoy the beach for hours or days at a time[.]")

b. Plaintiffs are collaterally estopped on the issue of irreparable harm.

The Court of Common Pleas of Montgomery County has already found that these Plaintiffs or their privies failed to prove irreparable harm necessary to warrant a special or preliminary injunction prohibiting the enforcement of this Order. Thus, Plaintiffs are barred by the doctrine of collateral estoppel from re-litigating this issue.

Collateral estoppel, or issue preclusion, operates to prevent a question of law or issue of fact that has once been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit. *Musser v. C. Wayne Co., L.P.*, 2016 WL 3080001, at *4 (Pa. Super. Ct. May 31, 2016) .

Under Pennsylvania law,[4] for collateral estoppel to apply, five elements must be met:

(1) an issue is identical to one that was presented in a prior case;

(2) there has been a final judgment on the merits of the issue in the prior case;

(3) the party against whom the doctrine is asserted was a party in, or in privity with a party in, the prior action;

(4) the party against whom the doctrine is asserted, or one in privity with the party, had a full and fair opportunity to litigate the issue in the prior proceeding; and

(5) the determination in the prior proceeding was essential to the judgment.

In re Weidner, 476 B.R. 873, 884-85 (E.D. Pa. 2012). All five elements are present in this case.

[4] Federal courts use the law of the forum where a decision was entered to determine whether it should give rise to collateral estoppel. *Estate of Tyler ex rel. Floyd v. Grossman*, 108 F. Supp. 3d 279, 289 (E.D. Pa. 2015).

The Honorable Richard P. Haaz of the Court of Common Pleas in Montgomery County has already decided the issue facing this Court: that Plaintiffs will not suffer irreparable harm as a result of the temporary, all-virtual school Order and therefore cannot establish a required element for preliminary injunctive relief. (State Court Decision, Exhibit "C," at p. 6). That determination was essential to Judge Haaz' decision because it is a required element to secure preliminary injunctive relief.

In addition, Plaintiffs are seeking to apply collateral estoppel against the same parties in the prior action or individuals in privity with them. The Superior Court has broadly defined privity as "such an identification of interest of one person with another as to represent the same legal right." *Garland v. Knorr*, 2020 WL 3034811, at *13 (E.D. Pa. June 5, 2020) (*quoting Ammon v. McCloskey*, 655 A.2d 549, 554 (Pa. Super. Ct. 1995). Two of the Plaintiffs in this action (John Mark Niels and Elizabeth Weir) were the lead plaintiffs in the prior action. Plaintiffs have simply removed Kaitlin Derstine (a plaintiff in the prior action) and inserted two new plaintiffs (Andrew and Kate Amrhein) in her place in this action. These new plaintiffs are in privity with Mr. Niehls and Ms. Weir because they are all claiming the same purported right to an in-person education. Because they are claiming the exact same right in this action that Mr. Niehls and Ms. Weir claimed in the prior action, privity exists between them.

Further**,** the plaintiffs in the prior action had a full and fair opportunity to litigate their request for preliminary injunctive relief before the state court. That court held a full hearing over the course of a day, heard testimony from six of plaintiffs' witnesses and entertained oral argument. Plaintiffs were provided with their "day in court" on their request for special and preliminary injunctive relief and should not be afforded another simply because they do not agree with Judge Haaz' decision.

In fact, since at least November 17, 2020, Plaintiffs have been planning two separate lawsuits in different forums in an apparent attempt to keep their claims alive if their first lawsuit was not successful. (*See* Exhibit "D"). On that date, a GoFundMe account operated by Mr. Niehls and his wife Kristen, explained that they were "zeroing in on two separate legal strategies" with one strategy apparently aimed at the Pennsylvania court and the other aimed at this Court. (*Id.*) Plaintiffs' attempt to seek a different decision from this court on the same issue is exactly the type of gamesmanship and forum shopping that collateral estoppel was designed to eliminate.[5]

Finally**,** there is a final adjudication on the merits that denied Plaintiffs' request for preliminary injunctive relief. Generally, an order denying preliminary injunctive relief does not constitute a final adjudication on the merits. *Porter v. Chevron Appalachia, LLC*, 204 A.3d 411, 419 n.2 (Pa. Super. Ct. 2019) (*citing Santoro v. Morse*, 781 A.2d 1220, 1229 (Pa. Super. Ct. 2001)). However, "a 'final judgment on the merits' is not an inflexible requirement…." *Lane v. Riley*, 2006 WL 2668514, at *3 (W.D. Pa. Sept. 14, 2006) (*citing Bearoff v. Bearoff Brothers, Inc.*, 327 A.2d 72, 75 (Pa. 1974)). And Pennsylvania law takes a broad view with respect to the finality of judgments for purposes of claim and issue preclusion. *See Pittsburgh Logistics Sys.,*

[5] Similarly, this "wait and see" approach is easily viewed as Plaintiffs' failure to act promptly in pursuing the emergent relief they seek from this Court. The Order issued on November 13th. Plaintiffs did not file this action until November 20th, have yet to serve the Defendants and did not properly file their TRO until 1:30 p.m. on Monday, November 23rd -- after all Montgomery County schools had implemented all virtual learning for a two-week period. "A party's delay in seeking a preliminary injunction could 'belie[ ] its claim of irreparable injury.'" *URL Pharma, Inc. v. Reckitt Benckiser Inc.,* 2016 WL 1592695, at *11 (E.D. Pa. Apr. 20, 2016). The Third Circuit has stated that any "delay in seeking enforcement of those rights…tends to indicate at least a reduced need for such drastic, speedy action." *Lanin v. Borough of Tenafly*, 515 Fed.Appx. 114, 118 (3d Cir. 2013). This Court has held that a one-month delay in seeking injunctive relief regarding the denial of access to educational opportunities may, standing alone, preclude a finding of irreparable harm. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 409 (E.D. Pa. 2017). While the delay in this case was one week, it was an intentional delay all while schools, staff and parents planned to comply with the Order's start date of Monday November 23rd.

Inc. v. LaserShip, Inc., 2019 WL 2443035, at *6 (W.D. Pa. June 12, 2019) (and cases cited therein).

The Third Circuit has also held that, "findings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again." *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 474 n. 11 (3d Cir.1997). In determining whether findings in a prior proceeding are "sufficiently firm," the court must consider whether "the parties were fully heard, whether the court filed a reasoned opinion, and whether that decision could have been or actually was appealed." *Id. (quoting In re Brown,* 951 F.2d 564, 569 (3d Cir. 1991)).

The state court's finding that Plaintiffs will suffer no irreparable harm is sufficiently firm to persuade this Court that there is no compelling reason to re-litigate the issue. The state court held a hearing that consisted of testimony from six different witnesses over the course of full day. Moreover, Judge Haaz issued a six-page memorandum with findings of fact and conclusions of law to support his decision that Plaintiffs will not suffer irreparable harm because of the Order and not entitled to preliminary injunctive relief. (State Court Decision, Exhibit "C," at pp. 1-6). Plaintiffs have not appealed this decision to date but could do so. Pa. R.A.P. 311(a)(4). As a result, the state court's finding that Plaintiffs will not suffer irreparable harm as a result of the Order is "sufficiently firm" to convince this Court that another hearing on this same issue of irreparable harm is not necessary.

As such, Respondents have established all five elements for the application of collateral estoppel and the Court should deny Plaintiffs' motion for preliminary injunctive relief on that basis alone.

3. There Is No Likelihood of Success on the Merits.

a. The Order Does Not Violate the Free Exercise Clause

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities based on that religious status. U.S. Const. amends. I, XIV ("Congress shall make no law . . . prohibiting the free exercise [of religion]"); *Espinoza v. Mont. Dep't of Revenue*, -- U.S. --, 240 S. Ct. 2246, 2254 (June 30, 2020); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating prohibition into the Fourteenth Amendment). At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993).

But the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," even if the law has the incidental effect of burdening a particular religious practice. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (Free Exercise Clause did not require a state to exempt the ingestion of peyote during a Native American Church ceremony from its neutral, generally applicable prohibition on using that drug); *Lukumi*, 508 U.S. at 531; *United States v. Lee*, 455 U.S. 252, 260 (1982) (imposition of Social Security tax that applied generally to all individuals was constitutional, even though it had incidental effect of conflicting with Amish religion); *Salvation Army v. Dep't of Cmty. Affairs of State of N.J.*, 919 F.2d 183, 194 (3d Cir. 1990) (rejecting argument that *Smith* was limited to free exercise challenges to neutral, generally applicable criminal statutes only); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999) (same).

A free exercise claim can prompt either strict scrutiny or rational basis review. *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003); *Ali v. Sponaugle*, 2019 WL 2295952, at *6 (E.D. Pa. May 30, 2019). To survive strict scrutiny, a challenged governmental action must be narrowly tailored to advance a compelling governmental interest, whereas a rational basis review requires merely that the action be rationally related to a legitimate governmental objective. *Id. at* 165 n. 24.

With respect to Free Exercise claims, a law that is "neutral" and "generally applicable," need not be justified by a compelling governmental interest even if that law has the incidental effect of burdening a particular religious practice. *Lukumi*, 508 U.S. at 531; *Tenafly*, 309 F.3d at165, *citing*, *Smith*, 494 U.S. at 879; *Agudath Israel of Am. v. Cuomo*, 2020 WL 6559473, at *5 (2d Cir. Nov. 9, 2020) ("Rational-basis review applies when a generally applicable policy incidentally burdens religion…."); *Smith*, 494 U.S. at 879. In these circumstances, a rational basis review is called for.

Here, Plaintiffs contend that the Order is neither neutral nor generally applicable because, when the Board determine to "shutter schools," it did not close other places where people congregate that are more secular in nature, like restaurants, bars, casinos, gyms and libraries, which – according to Plaintiffs – are known super-spreaders (whereas schools, they contend, are not). (Plaintiffs' Brief at pp. 23-24).

For the reasons set forth below, Respondents contend that the appropriate standard of review is the rational basis standard, which is clearly satisfied in this case.

i. The Order is Neutral

A law is not neutral if its object is to infringe upon or restrict practices because of their religious motivation. *Lukumi*, 508 U.S. at 532; *Tenafly*, 309 F.3d at 165. Laws have been found to be non-neutral if they single out religious activity alone for regulation. *Central Rabbincal*

Congress of the United States & Canada et al. v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183, 195 (2014) (Health regulation that purposefully singles out religious conduct performed by a subset of Orthodox Jews to solely regulate was not neutral and, as such, subject to strict scrutiny); *Harmon v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995). Or, where laws discriminate on their face between religious and non-religious activity. *Lukumi*, 508 U.S. at 533. Evidence that the law was motivated by animus towards people of faith in general or one faith or its practices can render it non-neutral. *Id*. Similarly, evidence that the law's impact falls only on one religious practice but almost no other can also render it non-neutral. *King v. Christie*, 981 F. Supp. 2d 296, 331 (D.N.J. 2013).

A lack of neutrality can also be found where the law appears generally applicable on its face but is not so in practice because exceptions within the law for comparable secular activities essentially amount to "religious gerrymandering." *Lukumi,* 508 U.S. at 535-36 (concluding that a law was non-neutral despite not expressly mentioning religious conduct because it included numerous secular exemptions); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F. 3d 359, 365-67 (3d Cir. 1999) (finding that policy that required police officers to shave their beards was unconstitutional because it provided exceptions for secular health purposes, but not for religious purposes). Moreover, a facially neutral law is not neutral if, in practice, it is selectively enforced by government officials in the exercise of their discretion so to exempt some secularly motivated conduct but not comparable religiously motivated conduct. *Lukumi* (ordinance punishing whoever unnecessarily kills any animal was not neutral where it gave officials discretion to consider the particular justification for each violation and where officials selectively applied the ordinance to permit hunting but not animal sacrifice during Santeria religious ceremonies; thus, strict scrutiny applied). *Tenafly Eruv Ass'n, Inc. v. Borough*

of Tenafly, 309 F.3d 144, 178 (3d Cir. 2002) (holding that plaintiffs were reasonably likely to show that the Borough violated the Free Exercise Clause by applying ordinance selectively against conduct motivated by Orthodox Jewish beliefs.)

Plaintiffs really proffer no argument that the Order in this case is not neutral -- beyond just saying so. (Plaintiffs' Brief at p. 25). Suffice it to say none of the above factors are present in this case. The Order does discriminate on its face but applies to all schools. It does not target "religiously motivated conduct" [arguably receiving a religious education] as it does not even use religion as a basis of classification for the imposition of the obligation to go all-virtual. It applies to ALL schools in the county. Moreover, it does not deprive anyone of a religious education, but merely temporarily alters the method and manner of all education – secular and spiritual -- for a short period of time during a pandemic. There is no allegation that the Order itself is religiously motivated or record evidence thereof. There are no exemptions for non-religious schools that could amount to "religious gerrymandering." There is no claim that the Order itself leaves some discretion to the Board or OPH to enforce it selectively as to certain schools nor a claim that the Board has impermissibly done so. In short, the Order is neutral.

ii. The Order is Generally Applicable

Plaintiffs' primary argument for the application of strict scrutiny review is that the Order is not generally applicable. Laws burdening religious practice must be of general applicability. *Smith*, 494 U.S. at 879-881. The general applicability requirement prohibits the government from "in a selective manner impos[ing] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. "While all laws are selective to some extent, . . . categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. "A law is therefore not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct

that is at least as harmful to the legitimate government interests purportedly justifying it." *Central Rabbinical Congress,* 763 F.3d at 197, *citing*, *Lukumi*, 508 U.S. at 535-38; *Agudath Israel of Am. v. Cuomo*, 2020 WL 6559473, at *2 (2d Cir. Nov. 9, 2020) (holding the same).

In *Lukumi*, the city of Hialeah passed four ordinances after a Santeria church moved in, which engaged in animal sacrifice as a form of religious practice. *Id.* at 537. These ordinances precluded animal cruelty. The expressed governmental interest behind these laws was protecting the public health and preventing cruelty to animals. The ordinances, however, failed to prohibit secular conduct that endangered these interests to a similar or greater degree than Santeria ritual sacrifice. *Id.* at 543-44. It permitted, for example, fishing, hunting, rat extermination, euthanasia of stray animals, the placing of poison in one's yard and the infliction of pain and suffering in the interest of medical science. *Id.* Improper disposal of animal carcasses poses a health risk that results from any form of animal killing, but the ordinance only addresses it when it results from religious exercise. *Id.* The Court found that the Ordinances were so underinclusive to be not generally applicable and thereby, warranting of strict scrutiny. *Id.* at 544-45.

iii. Here, the Board's Order is not Underinclusive.

First, the Order is not underinclusive because it does not fail to regulate secular conduct that is at least as harmful to the expressed governmental interest that justifies the Order. The expressed governmental interest for the Order is to prevent the increase of linked-transmissions in the Montgomery County school systems and thus the spread of COVID-19 in the school community in light of the enhanced risks of the Thanksgiving Holiday. The text of the Order provides in part:

> Based on experience from prior holidays during the COVID-19 pandemic, it is anticipated that the traditional celebrations associated with the Thanksgiving Holiday coupled with the high incidence of COVID-19 in Montgomery County have the potential to dramatically increase the spread of COVID-19 across the community.

> The implementation of virtual schools during the period of peak contagion is designed to reduce the spread of COVID-19 and is essential to ensure the protection of children, school staff, and others who are impacted, as well as those in the general community. (Order, ¶¶ 5-6).

The purpose of the Order is to try and keep staff healthy and the doors open. This governmental interest is based on both sound data and real threats of functional school closings. The risk of increased linked transmissions – already seen with alarming rate within schools -- is increased by college students returning home for Thanksgiving. Thus, the Order is aimed at school settings only – and all school settings.

Second, Plaintiffs comparison to "other secular activities" is simply not valid. Restaurants, bars, casinos, libraries, day-care centers, and gyms are not comparable secular activities. The restriction imposed by the Order short-term virtual education cannot be accomplished in these realms. One cannot virtually eat and drink.

Moreover, the data does not warrant a similar restriction to be imposed by the County Department of Health. To date, there have no reported cases of positive transmissions in gyms in the county. The same is true for hair salons and barbers. There have been only one or two cases of employee to employee spread of the virus in restaurants and bars in the County. There have been no documented cases of transmission from bar/restaurant employee to patron. These low rates of transmission in the County are the result of extremely aggressive enforcement of the Governor's Executive Order placing COVID-19 related restrictions on these establishments. As such, the secular conduct identified by Plaintiffs is not equally "harmful to the legitimate government interests purportedly justifying it" such to render the Order "under-inclusive." *Central Rabbinical Congress,* 763 F.3d at 197, *citing*, *Lukumi*, 508 U.S. at 535-38.

Finally, the Montgomery County Board of Public Health was specifically delegated responsibility for the prevention and control of communicable diseases in the schools by the Pennsylvania legislature. 35 P.S. § 521.3(a). As to businesses and other activities, the Governor signed Executive Orders enacting COVID-19 restrictions on the places of secular activities identified by Plaintiffs. *See* Order Directing Mitigation Measures of July 16, 2020 and the October 6, 2020 Amendment to that Order, copies of which are attached hereto as Exhibit "F." The Board and OPH acted completely within its lane and should not be deprived of that responsibility because Plaintiffs claim OPH should act more broadly – without any analysis of whether the Board and OPH could even do so in light of the state-wide regulations in effect.

Indeed, this scenario – where the local county board of public health is delegated the responsibility to enact emergency management measures regarding schools on a local, county basis – instead of the Governor enacting statewide measures – is actually accomplishing the expressed desires of Plaintiffs.

As such, the Order is both neutral and generally applicable and a strict scrutiny review is not warranted under these circumstances.

iv. The Order is rationally related to a legitimate governmental objective

The correct standard of review for this -- and each of Plaintiffs' constitutional claims -- is a rational basis review. Accordingly, the test is whether there is a plausible policy reason for the justification, based on the science available at the time – whether that science or those reasons ultimately turn out to be incorrect. *Nat'l Assoc. of Theatre Owners, et al., v. Murphy*, No. 20-8298, slip op. at 29-30 (D. N.J. August 18, 2020).

Here, the Order is designed to combat the spread of COVID-19 in Montgomery County schools leading up to and around the Thanksgiving holiday given the current understanding of

the virus. Its purpose is to keep students, teachers, administrators, staff, bus drivers – everyone necessary to open the doors of the school – healthy to accomplish that mission for the long term. The Order was based on hard data showing not just alarming rates of positivity in schools, but increased linked-transmissions indicating a rise of spread within the schools as well as actual instances of functional-closings, which absent this Order are likely to occur in greater numbers. Added to this grim news is the return of college students to the area that will only increase positivity rates and the risk of in-school spread.

This is an undeniable legitimate government interest. Even Supreme Court Justices who have dissented in decisions concerning restrictions they believe burden the free exercise of religion have acknowledged that state governments have more than a legitimate government interest – indeed, a compelling interest -- in these circumstances. *South Bay United Pentecostal Church*, -- U.S. --, 140 S. Ct. at 1614 (2020) (Kavanaugh, J. dissenting) ("California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens"); *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) ("no one contests that the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus").

Courts routinely accord deference to the State – and here the County – when dealing with public health emergencies. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). As Justice Roberts noted in his *South Bay United Pentecostal Church* concurrence, quoted in full in the introduction of this Brief, in these dire circumstances, courts should defer to agencies such as the OPH and its Board to make decisions about COVID-19 restrictions. *South Bay United Pentecostal Church*, -- U.S. --, 140 S. Ct. at 1613-14 (denying injunction to vacate Governor's

Ex. Order limiting attendance at places of worship to 25% of building capacity or a maximum of 100 attendees).

So too should this Court defer to the Board and the OPH's decision-making and expertise in dealing the scourge of COVID-19.

Frankly, these facts also easily satisfy a strict scrutiny review. Controlling COVID-19 is a compelling governmental interest as acknowledged in the cases cited above. The Order is narrowly tailored to address an alarming rise of COVID-19 and linked-transmissions in the schools by imposing virtual learning for a two-week period. For all the reasons compelling a conclusion that the Order is not under-inclusive, including that it does not discriminate between religious and non-religious schools and the data indicating far less spread in non-secular places, the Order also satisfies strict scrutiny analysis.

b. The Order Does Not Violate Plaintiffs' Substantive Due Process Rights.

In Count II of the Complaint, Plaintiffs seek a declaratory judgment that the Order violates Plaintiffs' right to substantive due process. However, nowhere in the Complaint or in the Motion for Temporary Restraining Order do Plaintiffs clearly identify the Constitutionally protected rights or interests they contend have been violated by the Order. Without such an identification, the Court should deny outright Plaintiffs' substantive due process claims. Even if the Court considers them, it should conclude that Plaintiffs are not likely to succeed.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." It is well known that while, "on its face, this constitutional provision speaks to the adequacy of state procedures, ... the clause also has a substantive component." *Nicholas v. Pa. State Univ.,* 227 F.3d 133, 139 (3d Cir. 2000) (citing *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833, 846–47 (1992)). This substantive

component protects citizens from arbitrary and improperly motivated government action.[6]

The Third Circuit Court of Appeals has previously acknowledged that the "fabric of substantive due process, as woven by our courts, encompasses at least two very different threads." *Id.* The first thread applies to legislative acts, which are laws and broad executive regulations that apply generally to large segments of society, as opposed to non-legislative, or executive acts, which generally apply to one person or to a limited number of people. *Id.* at 139 n. 1. A legislative act that limits a fundamental right will survive a substantive due process challenge only if it is necessary to promote a compelling governmental interest. *Id.* at 139. When a fundamental right is not at stake, however, a law must only be rationally related to a legitimate government interest to survive a substantive due process challenge. *Id.*

The second thread of substantive due process jurisprudence analyzes non-legislative, or executive actions. Non-legislative government acts may not arbitrarily infringe on fundamental rights protected by the Constitution. *Id.* at 139. And even where non-legislative action infringes on a fundamental right, only the *"most egregious* official conduct can be said to be 'arbitrary in the constitutional sense.'" *Boyanowski v. Capital Area Intermediate Unit,* 215 F.3d 396, 400 (3d Cir. 2000) (citing *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998) (emphasis in original)). Such abuse of power must "shock[ ] the conscience." *Id.* at 401 (citing *Lewis,* 523 U.S. at 846).

Given its broad application to public and private schools in the County, the Order at issue is properly analyzed under the first thread of substantive due process—whether it is rationally related to a legitimate government interest, or, if fundamental rights are implicated, necessary to promote a compelling governmental interest. *Nicholas,* 227 F.3d at 139.

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[6] There is no suggestion that the issuance of the Order was improperly motivated.

To be clear, there are no fundamental rights at stake here, nor have Plaintiffs identified any. Since Plaintiffs complain that the Order will result in educational loss to children who attend school in the County, this Court could construe Plaintiffs' claims as seeking to vindicate an alleged general right to public education. However, no such fundamental right to public education has ever been recognized. *Bowers v. NCAA*, 475 F.3d 524, 553 (3d Cir. 2007) (*citing San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution"). "Nor [has the Supreme Court] accepted the proposition that education is a 'fundamental right,' like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it." *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988).[7]

Since Plaintiffs' claims do not involve a fundamental right recognized by the United States Constitution, the Order need only be rationally related to a legitimate governmental interest, which clearly is the case here. Plaintiffs acknowledge the applicability of the rational basis standard in their Brief. (Plaintiffs' Brief at p. 21). Indeed, one of the cases upon which Plaintiffs rely, *County Concrete Corp. v. Town of Roxbury*, explains just how difficult it is to demonstrate a substantive due process violation for legislative action. *See County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) (citations omitted) (government must have had no legitimate reason for its decision or it must have been arbitrary or irrational).

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[7] If the Court determines that the issuance of the Order qualifies as non-legislative action, then Plaintiffs are precluded from asserting a substantive due process claim because without a fundamental right at issue, the state action can only be challenged for a violation of procedural due process. *See Fiedler v. Stroudsburg Area School District*, 427 F.Supp.3d 539, 555 (M.D.Pa 2019) (claim for deprivation of student's right to public education based on non-legislative action can only proceed as a procedural due process claim because there is no fundamental right to education); *see also Nicholas*, 227 F.3d at 140-42 (discussing how interests that do not qualify as fundamental rights cannot form the basis of a substantive due process claim arising from non-legislative action); *Kirby v. Loyalsock Tp. School Dist.*, 837 F.Supp.2d 467, 478 (M.D.Pa. 2011) (same).

This standard is especially difficult to meet when the government action is general economic and social welfare legislation as is the case here. "[W]hen 'general economic and social welfare legislation' is alleged to violate substantive due process, it should be struck down only when it fails to meet a minimum rationality standard, an 'extremely difficult' standard for plaintiff to meet." *See Stern v. Halligan,* 158 F.3d 729, 731 (3d Cir. 1998) (quoting *Knight v. Tape, Inc.,* 935 F.2d 617, 627 (3d Cir. 1991)).

To pass muster under this rational basis standard, the Order need not be narrowly tailored to achieve its legitimate end. *Id.* at 734 ("Mere over or underinclusiveness will not invalidate social welfare regulation so long as the state action represents a rational response to a legitimate problem."). Nor must the law be consistent in every respect with its goals. "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Rogin v. Bensalem Township,* 616 F.2d 680, 689 (3d Cir.1980) (quoting *Williamson v. Lee Optical,* 348 U.S. 483 (1955)).

Other than by saying it is "clear" that the Order violates substantive due process, Plaintiffs provide no explanation as to how. To the contrary, there can be no serious argument that the Order does not satisfy this minimal standard, which is discussed in detail in Section III(C)(3) above. *See Stern,* 158 F.3d at 732 ("Protecting the health, safety, and general welfare of township inhabitants ... is plainly in the public interest."). Based on the data made available to it about the significant recent increases in COVID-19 infections and the impact upon the schools and the community, which is described above and set forth in the accompanying Declaration of Janet Panning, MS, the Interim Administrator of the Montgomery County Department of Health and Human Services, the Board of Health reasonably concluded that the Order, which was very limited in time and scope, would protect the health and safety of the school community during

this period of time surrounding the Thanksgiving holiday, and allow for the reopening of the schools to in-person learning shortly thereafter. (Panning Decl., ¶¶7-24, 28-30). The Board does not need to prove that there was any different or less restrictive way to protect the school community if its rationale was reasonable, which under the circumstances it surely was. *See Stern,* 158 F.3d at 734; *Rogin,* 616 F.2d at 689. Thus, as properly analyzed under the first thread of substantive due process, the Order does not impermissibly limit any substantive due process rights and Plaintiffs are not likely to succeed on their substantive due process claim.

c. Plaintiffs' Have Not Asserted a Claim for Violation of Procedural Due Process.

With respect to an asserted due process violation, Plaintiffs limit their claims in the Complaint to only ***substantive*** due process. Therefore, there is no reason for this Court to consider granting a Temporary Restraining Order on the basis that the Order violates Plaintiffs' rights to procedural due process, and Plaintiff's arguments in their Brief should be summarily ignored. Even if the Court were inclined to consider Plaintiffs' likelihood of success on a procedural due process claim that is not pleaded in the Complaint, the Court should quickly conclude that such claim lacks merit.

A claim that the Respondents issued the Order in violation of Plaintiffs' procedural due process rights will fail because, in issuing the Order, Respondents were acting in a legislative capacity, and the United States Supreme Court long ago held that the protections of procedural due process do not extend to legislative actions. *See Rogin,* 616 F.2d at 693 (citing *Bi–Metallic Inv. Co. v. State Bd. of Equalization of Colo.,* 239 U.S. 441 (1915)).

Here, while the Order is not legislation in the strict sense of the word, its issuance does qualify as legislative action because it applies generally to all schools within the County and not merely to Plaintiffs. Thus, the Order constitutes general statements of County policy rather than

specific applications of policy to a particular person. Under this definition, the Order can only be properly characterized as a legislative act. Accordingly, under established precedent Plaintiffs have no valid procedural due process claim and that should end the inquiry.

If the Court does examine the substance of the claim as argued by Plaintiffs in their Brief, the Court should conclude that no such valid claim exists. The "hallmarks of a procedural due process claim" are "pre-deprivation notice and [a] hearing." *Burella v. City of Philadelphia*, 501 F.3d 134, 146 (3d Cir. 2007); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the "fundamental requirement" of procedural due process is "the opportunity to be heard at a meaningful time and in a meaningful manner.").

To state a claim under §1983 for deprivation of rights to procedural due process, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of "life, liberty, or property," and (2) the procedures available to him did not provide him with due process of law. *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006). Whether a property interest exists for procedural due process purposes is determined by looking at a state law. *See Ruiz v. New Garden Twp.*, 376 F.3d 203, 206 (3d Cir. 2004).

Again, this claim is not pleaded in the Complaint nor is the alleged State law property interest subject to deprivation is not well-defined in Plaintiffs' Brief. At most, it appears that Plaintiffs assert the affected property interest to be a general right to education. Indeed, their sole description of this property interest is a line in the Brief that says, "Pennsylvania law recognizes that the right to education is a statutory right." (Plaintiffs' Brief at p. 27 (citing *O'Leary v. Wisecup*, 364 A.2d 770 (Pa. Cmwlth. Ct. 1976))). That general proposition only goes so far. Plaintiffs have not defined any State law property interest of which they have been

deprived because of children having virtual only education for a five to eight-day period over the Thanksgiving holiday. In fact, under Section 520.1 of the Pennsylvania Public School Code, local school districts have flexibility in the case of emergencies, such as the current COVID-19 pandemic, to determine how best to satisfy instructional time requirements of State law for public education. 24 P.S. § 5-520.1. *See also* Pennsylvania Department of Education Guidance *Instructional Days/Hours During the 2020-2021 School Year - Implications Related to COVID-19*, a copy of which is attached hereto as Exhibit "E" and available at the following link (https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/SchoolReopeningGuidance/ReopeningPreKto12/Pages/InstructionalHours.aspx). Given this flexibility during unprecedented times, Plaintiffs must do much more to demonstrate that Plaintiffs have been deprived of their children's statutory right to education.[8]

The Order merely requires virtual only learning for a limited period surrounding the Thanksgiving holiday. It amounts to a period of five to eight-school days depending on the school's calendar (and perhaps even less given that some districts within the County have a hybrid in-person schedule in any event). Plaintiffs do not explain how this brief pause in in-person learning over the holiday in any way deprives Plaintiffs of their children's statutory right to education in Pennsylvania. The studies and related material cited by Plaintiffs in their papers about the potential long-term effects of virtual learning do not support their claim of deprivation under these very limited circumstances. Since Plaintiffs will be unable to demonstrate the deprivation of any State law property interest because of the implementation of the Order, they will have no chance of success on a denial of procedural due process claim.

[8] As explained above in Section III.A, Plaintiffs lack standing to assert this claim.

If the Court goes further and determines it appropriate to consider the process employed in connection with the issuance of the Order, the Court will plainly see that the process was fair and reasonable and in full compliance with Pennsylvania State law, as recognized by the State Court in its November 20, 2020 Order denying Plaintiffs' Petition for Special and Preliminary Injunction. Plaintiffs cite to the balancing test set forth by the United States Supreme Court in *Mathews*, *supra*, for administrative actions, which asks the Court to weigh the private interest affected by the state action and the value of additional procedural safeguards against the burdens that such additional procedures would impose upon the government. *See* Plaintiffs' Brief at p. 28. *See also Rogin*, 616 F.3d at 694 (*citing Mathews*, 424 U.S. at 335)). Even if this balancing test were applicable, the balancing of competing interests demonstrates that the process employed by the Respondents in issuing the Order was eminently fair.

Indeed, Plaintiffs' recitation of the events that occurred on November 12 and 13, 2020 which led to the issuance of the Order is wholly unsupported by affidavits, declarations or exhibits, and is frankly not close to accurate. The process to consider the issue of virtual only learning over the Thanksgiving holiday was noticed in accordance with Pennsylvania law, and involved the participation of, and considered the input from hundreds of members of the general public, if not more. (State Court Decision, Exhibit "C," Findings j-u, at pp. 2-3). In fact, two (2) of the Plaintiffs themselves attended the November 12, 2020 virtual public meeting and spoke orally during the public comment portion of the meeting. (State Court Decision, Exhibit "C," Findings q and r, at p. 3). Surely, Plaintiffs themselves cannot legitimately claim to not have had notice and opportunity to submit their views on the issue of virtual only learning before the Order was issued.

Thereafter, these Plaintiffs (and in the case of the Amrheins, their proxies), challenged the process in State Court and requested an injunction to halt the Order from going into effect. On Friday, November 20, 2020, Plaintiffs presented evidence and testimony attempting to demonstrate the unfairness of the process and convince the State Court to give them the exact relief they are seeking from this Court. The request for injunction was denied. In doing so, the State Court made several factual findings about the process and ultimately concluded that the State Court Defendants "satisfied the advanced notice and public participation requirements of" Pennsylvania's Sunshine Act. (State Court Decision, Exhibit "C," Conclusion of Law #7, at p. 5). Plaintiffs cannot now relitigate these issues to overturn the State Court's conclusions about the fairness of the process.

In balancing the various interests at stake, this Court should conclude that there were no procedural due process problems here and Plaintiffs will not succeed on a procedural due process claim.

d. The Order Does Not Violate Plaintiffs' Equal Protection Rights

The Fourteenth Amendment prohibits states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Clause does not prohibit differentiation among classes of persons, but rather restrains a state from "treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Because Plaintiffs do not allege membership in a historically disparaged class or group, they are proceeding on a "class of one" theory. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (noting that the "class of one" theory applies where "the plaintiff did not allege membership in a class or group"). To state an equal protection claim under this theory, "a plaintiff must allege that (1) the defendant treated him differently from others similarly situated,

(2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill v. Bor. of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006).

i. Plaintiffs do not adequately identify how they have been treated differently than others similarly situated

Nowhere in Plaintiffs' Brief do they attempt to identify the class of individuals with which they are purportedly situated similarly. Nor do they identify how they have been treated differently than others within that class. The only statement of any kind in this regard is found on page 31 of their Brief which states:

> Defendants Order violates the rights of Plaintiffs, who have done an excellent job of limiting and preventing the spread of COVID-19 with the schools, while permitting other businesses and activities continue despite the evidence that those businesses and activities are responsible for the spread of COVID-19 in Montgomery County. (Plaintiffs' Brief at p. 31).

There are numerous problems with this argument. First, it is not at all clear who Plaintiffs claim fall within their class of "similarly situated" persons. If the class is all school-aged children in Montgomery County, then as pointed out in the Standing argument above, Plaintiffs lack standing to assert an equal protection argument because they are not members of that class. If the claim is that schools are being treated differently than commercial establishments, then once again Plaintiffs lack standing because they are individuals -- not schools -- and have no standing to argue on behalf of Montgomery County schools.

In looking at the issue of determining whether a plaintiff is "similarly situated" with others within a "class of one", the Third Circuit Court of Appeals has said that people are similarly situated for purposes of the Equal Protection Clause when they are alike "in all relevant aspects." *Startzell v. City of Phila.*, 533 F.3d 183, 203 (3d Cir. 2008) (quoting *Nordlinger*, 505 U.S. at 10)). In our Circuit, a plaintiff need not show that comparators are *identical* in all relevant aspects but rather that they share pertinent similarities. *See Borrell v. Bloomsburg Univ.*,

955 F.Supp.2d 390, 405 (M.D. Pa. 2013). "Determining whether an individual is 'similarly situated' to another individual is a case-by-case fact-intensive inquiry." *Id.* (quoting *Chan v. Cnty. of Lancaster*, No. 10–3424, 2011 WL 4478283, at *15 (E.D. Pa. Sept. 26, 2011)).

Here, plaintiffs have failed to identify any individual or group of individuals to whom they are "similarly situated". On that basis alone, the Plaintiffs' Equal Protection claim must fail. Moreover, even if Plaintiffs were able to identify such a class, they have not sufficiently shown that they have been treated differently than others similarly situated within that class.

Plaintiffs' entire argument seems to be that businesses and other activities are being treated differently (and less restrictively) than schools even though those businesses and other activities are responsible for the spread of COVID-19. Plaintiffs, however, have presented no verified facts that establish what businesses or activities within Montgomery County are responsible for the spread of COVID-19, or that somehow those businesses and activities are somehow being regulated less restrictively by the Board of Health. In fact, it is simply not true.

The verified facts contained in the Declaration of Janet Panning contradict Plaintiffs' allegation that any commercial establishments within Montgomery County are responsible for significant spread of COVID-19. Moreover, contrary to Plaintiffs' unverified statement, there are, in fact, significant restrictions on businesses and activities in Montgomery County which are specifically aimed to curb the spread of COVID-19, all of which have been imposed by the Governor, including but not limited to those found at:

> Targeted Mitigation Order: https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/Targeted-Mitigation-FAQ.aspx
>
> As to Mask Wearing: https://www.health.pa.gov/topics/disease/coronavirus/Pages/Stop-the-Spread.aspx
>
> As to Travelers: https://www.health.pa.gov/topics/disease/coronavirus/Pages/Travelers.aspx

Thus, there is absolutely no evidence that Plaintiffs have been treated differently than any other individuals similarly situated to them. All businesses and activities within the county are subject to some form of mitigation order aimed at curbing the spread of COVID-19. And contrary to the claims of Plaintiffs, there is simply no evidence that the spread of COVID-19 within commercial establishments in Montgomery County is worse than in the schools. On the contrary, the facts as established in the Declaration of Janet Panning show that the opposite is true. As a result, Plaintiffs' Equal Protection claim must fail.

ii. Even if the Order Does Treat the Plaintiffs Differently, the Respondents Had a Rational Basis for Adopting the Order

Even if the Plaintiffs were able to identify sufficiently similar comparators and establish that they were treated differently to those comparators, Respondents still defeat Plaintiffs' claim by showing that there was a rational basis for classifying them separately. Under rational-basis review, a classification is unconstitutional if it is "irrational and wholly arbitrary." *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004) (quoting *Olech*, 528 U.S. at 564,); *see Highway Materials, Inc. v. Whitemarsh Twp.*, 386 Fed.Appx. 251, 259 (3d Cir. 2010) (explaining that class-of-one challenges fail when " 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification' " (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993))). "Rational basis review is a very deferential standard" that can be met "if there is any reasonably conceivable state of facts that could provide a rational basis for the differing treatment." *Newark Cab Assoc. v. City of Newark*, 901 F.3d 146, 156 (3d Cir. 2018) (quoting *United States v. Walker*, 473 F.3d 71, 77 (3d Cir. 2007)). On rational-basis review, a classification carries a presumption of validity, and those attacking the rationality of the classification "have the burden 'to negative every conceivable basis which might support it." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v.*

Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). A court may uphold state action creating a classification on any conceivably valid purpose, even when the court itself supplies the hypothetical basis. *Tillman v. Lebanon County Corr. Facility,* 221 F.3d 410, 423 (3d Cir.2000).

Here, Plaintiffs cannot meet their burden of establishing that there was no rational basis for the Order entered by the Board of Health. As set forth in Section III(C)(3)(d) above, the Board of Health had a rational basis for adopting the Order requiring all virtual education for a very limited two-week period.

IV. CONCLUSION

Respondents Montgomery County Office of Public Health and Montgomery County Board of Health respectfully request that the Court deny the Motion for Preliminary Injunction and Temporary Restraining Order and grant such further relief as the Court deems just and equitable.

Date: November 23, 2020

/s/ Raymond McGarry

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Attorneys for Respondents Montgomery County Office of Public Health and Montgomery County Board of Health

CERTIFICATE OF SERVICE

I, Raymond McGarry, hereby certify that on this 23rd day of November 2020, I caused a true and correct copy of the foregoing be electronically filed using the Court's electronic filing system, and to be served upon those parties requesting service therefrom.

/s/ Raymond McGarry
Raymond McGarry

EXHIBIT A

EXHIBIT B

MONTGOMERY COUNTY
BOARD OF COMMISSIONERS
VALERIE A. ARKOOSH, MD, MPH, CHAIR
KENNETH E. LAWRENCE, JR., VICE CHAIR
JOSEPH C. GALE, COMMISSIONER

MONTGOMERY COUNTY DEPARTMENT
OF HEALTH & HUMAN SERVICES
OFFICE OF PUBLIC HEALTH
PO BOX 311 • NORRISTOWN, PA 19404-0311
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JANET PANNING, MS
INTERIM ADMINISTRATOR
RICHARD S. LORRAINE, MD, FACP
MEDICAL DIRECTOR

ORDER OF THE MONTGOMERY COUNTY OFFICE OF PUBLIC HEALTH

Montgomery County School COVID-19 Risk Reduction and Mitigation Order

BACKGROUND

1. On March 8, 2020, the Montgomery County Commissioners declared a disaster emergency in Montgomery County because of a widespread outbreak of Coronavirus (COVID-19) that overwhelmed first responders, healthcare providers and businesses within Montgomery County.

2. The medical emergency from COVID-19 continues to endanger the health, safety and welfare of a substantial number of persons and businesses in Montgomery County, necessitating the continuation of the declared emergency through at least December 6, 2020, with the potential for extension beyond that date.

3. Emergency management measures are required to reduce the severity of this disaster and to protect the health, safety and welfare of affected residents in Montgomery County.

4. Montgomery County is currently experiencing a substantial surge of COVID-19 cases across the County with an associated rapid increase in hospitalizations related to COVID-19. The majority of spread is associated with private social gatherings and recreational sports.

5. Based on experience from prior holidays during the COVID-19 pandemic, it is anticipated that the traditional celebrations associated with the Thanksgiving Holiday coupled with the high incidence of COVID-19 in Montgomery County have the potential to dramatically increase the spread of COVID-19 across this community.

6. The implementation of virtual schools during the period of peak contagion is designed to reduce the spread of COVID-19 and is essential to ensure the protection

of children, teachers, school staff, and others who are impacted, as well as those in the general community.

THEREFORE, pursuant to my authority as Interim Administrator of the Montgomery County Office of Public Health under the Pennsylvania Disease Prevention and Control Law of 1955, 35 P.S. 521.1 et. seq., in order to ensure the health, safety and welfare of residents, school personnel, school children, their families, and the general populace of Montgomery County from the further spread of COVID-19, I hereby order the following:

All schools, both public and private in Montgomery County are required to support virtual education only, for the period of November 23 through December 6, 2020. This requirement includes virtual education only for special education and canceling of school sanctioned extra-curricular activities.

Janet Panning, MS
Interim Administrator
Montgomery County Office of Public Health

EXHIBIT C

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

JOHN NIEHLS, ELIZABETH WEIR, and KAITLIN DERSTINE *Petitioners*	:	NO. 2020-19389
v.	:	
MONTGOMERY COUNTY BOARD OF COMMISSIONERS, VALERIE A. ARKOOSH, KENNETH E. LAWRENCE, MONTGOMERY COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, MONTGOMERY COUNTY BOARD OF HEALTH, JANET PANNING, RICHARD S. LORRAINE, MICHAEL B. LAIGIN, FRANCIS JEYARAJ, STEVEN KATZ, BARBARA WADSORTH, MARTIN D. TRICHTINGER *Respondents/ Defendants*	:	

MEMORANDUM OF FINDINGS AND LEGAL CONCLUSIONS

Petitioners, John Niehls, Elizabeth Weir, and Kaitlin Derstine, filed a Complaint and Petition for Special and Preliminary Injunction on November 18, 2020 to enjoin official action taken by Respondent, Montgomery County Board of Health ("Board of Health"), at the special meeting held on November 13, 2020 for alleged violations of the Sunshine Act, 65 Pa.C.S.A. § 701, et. seq. The official action taken by the Board of Health required all schools in Montgomery County to support virtual education only for the period of November 23, 2020 through December 6, 2020 and canceled all school sanctioned extra-curricular activities due to the widespread outbreak of COVID-19. Petitioners allege that the Board of Health violated the Sunshine Act by failing to provide proper public notice of the November 13, 2020 meeting, by limiting public comment and by deliberating in private. Respondents filed their brief in opposition to the petition on November 19, 2020. An evidentiary hearing was held on November 20, 2020 which established the following:

a) Plaintiffs are residents of Montgomery County, Pennsylvania.

b) The Board of Health consists of five members appointed by the Montgomery County Board of Commissioners.

c) The five members of the Board of Health are Michael B. Laign, Francis Jeyaraj, Steven Katz, Barabara Wadsworth, and Martin D. Trichtinger, and are sued here in their official capacity.

d) The Board gave notice through the Montgomery County website of a special meeting to be held via Zoom on November 12, 2020 at 10 a.m.

e) The Montgomery County Office of Public Health tweeted the following on November 10, 2020 at 12:43 p.m.:

> There will be a Special Montgomery County Board of Health Meeting held virtually on Thursday, November 12, 2020 at 10am.
>
> To get the Zoom link, please confirm your participation by sending your name, phone number and e-mail address to Toyca Williams, twilliams@montcopa.org.

f) Attendance for the November 12th Zoom meeting was capped at 500 participants.

g) The November 12th meeting commenced at 10:00 am.

h) The proposed order presented for consideration was as follows:

> All schools, both public and private in Montgomery County are required to support virtual education only, for the period of November 23 through December 6, 2020 with the potential for expansion beyond this date. This requirement includes virtual education only for special education and canceling of school sanctioned extracurricular activities.

i) Lauren Hughes, Esquire is a Senior Assistant Solicitor for Montgomery County.

j) During the November 12th meeting, Ms. Hughes testified that she gave instructions regarding the two ways in which the public could provide comments to the Board.

k) Participants could speak orally at the meeting by entering their name in the "Chat Feature" to be called upon. Each speaker was asked to state their name and township where they reside at the outset of their oral comments.

l) Alternatively, members of the public could submit comments in writing to the Board via email to publichealth@montcopa.org.

m) Ms. Hughes testified that she was asked via the chat feature on Zoom to provide the email address to submit comments in writing to the Board of Health and Ms. Hughes did so.

n) Ms. Hughes testified that at the beginning of the meeting, she stated that the letters and emails that were previously sent to the Board of Health regarding the issue at hand would not be read out loud at the meeting, but had been sent to the Board of Health members for their consideration.

o) Public comments at the meeting were limited to two minutes per person.

p) Ms. Hughes maintained a list of people who indicated they wanted to publicly comment on the proposed order. Exhibit B, Declaration of Lauren Hughes, Esquire.

q) All three Petitioners were in Zoom attendance at the November 12th meeting.

r) All three Petitioners spoke orally at the Zoom meeting.

s) The Board heard between fifty (50) and seventy-five (75) public comments. *See* Memorandum of Law in Support of Petition for a Special and Preliminary Injunction, at 5.

t) After more than two hours of public comment, a 10-15 minute period elapsed where no one indicated via the chat feature they wished to speak publicly.

u) Ms. Hughes stated that comments could still be submitted via email for the Board's consideration. Ms. Hughes testified that a large number of emails were subsequently received and forwarded to the Board of Health for their consideration.

v) The Board of Health determined that it would recess without a vote and would reconvene the next day, November 13, 2020 at noon.

w) The November 12th meeting ended at approximately 12:40 p.m.

x) The Montgomery County Office of Public Health tweeted the following on November 12, 2020 at 5:11 p.m.:

> Thank you to those who spoke at today's Board of Health meeting. The meeting was recessed and will reconvene Fri. 11/13 at noon. Public comment received by 4pm today will be reflected in the final Board of Health minutes. Watch tomorrow's meeting here – facebook.com/MontcoHealthpa/

y) At 6 p.m. on November 12th, the Board of Health held a zoom meeting with Commissioner Val Arkoosh, Montgomery County Solicitor Josh Stein, Senior Assistant Solicitor Lauren

Hughes, all five members of the Board of Health, Michelle Masters, Janet Panning and Toyca Williams from the Health Department. This meeting was not open to the public.

z) At the 6 p.m. meeting, Solicitor Josh Stein was asked if removing the clause "with the potential for expansion beyond this date" would be possible. Solicitor Stein suggested removal of that language from the proposed order.

aa) None of the five members of the Board of Health indicated that discussions were held during that meeting for the purpose of making a decision. They referenced the 6 p.m. meeting as being informational.

bb) At that meeting, Commissioner Arkoosh and Michelle Masters informed those present about the public health reasons for passing the proposed resolution, how other counties in the Commonwealth were handling the issue, and whether the Commonwealth was considering action that might impact school closings.

cc) The meeting resumed on November 13th at noon via Facebook live.

dd) The public was able to observe the meeting on Facebook live, but no public comments were permitted.

ee) The Board voted to pass the following order excluding language of a potential expansion beyond the period specified:

> All schools, both public and private in Montgomery County are required to support virtual education only, for the period of November 23 through December 6, 2020 with the potential for expansion beyond this date. This requirement includes virtual education only for special education and canceling of school sanctioned extracurricular activities.

Conclusions of Law

1. On March 6, 2020, the Commonwealth of Pennsylvania issued a Declaration of Emergency due to the outbreak of COVID-19.

2. On March 8, 2020, the Montgomery County Commissioners declared a disaster emergency in Montgomery County which was extended by subsequent declarations to October 6, 2020.

3. On October 1, 2020, the Montgomery County Commissioners continued the declaration of emergency which took effect October 7, 2020 for a period of sixty days.

4. On April 20, 2020, the General Assembly passed COVID-19 related amendments to a number of statutes, including the Sunshine Act. 35 Pa.C.S. § 5741 - response to COVID-19 disaster emergency regarding local government meetings states as follows:

> **(c) Advance notice.--**To the extent practicable, an agency, department, authority, commission, board, council, governing body or other entity of a political subdivision shall post advance notice of each meeting conducted under subsection (a) on the entity's publicly accessible Internet website, if any, or in an advertisement in a newspaper of general circulation, or both. Public notice shall include the date, time, technology to be used and public participation information as provided under subsection (f).
>
> **(f) Public participation.--**To the extent practicable, an agency, department, authority, commission, board, council, governing body or other entity of a political subdivision shall allow for public participation in a meeting, hearing or proceeding through an authorized telecommunication device or written comments. Written comments may be submitted to the entity's physical address through United States mail or to an e-mail account designated by the entity to receive the comments.

5. Deliberation is defined as "the discussion of agency business held for the purpose of making a decision." 65 Pa.C.S.A. § 703.

6. 65 Pa.C.S.A. § 713 states, in relevant part, as follows:

> Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid. Should the court determine that the meeting met the requirements of this chapter, all official action taken at the meeting shall be fully effective.

7. Respondents satisfied the advanced notice and public participation requirements set forth in 35 Pa.C.S. § 5741(c) and (f).

8. Petitioners failed to satisfy their burden of proof that the Board of Health engaged in "deliberations" on November 12, 2020 in violation of the Sunshine Act.

9. Petitioners failed to satisfy their burden of proof that Respondents violated the Sunshine Act.

10. Petitioners failed to meet their burden of proof to satisfy the prerequisites to obtain a preliminary injunction. *See Lee Publications, Inc. v. Dickinson School of Law*, 848 A.2d 178, 189 (Pa. Cmwlth. 2004).

11. The evidence in the record does not support issuance of a preliminary injunction under Pa.R.C.P. 1531.

12. The petition for special and preliminary injunction is **DENIED** and a separate order will be entered.

BY THE COURT:

Richard P. Haaz, J.

This Memorandum has been e-filed on 11/20/20.
Service via e-filing by the Prothonotary to the parties of record.
Emailed to:
Michael Jorgensen, Court Administration, Civil Division

Secretary

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

JOHN NIEHLS, ELIZABETH WEIR, and KAITLIN DERSTINE *Petitioners* v. MONTGOMERY COUNTY BOARD OF COMMISSIONERS, VALERIE A. ARKOOSH, KENNETH E. LAWRENCE, MONTGOMERY COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, MONTGOMERY COUNTY BOARD OF HEALTH, JANET PANNING, RICHARD S. LORRAINE, MICHAEL B. LAIGIN, FRANCIS JEYARAJ, STEVEN KATZ, BARBARA WADSORTH, MARTIN D. TRICHTINGER *Respondents/ Defendants*	:	NO. 2020-19389

ORDER

AND NOW, this 20th day of November, 2020, upon consideration of the Petition for a Special and Preliminary Injunction, Respondents' brief in opposition thereto, and an evidentiary hearing held on November 20, 2020, it is hereby **ORDERED and DECREED** that said Petition is **DENIED.**

BY THE COURT:

Richard P. Haaz, J.

This Order has been e-filed on 11/20/20.
Service via e-filing by the Prothonotary to the parties of record.
Emailed to:
Michael Jorgensen, Court Administration, Civil Division

Secretary

EXHIBIT D

PIPE Lawsuit against Lockdowns

NOVEMBER 18, 2020 by JohnMark AndKristen Niehls, Organizer

Big news coming this afternoon on our lawsuit progress! Stay tuned to www.pipe4kids.com or the PIPE facebook group for more info!

NOVEMBER 17, 2020 by JohnMark AndKristen Niehls, Organizer

Many are asking for legal updates. For several reasons we are not able to provide step-by-step updates in a public forum. However, we have met with several attorneys and are zeroing in on two separate legal strategies. An attorney has been retained to file for a preliminary injunction this week, which was outlined on the original go fund me post. We are planning to retain a second attorney to pursue our other legal strategy, also this week, and have more meetings on that tomorrow.

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It is important to note that every attorney we have spoken with has said some version of the same thing... which is that this is an uphill battle. While it appears to be a slam dunk to a non-legal person like me, it's actually not.

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Once we get to the point of actually filing the case we will be able to share more specifics with everyone. Lots of work is going on and we just need time to pull it together. Thank you for the support.

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The best thing we can all do is to keep our voices loud and strong in a unified way. Montco is now on an island with their order (at least on the K-8 side) and we need to make sure they understand we are not going to be silent on this unsubstantiated closure of our kids schools!

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More to come over the next couple of days!

EXHIBIT E

Instructional Days/Hours During the 2020-2021 School Year

Implications Related to COVID-19

The Pennsylvania Department of Education (PDE) recognizes that school leaders face many difficult decisions and challenges in planning for the start of the 2020-2021 school year and determining how to provide students with a minimum of 180 days of instruction and 900 hours of instruction at the elementary level and 990 hours of instruction at the secondary level. See 24 P.S. §§ 13-1327, 15-1501; see also, 22 Pa. Code § 11.3. This correspondence addresses the minimum instructional time requirements and other issues that must be considered when making decisions related to the provision of instruction during a global pandemic.

Section 520.1 of the Pennsylvania Public School Code (School Code) provides the following:

Emergency Instructional Time Template

Submit temporary instructional time provisions to PDE using the Emergency Instructional Time Template (/Documents/K-12/Safe%20Schools/COVID/Guidance Documents/Emergency%20Instructional%20Time%20Template-Fillable.pdf) (PDF).

(a) Whenever an emergency shall arise which the board of school directors of any school district in the performance of its duties could not during the prescribed length of school days, number of days per week, anticipate or foresee, and which emergency shall result in any such school district being unable to provide for the attendance of all pupils or usual hours of classes, it shall be found as a fact by the school directors of any school district and so recorded on the minutes of a regular or special meeting of such board and certified to the Superintendent of Public Instruction[1], and such board of school directors, subject to the approval of the Superintendent of Public Instruction, shall have power to put into operation in such school district any one or more of the temporary provisions hereinafter provided for, but in no event shall such temporary provisions remain in effect for a period of more than four years after they are first put into effect.

(b) Subject to the foregoing provisions, any board of school directors may:

(1) Keep the schools of the district in session such days and number of days per week as they shall deem necessary or desirable, but the provisions of this act requiring a minimum of one hundred eighty (180) session days as a school year shall not be affected thereby.

(2) Reduce the length of time of daily instruction for various courses and classes.

(c) Any school district, by invoking the powers herein granted, shall not thereby forfeit its right to reimbursement by the Commonwealth or other State-aid as otherwise provided for by this act.

24 P.S. § 5-520.1

Section 520.1 of the School Code provides flexibility in the event of an emergency that prevents a school entity from being able to provide for the attendance of all pupils or usual hours of classes. PDE considers the World Health Organization-declared Coronavirus disease (COVID-19) global pandemic an emergency as contemplated by section 520.1. Accordingly, local governing boards have the authority to enact temporary provisions as set forth in section 520.1 during the period of the pandemic response and should consult their solicitor in this regard. Any school entity that enacts such temporary provisions must submit the following to the Secretary of Education (Secretary) for approval: (1) board meeting minutes demonstrating approval of the temporary provisions, and (2) the temporary provisions adopted, including the school entity's proposed calendar and academic schedule. Such information shall be submitted with or as an amended component of the school entity's Health and Safety Plan at RA-EDContinuityofED@pa.gov (mailto:RA-EDContinuityofED@pa.gov) .

Upon receipt, the Secretary will review to ensure board approval and that the school entity's plan accounts for at least 180 days and 990/900 hours of instruction. Charter schools, cyber charter schools, and regional charter schools are strongly encouraged to coordinate with their authorizer(s) in implementing pandemic-related temporary provisions and must file any amended component of the school entity's Health and Safety Plan with their authorizer(s).

The recognition of instructional programs that may count towards instructional time requirements is a local decision to be made by each school entity. When making decisions related to the provision of instructional time, all school entities must be cognizant of issues such as: the provision of planned instruction needed to attain the relevant academic standards set forth in Chapter 4; implementing systems of tracking attendance and instructional time, especially related to students engaging in remote instruction; the provision of FAPE; and equity in access to instruction for all students.

Additionally, Chapter 11 requires that "instruction time for students shall be time in the school day devoted to instruction and instructional activities provided as an integral part of the school program ***under the direction of certified school employees***." 22 Pa. Code § 11.2 (emphasis added). Although instruction may be provided in synchronous or asynchronous formats, to count as instruction—whether in the classroom or remotely—students' instructional activities must be under the direction of a certified school employee, unless otherwise permitted (*e.g.*, 24 P.S. § 17-1724-A).

Any school entity that includes time spent in a remote learning environment toward instructional time requirements must implement a system that accurately tracks out of school instructional time similar to attendance in the school building.

A charter school must work with its authorizer if it is planning to implement some type of alternative schedule or type of instruction.

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[1]The Superintendent of Public Instruction is the Secretary of Education.

EXHIBIT F

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR

ORDER OF
THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA
DIRECTING TARGETED MITIGATION MEASURES

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention declared the coronavirus disease 2019 ("COVID-19") a pandemic; and

WHEREAS, the COVID-19 pandemic has created a national emergency in the United States of America; and

WHEREAS, pursuant to section 7301(a) of the Emergency Management Services Code, 35 Pa. C.S. § 7301(a), I am charged with the responsibility to address dangers facing the Commonwealth of Pennsylvania ("Commonwealth") that result from disasters; and

WHEREAS, on March 6, 2020, pursuant to section 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. § 7301(c), I proclaimed the existence of a disaster emergency throughout the Commonwealth as a result of COVID-19, and further extended the disaster emergency by Amendment on June 3, 2020; and

WHEREAS, in executing the extraordinary responsibility outlined above, I am authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law pursuant to 35 Pa. C.S. § 7301(b); and

WHEREAS, in addition to the authorities to which I am granted by law, my Secretary of Health has the authority to determine and employ the most efficient and practical means for the prevention and suppression of disease pursuant to 71 P.S. § 532(a) and 71 P.S. § 1403(a); and

WHEREAS, these means include isolation, quarantine, and any other control measure needed pursuant to 35 P.S. § 521.5; and

WHEREAS, I previously issued an Order closing all businesses that are not life sustaining in the Commonwealth; see Order of March 19, 2020, as amended; and

WHEREAS, I previously issued an Order directing all individuals in Pennsylvania to stay at home; see Order of April 1, 2020, as amended; and

WHEREAS, while the Commonwealth's mitigation efforts to date have helped curtail the spread of COVID-19 without overwhelming medical resources, the number of positive cases continues to rise; and

WHEREAS, as of July 15, 2020, the Commonwealth has 97,665 positive cases of COVID-19 in all sixty-seven counties and 6,957 deaths from COVID-19; and

WHEREAS, the Pennsylvania Department of Health has seen new increases in cases due to community spread; and

WHEREAS; my Secretary of Health issued an Order on July 1, 2020, requiring universal face coverings to be worn by all persons in the Commonwealth; and

WHEREAS, despite the Secretary of Health's July 1, 2020 Order, there remains an urgent need to further efforts to slow this new increase in cases to avoid the more-stringent mitigation strategies pursuant to previous Orders recently discontinued; and