IN THE HIGH COURT OF JUSTICE Claim No.:

QUEEN'S BENCH DIVISION

IN THE MATTER OF A PART 8 CLAIM FOR A *QUIA TIMET* INJUNCTION

B E T W E E N :

AB
(a child by CD, his/her father and litigation friend)

Claimant

- and –

THE TRUSTEES OF THE TAPTON SCHOOL ACADEMY TRUST
(A COMPANY LIMITED BY GUARANTEE)

Defendants

STATEMENT OF CASE AND
WRITTEN SUBMISSIONS OF THE CLAIMANT

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*References to the Claim Bundle are as, for example, **#35***

INTRODUCTION

1. The Tapton Academy School Trust ('**the Defendants**' or '**the Trust**') owns and manages number of schools including the school attended by AB in the Sheffield area ('**the School**'). AB is a girl aged 12 years old who attends the School and has done since September 2020. She brings this claim by CD, his/her father and litigation friend. With this claim AB and CD make an application for their names and that of the School to be anonymous (in the case of CD and the School, on the basis that the disclosure of their identity would risk the disclosure of the identity of a child).

2. The Trust, as a 'qualifying academy proprietor' is a company limited by guarantee, which in pursuance of academy arrangements is the proprietor of an academy, and whose object as expressed in its articles or memorandum of association (or each of whose objects as so expressed) is a charitable purpose, pursuant to s 12 of the Academies Act 2010.

3. This is a Part 8 claim for a *quia timet* injunction prohibiting the School and the Trust from:

(1) Continuing to require or encourage children attending the School to wear face coverings at all, alternatively while in classrooms ; and
(2) Continuing to impose other Non-Pharmaceutical Interventions (NPIs);

In the latter case without having conducted suitable and sufficient risk assessments. These measures were introduced to address the risk of harm caused by the transmission of the SARS-CoV-2 virus ('**the virus**').

4. CD requested that the School cease making the above impositions on children by a letter before action sent to the School on 8.3.2021. He has subsequently obtained the representation of solicitors who have continued to communicate with the Trust's solicitors. During the pre-action phase of this litigation, the Trust's representatives have asserted that any claim should be by means of judicial review. The Trust has refused CD's request to remove the above requirements. It has disclosed a risk assessment which fails to outline any basis for concluding that a requirement for children to wear face coverings inside school premises either: (a) makes any material difference to the transmission of the virus or the risk of harm to children; or (b) is a safe and proportionate means of doing so. Indeed, the assessment fails even to consider any potential harm to children caused by the requirements.

5. This application for injunctive relief is made to protect AB and other children attending the School from the risk of long-term (and thus serious) harm caused by the requirement to wear face coverings throughout the school day in the absence of a suitable and sufficient risk assessment. The claim is made on the grounds that:
(1) A requirement to impose measures impacting upon the ability of children to breathe normally and/or to interact with each other presents a *prima facie* risk of harm wherever it is imposed without a risk assessment compliant with the Health and Safety at Work Act 1974 ('**the 1974 Act**') and/or the Management of Health and Safety at Work Regulations 1999 ('**the 1999 Regulations**'); and that this risk is *prima facie* serious where these requirements are imposed: (a)

on children; and (b) for the entirety of the school day; and, further or alternatively,

(2) There is sufficient evidence of a risk of physical and psychological harm to children from the imposition of this policy for the Court to be satisfied that it should exercise its jurisdiction to end the requirements.

6. Insofar as the said requirements might cease in May or June 2021: (a) the Court will be asked to consider an interim application in April 2021; and (b) the Court is asked to take account of the risk that they might be reimposed in the Autumn term in 2021 or at a later date and to determine the claim even if a final hearing is held after the requirements have (for the time being) ended.

7. This claim is supported by a witness statement of AB (#) and two expert reports, one by Simone Plaut CMIOSH MSc HDCR FETC, a Chartered Health & Safety Practitioner (#), and one by Dr Zenobia Storah, DClinPsy, CPsychol, a Child and Adolescent Clinical Psychologist (#). The Claimant also relies upon the review of evidence of the efficacy of the use of face-coverings in the community – in particular from randomised controlled trials and meta-analyses – in the recently published report 'Facemasks in the COVID-19 era: A health hypothesis' by Baruch Vainshelboim, of the Cardiology Division, Veterans Affairs Palo Alto Health Care System/Stanford University, Palo Alto, CA, United States (#)

8. The Claimant's claim for a prohibitory injunction is accompanied by an application for an interim injunction in the first instance. This being a Part 8 Claim for which Particulars of Claim are not required, this Statement of Case ('**the Statement of Case**') is made in support of both the claim and the application for interim relief and contains both a statement of case and submissions in support of the application.

9. AB and the remainder of the School returned for the start of the Summer term on Monday, 19.4.2021. Thus, there is an urgent need for this matter to be determined with expedition. Further, even if the Policy is withdrawn prior to the hearing of the hearing of the claim (on an interim or a final basis) there remains a real risk that it or a similar policy requiring the wearing of face-coverings may be re-imposed later this year in response to a change in government guidance. The last year has seen many government

restrictions being lifted (in the spring and then summer of 2020) only to be re-imposed (in the autumn and winter of 2020/21).

FACTUAL BACKGROUND

Earlier closures of schools and face-covering policies

10. On 18.3.2020 the Prime Minister and the Secretary of State for Education, as part of its responses to the spread of the SARS-CoV-2 virus ('**the virus**') announced that schools 'must close' save for the education of children of key workers. Although this was announced as though it was a legal requirement, it was in fact simply guidance. This was confirmed by the Secretary of State in his response to a judicial review challenging (*inter alia*) the government's guidance or requirement to close schools. The judgment of the Court of Appeal in that claim (*R (Dolan) v Secretary of State* [2020] EWCA Civ 1605, at para 27) set out the legal position at that time:

> '…there was no order made under the Coronavirus Act 2020 to close any school in England. The factual position was that, as at about 18 March 2020, the Government considered that education should not be provided at school premises in England save for the children of key workers and vulnerable children. There was no legal measure made by either of the two respondents requiring those responsible for running schools to close those schools. Regulation 7 [of the Health Protection (Coronavirus, Restrictions) (England) Regulations)] specifically exempted educational facilities from the general prohibition on gatherings in a public place.

11. Subsequently schools reopened in a staged reopening from June 2020, in which children from certain year groups where able to return to school.

12. At the beginning of the Autumn term in 2020 the Department for Education and Schools ('**the Department**') issued guidance that secondary school children should wear face-coverings in school corridors and other indoor public parts of schools. Children over 11 years old (save those with exceptions by reason of a disability or because of the risk that they would suffer severe distress) were also required to wear face-coverings whenever they travelled on public transport pursuant to The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 ('**the Public Transport Regulations**'); and, wherever schools provided their own bus or other transport, they usually made this imposition on secondary school children. Consequently, many children would be required to wear face coverings for an

additional period of one to two hours (and in some cases a longer period), depending on how far away from a school they lived.

13. In addition, schools were provided with guidance by the Department that they should introduce other NPIs. These included restrictions on where children could sit in classrooms and requirements that children should be distanced from each other including when they were eating their meals on school premises.

14. Schools remained open under these measures for the remainder of the Autumn term.

15. Prior to the beginning of the Spring term in 2021 the Department issued guidance that schools should not reopen until further notice. This guidance again excluded children of key workers, whom schools were again advised to educate on school premises.

Government guidance in early 2021

16. In February 2021, the Department announced that schools should reopen in full on 8.3.2021. Before that reopening, the Department issued guidance that secondary school children should be required to wear face coverings whenever they work inside school premises, including in classrooms ('**the Guidance**') (#).[1] The Government has stated that this is not compulsory, but part of a range of measures aimed at limiting transmission of SARS-CoV-2.

17. The Guidance sets out its reasoning in the Introduction to the Guidance:

> We know that the predominant new variant of coronavirus (COVID-19) is more transmissible; however, Public Health England (PHE) advice remains that the way to control this virus is with the system of controls, even with the current new variants. We further strengthened these measures to provide *more reassurance* and to help decrease *the disruption the virus causes to education.*
>
> (# Emphasis added)

'Reassurance' is not, of course, a means of reducing the risk of transmission of a virus, let alone the risk of 'serious harm'. Nor does reducing the risk of 'disruption' (presumably meaning the reduction of absences of children or forced self-isolation due

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976213/Face_coverings_in_education_April_2021.pdf

to the government's decision to impose self-isolation requirements on those testing positive with the virus) equate to the reduction of a risk of 'serious harm'.

18. The Guidance then asserts that the 'system of controls' (including mandatory face coverings) 'creates a safer environment for staff, pupils and students where the risk of transmission of coronavirus (COVID-19) infection is substantially reduced'. In respect of face coverings, this assertion is not supported by any evidence save the World Health Organisation ('**the WHO**') statement of 21.8.2020 about children and face coverings.[2]

19. The Guidance continues (at p 4, #):

> In schools and colleges where pupils and students in year 7 and above are educated, we recommend that face coverings should be worn by pupils when moving around the premises, outside of classrooms, such as in corridors and communal areas where social distancing cannot easily be maintained.
>
> In addition, we also recommend in those schools and FE providers, that face coverings should be worn by adults and pupils in classrooms or during activities unless social distancing can be maintained. This does not apply in situations where wearing a face covering would impact on the ability to take part in exercise or strenuous activity, for example in PE lessons. Face coverings do not need to be worn by pupils when outdoors on the premises.
>
> Subject to the roadmap process, as part of step 3, we expect these precautionary measures to no longer be recommended. This would be no earlier than 17 May and will be confirmed with one week's notice.

20. The Guidance goes on to say (at p 5, #) that:

> The use of face coverings may have a particular impact on those who rely on visual signals for communication. Those who rely on visual signals for communication, or communicate with or provide support to such individuals, are currently exempt from any requirement to wear face coverings in education settings or in public places.

21. Mention is made at p 6 of the Guidance of possible 'reasonable adjustments' for disabled pupils and students.

22. The Guidance specifies that the exemptions within the Public Transport Regulations and the Health Protection (Coronavirus, Wearing of Face Coverings in a Particular Place) (England) Regulations 2020 ('**the Particular Place Regulations**') 'should be applied in education settings, and we would expect teachers and other staff to be

[2] https://www.who.int/news-room/q-a-detail/q-a-children-and-masks-related-to-covid-19

sensitive to those needs, noting that some people are less able to wear face coverings and that the reasons for this may not be visible to others.'

23. The Guidance failed to inform schools, local authorities and/or academy trusts of their duty not to impose any measure that might impact upon the health and safety of children and/or staff without conducting a risk assessment compliant with their duties under the 1974 Act and/or the 1999 Regulations. That does not, of course, absolve any of those bodies from those or any other statutory or common law duties.

24. The exemptions in Public Transport and the Particular Place Regulations are identical. They are set out in reg. 4 of the Public Transport Regulations and are as follows:

> For the purposes of regulation 3(1), the circumstances in which a person ("P") has a reasonable excuse include those where—
>
> (a)P cannot put on, wear or remove a face covering—(i)because of any physical or mental illness or impairment, or disability (within the meaning of section 6 of the Equality Act 2010 F1), or
> (ii)without severe distress;
> (b)P is travelling with, or providing assistance to, another person ("B") and B relies on lip reading to communicate with P;
> (c)P removes their face covering to avoid harm or injury, or the risk of harm or injury, to themselves or others;
> (d)P is travelling to avoid injury, or to escape a risk of harm, and does not have a face covering with them;
> (e)if it is reasonably necessary for P to eat or drink, P removes their face covering to eat or drink;
> (f)P has to remove their face covering to take medication;
> (g)a relevant person [a police officer or other prescribed official] requests that P remove their face covering.

The Trust Policy and Risk Assessment

25. Pending the return of children to the school, the Trust introduced a policy ('**the Trust Policy**') that imposed more onerous requirements than the Guidance. The School Policy can be taken from 'the Tapton School Academy Trust Master Risk Assessment from March 2021 for the full reopening of schools after Lockdown' ('**the Trust Risk Assessment**', #). This stipulated the following:

> 'Staff, adults and all secondary pupils must wear a face mask at all times unless a) in a room on their own, b) medically exempt, c) teaching primary students'... Students are required to wear a mask on arrival at school, and whenever inside the school buildings, including classrooms.'

> NHS Test and Trace asymptomatic testing (using lateral flow devices) was also introduced. Testing is 'voluntary but strongly encouraged'.
>
> (at #)

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26. These measures were in addition to those introduced in the autumn term of 2020, which included social distancing, phased movement around the school, one-way systems and a 'Bubble' system to group children with the aim of reducing contacts between individuals within the school.

27. The above requirements go further than the Guidance by requiring children to wear face coverings whenever they were in classrooms with other children, irrespective of whether they were unable to be socially distanced from other children; and by mandating wearing them at all times when the Guidance (p. 4, #) does not require face coverings to be worn by pupils when outdoors on school premises. They also provide that:

> Secondary students should discuss with the Headteacher the reasons they are not wearing a mask. The Headteacher can issue a letter stating that this has been agreed and staff will be made aware that they do not need to challenge the student further.
>
> (at #)

28. In contrast, the exemptions under the Public Transport and Particular Place Regulations (and, because they are applied into it, the Guidance) apply irrespective of whether any advanced 'permission' or evidence of an exemption is provided. The only means by which they may be enforced is if a 'relevant person' (a police officer or other stipulated public official) has reasonable grounds for believing that a person does not have a reasonable excuse for not wearing a face covering for not wearing a face covering. The Trust Risk Assessment does provide that the exemptions in the Regulations should be applied.

29. The Trust Risk Assessment states that 'no-one should be excluded from education on the grounds that they are not wearing a face covering'. But it says so while also encouraging teachers to challenge children who are not wearing face coverings unless they have an exemption letter from the head teacher in accordance with the Trust Risk Assessment.

THE LEGAL FRAMEWORK

Quia timet injunctions

30. In the following sections of this part, the Claimant sets out duties owed by the school to children attending it, including AB, under statute, the (European) Convention on Human Rights and Fundamental Freedoms ('**the Convention**') and common law. This Statement of Case will go on to plead the Claimant's case that those duties have been and continue to be breached by the continued imposition of the School Policy by the Trust.

31. This is not, however, a claim for redress reliant directly on the Trust's breach of its statutory or common law duties. Rather, the Claimant relies upon alleged breaches of those duties in support of his/her case that the Trust, by imposing the School Policy, risks causing children serious harm to:

    (1) Their physical health;
    (2) Their mental health; and
    (3) Their Convention rights, in particular their right to bodily integrity and to an education.

32. Consequently, the Court should exercise its jurisdiction to impose a *quia timet* injunction prohibiting the Trust from maintaining the Trust Policy that risks causing those harms. The statutory and common law duties cited are imposed upon the Trust to protect children from physical and mental harm; and the right to education is one protected by Article 2 of Protocol One to the Convention, with which the Trust must comply, as a body with the public responsibility of providing an education to AB and others, pursuant to its duties under the Human Rights Act 1998 ('**the HRA**'). Breaches of duties to protect children from those harms are, thus, *prima facie* evidence that those children are at risk from them. The greater the extent to which the Trust and School is in breach of its duties and the more central are those duties for protecting children from harm, the greater is the evidence of the risk.

33. Further and alternatively, the Claimant relies upon the expert report of Ms Plaut and Dr Storah, which establish a direct risk of harm to the physical and/or mental health of AB

and other children at the School from the imposition of the requirement to wear masks and other NPIs imposed on children at the School.

34. The basis on which *quia timet* injunctions may be granted, including those applied for on an interim basis, was set out by Morgan J in *INEOS Upstream Ltd and others v Persons Unknown and others* [2017] EWHC 2945 (Ch)

> 88. The general test to be applied by a court faced with an application for a quia timet injunction at trial is quite clear. The court must be satisfied that the risk of an infringement of the claimant's rights causing loss and damage is both imminent and real. The position was described in *London Borough of Islington v Elliott* [2012] EWCA Civ 56, per Patten LJ at 29, as follows:
>
> > "29 The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on American Cyanamid principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted."
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> 89. In *London Borough of Islington v Elliott*, the court considered a number of earlier authorities. The authorities concerned claims to quia timet injunctions at the trial of the action. In such cases, particularly where the injunction claimed is a mandatory injunction, the court acts with caution in view of the possibility that the contemplated unlawful act, or the contemplated damage from it, might not occur and a mandatory order, or the full extent of the mandatory order, might not be necessary. Even where the injunction claimed is a prohibitory injunction, it is not enough for the claimant to say that the injunction only restrains the defendant from doing something which he is not entitled to do and causes him no harm: see *Paul (KS) (Printing Machinery) v Southern Instruments (Communications)* [1964] RPC 118 at 122; there must still be a real risk of the unlawful act being committed. As to whether the contemplated harm is "imminent", this word is used in the sense that the circumstances must be such that the remedy sought is not premature: see *Hooper v Rogers* [1975] Ch 43 at 49-50. Further, there is the general consideration that "Preventing justice excelleth punishing justice": see *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] Ch 235 at 242, quoting the Second Institute of Sir Edward Coke at page 299.

> 90. In the present case, the Claimants are applying for *quia timet* injunctions on an interim basis, rather than at trial. The passage quoted above from *London Borough of Islington v Elliott* indicated that different considerations might arise on an interim application. The passage might be read as suggesting that it might be easier to obtain a *quia timet* injunction on an interim basis. That might be so in a case where the court applies the test in *American Cyanamid* where all that has to be shown is a serious issue to be tried and then the court considers the adequacy of damages and the balance of justice. Conversely, on an interim application, the court is concerned to deal with the position prior to a trial and at a time when it does not know who will be held to be ultimately right as to the underlying dispute. That might lead the court to be less ready to grant *quia timet* relief particularly of a mandatory character on an interim basis.
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> 91. I consider that the correct approach to a claim to a *quia timet* injunction on an interim basis is, normally, to apply the test in *American Cyanamid* [*v Ethicon* [1975] AC 396]. The parts of the test dealing with the adequacy of damages and the balance of justice, applied to the relevant time period, will deal with most if not all cases where there is argument about whether a claimant needs the protection of the court. However, in the present case, I do have to apply section 12(3) of the Human Rights Act 1998 and ask what order the court is likely to make at a trial of the claim.

35. In *Khorasandjian v Bush* [1993] QB 727, the Court of Appeal found that the following can be restrained on a *quia timet* basis:

> "(i) the campaign of harassment has to be regarded as a whole without consideration of each ingredient in isolation, and viewed as a whole it is plainly calculated to cause the plaintiff harm, and can be restrained *quia timet* because of the danger to her health from a continuation of the stress to which she has been subjected; (ii) threats of violence can be restrained *per se*, whether or not the threat, without the subsequent violence, is calculated to cause the plaintiff harm.[3]

Thus, a claimant need not prove that a defendant intended to cause harm.

36. There are many examples of the court imposing *quia timet* interim injunctions to prevent the publication of potentially defamatory material or material breaching privacy rights, of which *Evans and others v Ritch* ([2013] All ER (D) 253 (Jan)) is an example.

37. The High Court has also imposed *quia timet* injunctions preventing potential harm to persons other than the claimant. *RGCM Ltd v Lockwood and others* [2019] EWHC 1937 (Ch) was a successful application for an interim injunction preventing unknown

[3] The Court was unanimous on those two bases on which relief can be granted but not on a third, which extended the tort of nuisance and might be regarded as having been disapproved by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655, but it is not relevant here.

'urban explorers' from engaging in 'parkour', climbing and running without safety equipment up tall buildings and scaffolding. While the harm might have included liabilities for personal injury or death that the claimant might have had, the Court appears also to have had in mind the risk of serious harm to the 'urban explorers' themselves.

Interim injunctions

38. The Court will apply the well-known principles in *American Cyanamid* in the manner set out in *INEOS* (*supra*). If it is satisfied that there is a risk of harm either from the breach of statutory or common law duties and/or a disproportionate interference with Convention rights, there must be a serious issue to be tried; and the risk of physical and/or mental harm is not one that could be adequately compensated for in damages.

The status of the Guidance

39. As the Court of Appeal made clear in *Dolan*, no school, academy trust or local educational authority is required to implement any recommendation or guidance given by the government, the Secretary of State or the Department.

40. Guidance has long been held capable of challenged through judicial review (*Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003 and many other cases). That reviewability is a means by which the public body issuing the guidance may be challenged. It has no impact on the *statutory* duties owed by a person or organisation (including a school) to another person (including a pupil). If following guidance issued by a public body would cause an organisation to be in breach of its statutory or common law duties, it would be no defence for that organisation to say that it was following the guidance of a public body: its statutory and common law duties will always take precedence. Moreover, the Guidance itself states expressly that it does not impose any legal duties. Consequently, the school may follow the Guidance only insofar as it would not, by doing so, breach any other statutory duty.

Duties to children in statute and under international human rights law

41. When making any decision concerning children and young people, the best interests of children shall be a primary consideration.[4] Both local authorities and academy proprietors have a duty to support pupils at the school with medical conditions (s. 100(1) Children and Families Act 2014).

Statutory duties under the 1974 Act and the 1999 Regulations

42. The 1974 Act imposes general duties on an employer, in this case the Trust, towards its employees (s. 2), persons other than its employees (s. 3) and other persons using the school premises for a place of work (s. 4) to avoid risks to their health or safety.

43. Of relevance to children, s. 3 provides:

> It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

44. Section 1 of the 1974 Act imposes on the Trust the following duties:

> (a) securing the health, safety and welfare of persons *at work*;
> (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with *the activities* of persons at work;
> (c) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances; . . .
>
> (Emphasis added)

SARS-CoV-2 is not, within paragraph (c) above a 'substance' in the meaning of the 1974 Act.

45. The Act does not impose any wider duties to persons outside these classes. In particular, it does not itself place any wider statutory legal obligation on the Trust to have regard to or ensure the safety of the general public by reason of the risks that are not attributable to the School activities. The risks arising from the social contacts of its staff or children, with grandparents or anyone else, in their private lives are matters for the private, personal and autonomous decision making of every individual, as are the

[4] Article 3 of the UNCRC: whilst not enshrined directly into domestic law in England (although it is in Wales and Scotland), the courts have consistently recognised that English law must be interpreted as far as possible so as to give effect to a meaning that does not conflict with the requirements of the UNCRC – *R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [83].

steps any individual may wish to take to protect themselves or their contacts. The ordinary social interactions of children and staff cannot be regarded as 'activities of the persons at work'.

46. Thus, the 1974 Act does not make the Trust or the School responsible for the spread of the virus by children or staff in the wider community. Nor in respect of a common law duty of care could the Trust be any more responsible for the spread of SARS-CoV-2 than it could for the spread of a similar corona or influenza viruses that may lead to potentially fatal diseases in the vulnerable.

47. The 1999 Regulations provide more specific obligations. Regulations 2 and 3 require the Trust, being an employer of more than five people, to make a "suitable and sufficient assessment of the risks to the health and safety" of

> a) its employees to which they are exposed whilst they are at work, (including teachers) and
> b) others not in our employment but arising out of or in connection with the conduct of our undertaking (including children and visitors)

48. Regulation 3(3) also demands that the Trust's risk assessment be reviewed and required changes made if there is reason to suspect that it is no longer valid or there has been a significant change in the matters to which it relates.

49. In reviewing its risk assessments, the Trust cannot ignore the reports and evidence of mental and physical harms to children being reported widely. The School staff will also have observed or received increasing reports of concerns about the mental health of its children as a result of increased NPIs and restrictions. In these circumstances the School's risk assessments are required to be reviewed immediately and regularly.

50. Neither the 1974 Act nor the 1999 Regulations have been amended in response to the spread of SARS-CoV-2. Indeed, since 19 March 2020 SARS-CoV-2 has not been considered to be a High Consequence Infectious Disease (HCID) in the UK. This was the determination of the four nations public health HCID having regard to matters including low overall mortality rates. Agreed by the Advisory Committee on Dangerous Pathogens (ACDP), this remains the position today.

51. Not being a specialist clinical environment, the School has not previously had to assess risk of spreading other common types of coronavirus that cause cold or flu symptoms and which are spread in the same way as SARS-CoV-2. Nor has the School been required to take measures significantly affecting its running of the School to avoid that risk.

52. The commonplace 'covid-secure' assessment to reduce the risk of spreading the virus, conducted at recommendation of the Government and the HSE, is an assessment with extremely narrow focus. However, there is no law requiring it to replace or be prioritised for consideration over and above risk of other dangers. An assessment which does so is fundamentally flawed and in most cases, certainly in the School, cannot be an assessment in accordance with Regulation 3 of the 1999 Regulations.

Proportionality

53. The 1999 Regulations were made for the purpose of giving effect to proposals submitted to the Secretary of State by the Health and Safety Commission (the predecessor of the Health and Safety Executive, into which it merged in 2008) under s. 11(2)(d) of the 1974 Act after the carrying out by the Commission of consultations in accordance with section 50(3) of that Act (see the introductory text to the 1999 Regulations). Moreover, section 3 of the HRA requires that the relevant provisions of the 1974 Act must be read, so far as is possible, to be compatible with the Convention. The Trust and the School exercise a public function. Thus, the 1999 Regulations must be interpreted, and the School must act, in accordance with the Convention. Where it does not, it will have breached its duties to children and staff at the School under the Regulations.

54. The following Articles of the Convention are engaged:

Article 8, which provides the right to respect for private and family life, home and correspondence and embraces, for example, rights

- not to wear a face covering (*S.A.S. v. France* (2014) Application no. 43835/11, Grand Chamber, at para 122)[5];

[5] file:///C:/Users/User/Downloads/001-145466.pdf

- to bodily integrity and personal autonomy; and
- to establish and develop relationships with others.

Article 2, of Protocol One which provides a right of access to education through the School existing at a given time. It must be provided equally without interference with other fundamental rights (including Article 8 rights).

55. It is fundamental principle that no act or omission of the School is permitted to interfere with those rights unless such interference is proportionate: *i.e.* it is both appropriate and reasonably necessary. The proportionality principle was encapsulated in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [28]-[49] and in particular by Lord Sumption at para 20:

> [The effect of precedent] can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine
> (i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
> (ii) whether it is rationally connected to the objective;
> (iii) whether a less intrusive measure could have been used; and
> (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.
>
> These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

56. Further:

(1) A more rigorous and intensive review is necessary when fundamental rights are at stake (*Pham v Secretary of State for the Home Department* [2015] UKSC 19, paras 114);

(2) It is necessary to 'balance the severity of the effects [of the requirements in the Policy, in this case] on the rights of the persons… against the importance of the objective.' (*A v Secretary of State for the Home Department* [2004] UKHL 56);

(3) 'There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference' (*Pham*, para 106); and

(4) The domestic courts are in a better position to assess local needs and conditions and they may apply a stricter standard than the Strasbourg Court when

considering whether measures are proportionate or whether less restrictive means might obtain the object, an objective question based on the merits, not whether the decision maker has considered each less restrictive measure (*Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19, per Baroness Hale at para 31).

57. Were a policy to interfere disproportionately with any of the above rights, it follows that the School and Trust would cause harm to children (through that interference).

Relevant judgment in another jurisdiction

58. The Claimant also relies, as persuasive precedent, on the findings of the Weimar Family Court, in Germany on 8th April 2021 (Ref.: 9 F 148/21).[6] The judgment is particularly persuasive because it related directly to the imposition of materially identical or very similar measures on schoolchildren as have been imposed by the Trust: namely requiring face-coverings to be worn all day and social distancing measures to be imposed in schools. The court concluded that there was no reliable evidence for the efficacy of face-coverings and other social distancing measures and that there was substantial evidence that requiring children to wear them or engage in those practices was harmful. Applying a materially identical proportionality test, the Court concluded that:

> '…the measures intended to achieve a legitimate purpose must be suitable, necessary and proportionate in a narrow sense – that is to say: when weighing their advantages and disadvantages. The measures at issue are not evidence-based, contrary to Section 1(2) IfSG, and are already unsuited to achieving the fundamentally legitimate purpose they pursue, namely to avoid overloading the health system or to reduce the incidence of infection with the SARS-CoV- 2 virus. In any case, however, they are, strictly speaking, disproportionate because the considerable disadvantages/collateral damage caused by them are not compensated for by any recognisable benefit for the children themselves or for third parties,'

59. The judge went on to find that:

> 'Likewise, 'third-party protection' and 'unnoticed transmission', which the RKI [Robert-Koch Institute] used to justify its 're-evaluation', are not supported by scientific facts. Plausibility, mathematical estimates and subjective assessments

[6] A full translation of the judgment is being obtained. The translation relied upon (published here - http://www.fuzzydemocracy.eu/francais/rubrique1.htmlis) the s a reworking by a professional translator (Paul Charles Gregory, BDÜ) of a machine translation using DeepL of an article in German summarising the judgment (published here: https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/).

> in opinion pieces cannot replace population-based clinical epidemiological studies. Experimental studies on the filtering performance of masks and mathematical estimates are not suitable to prove effectiveness in real life. While international health authorities advocate the wearing of masks in public spaces, they also say that there is no evidence from scientific studies to support this. Indeed, all currently available scientific evidence suggests that masks have no effect on the incidence of infection. None of the publications that are cited as evidence for the effectiveness of masks in public spaces allow this conclusion.'

60. Addressing evidence of a- and pre-symptomatic transmission (a critical basis for the efficacy of requiring face-coverings and social distancing for those without symptoms) the court noted Professor Kappstein's evidence:.

> 'From a systematic review with meta-analysis on Corona transmission in households published in December 2020, the professor contrasted a higher, but still not excessive, transmission rate of 18% for symptomatic index cases with an extremely low transmission of only 0.7% for asymptomatic cases. The possibility that asymptomatic people, previously referred to as healthy people, transmit the virus is therefore meaningless.'

61. The judge concluded that:

> 'Based on surveys in Austria, where no masks are worn in primary schools, but rapid tests are carried out three times a week throughout the country, the expert witness Prof. Dr. Kuhbandner concludes: '100,000 primary school pupils would have to put up with all the side effects of wearing masks for a week in order to prevent just one infection per week.'
>
> 'To call this result merely disproportionate would be a completely inadequate description. Rather, it shows that the Land [i.e. federal state] legislature regulating this area has lost contact with reality to an unprecedented extent.'

EVIDENCE OF THE RISK OF HARM

Breach of statutory and common law duties

62. The Claimant relies on the expert report of Simone Plaut CMIOSH MSc HDCR FETC ('**the Plaut Report**', #) that establishes that the Trust Risk Assessment underlying the Policy is wholly inadequate and not compliant with the School's duties under the 1974 Act or the 1999 Regulations. Ms Plaut's expertise in occupational health and safety as a practitioner and working for NHS trusts, local authorities and residential care for children (*inter alia*) is set out in para 2.1 of the Plaut Report. That Report relies upon the evidence of a large volume of expert material to establish the risk of harm she concludes is caused by the Policy.

63. In establishing the actual risk of harm addressed in the following section of this Part of the Statement of Case, the Claimant relies also on the expert report of Dr Zenobia Storah, DClinPsy, CPsychol ('**the Storah Report**', #), which addresses the risk of psychological harm to children caused by the Policy.

Minimal risk of harm to children from SARS-CoV-2

64. Ms Plaut sets out the actual risk to children from transmission of the virus (paras 5.2-5.11, #). As the Policy was introduced with the purported aim of protecting children (as persons other than workers who are on school premises) from harms caused by the virus, this is a necessary consideration without which the risk from the Policy cannot be balanced. The Trust Risk Assessment takes no account of the risk of harm to children *caused by* the transmission of the virus. A risk assessment compliant with the 1974 Act and the 1999 Regulations must determine not the risk of transmission of a virus but the risk of *harm* caused by that transmission. Children are exposed to cold and flu viruses all the time and such exposure (and the mild symptoms to be expected) cannot be considered to cause them serious harm.

65. Ms Plaut demonstrates, by use of statistics from the Office for National Statistics ('**the ONS**') and the National Health Service ('**the NHS**') that the risk to children of transmission is so small as to be statistically insignificant. In particular, between March 2020 and April 2021:

> '…only 39 children and teenagers under 20 died within 28 days of a positive test for the virus… [including those with pre-existing conditions. This compares with previous year deaths for under 20s from ALL CAUSES for 2019 being… 1,506 if infants in the first year of life are excluded... Thus the percentage of [this age-group] who died within 28 days of a positive PCR test [against the total number of 1-19 year-olds who died in 2019] is around 2.66%.'
>
> (Para 5.5, #)

The large majority of that tiny number of children (out of a total population under 20 of around 15 million[7]) already suffered from pre-existing conditions serious enough to be registered on their death certificates.

[7] https://www.statista.com/statistics/281174/uk-population-by-age/

66. The risk of harm to other persons on the school premises from transmission of the virus might be a relevant consideration in determining whether the Policy is justified , but it cannot justify a policy of requiring face-coverings unless that is proportionate to the risk faced *by children* by the imposition of the policy. The Trust Risk Assessment fails to consider this risk.

67. The Trust cannot rely on the government's assessment of risk and must assess that risk for itself. Nevertheless, it is of note that the Secretary of State, when issuing the Guidance, relied on an evidence summary published in February 2021: 'Covid 19 Children, Young people and education settings' ('**Government Evidence Summary**').[8] This Summary concluded that 'the risk[s] to the education staff are similar to that for most other occupations.'[9]

68. Finally, recent data suggests very low or zero prevalence of the virus within school populations.[10] Extensive clinical evaluation from Public Health England and the University of Oxford shows that the Lateral Flow Test ('**LFT**') has an overall false positive rate of 0.32%[11] . According to NHS Test and Trace the number of children and staff testing positive with LFTs in secondary schools between 31 December 2020 and 7 April 2021 was 15,265 out of a total number of tests performed of 17,969,553[12], indicating positivity rate of 0.00085%. That is to say, the purported positive rate was *376 times lower* than the overall false positive rate of the test.

No evidence of the efficacy of face-coverings worn by children

69. The Trust has failed to consider any evidence that the use of face-covering – in schools or in the general community – is an effective means of reducing the transmission of the virus. This is, in itself, fatal to any attempt to suggest that the Policy and Trust Risk Assessment could be compliant with the Trust's duties under the 1974 Act and the 1999

[8] "DfE Evidence summary COVID-19 - children young people and education settings. Published 21 Feb 2021"
[9] *Ibid* p 15
[10] https://www.gov.uk/government/publications/weekly-statistics-for-nhs-test-and-trace-england-4-march-to-10-march-2021/weekly-statistics-for-rapid-asymptomatic-testing-in-england-4-march-to-10-march-2021#lfd-tests-conducted-in-education-settings-england
[11] https://www.ox.ac.uk/news/2020-11-11-oxford-university-and-phe-confirm-lateral-flow-tests-show-high-specificity-and-are
[12] See Table 7 of this NHS Test and Trace spreadsheet published on 15 April 2021, rows 17, 18, 22 &23 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978100/tests_conducted_2021_04_15.ods

Regulations. Without an evidential basis for concluding that the Policy could have any effect on the transmission of the virus (and so, more remotely, on harm caused by that transmission), the Policy could not be of any benefit (let alone be necessary); and that is so even if the risk of harm from transmission were sufficient (balanced against the harms of the Policy) to justify measures that were an effective means of preventing transmission (which, for reasons outlined here, they would not be in any event).

70. The Trust cannot rely on the government Guidance to establish such an evidential basis, save where the evidence relied upon in the Guidance is itself sufficient to establish the efficacy of mandating masks in school settings. The Trust's duties under the 1974 Act and the 1999 Regulations are independent of such guidance and it must come to its own conclusions that any measures it imposes are necessary and do not impose a risk of harm disproportionate to the protection they may give. The Guidance relies on the Government Evidence Summary and a report by the WHO, neither of which (save to the limited extent set out in the following two paragraphs) consider evidence that requiring face-coverings in the community has any (or any more than minimal) effect on the transmission of the virus.

71. The only evidence relied on by the government relating to the efficacy of face-coverings (in the Government Evidence Summary, #) is based on adult populations only. This evidence itself is of little or no value as it relies on modelling and not randomised controlled trials ('**RCTs**') or meta-analyses (widely considered to be the most valuable scientific evidence). Nor does it make any attempt to evaluate whether there has ever been any correlation between the imposition of face-covering requirements on the general population and a difference in the rate of increase or decrease in transmission of the virus, without which there can be no basis for suggesting that *those policies or requirements* have any effect on transmission (even if the use of face coverings *might* in (for example) a clinical environment). It states that the impact of face-coverings on adults is 'difficult to quantify' and gives a very significant confidence interval (the percentage chance that the inferred conclusion is correct) of between 7 and 45% (#).[13]

[13] Government Evidence Summary, p 18

72. The limitations on the relevance and reliability of evidence of the efficacy of face-coverings used by *adults* to evaluate the efficacy of a policy requiring them to be worn by *children* is obvious. Children are much less likely to follow instructions and are much more likely to touch and fiddle with their masks. Moreover, given that they are required to wear them all day, it is very likely that many if not most will do so not having changed them regularly (as advised) or at all.

73. While the absence of evidence of efficacy is sufficient to establish that the Trust Risk Assessment is incompatible with the Trust's statutory duties, the Claimant also relies upon the review of the evidence in 'Facemasks in the COVID-19 era: A health hypothesis' by Baruch Vainshelboim, of Stanford University (#). This report is a review of academic and other evidence, in particular randomised controlled trials ('**RCTs**') and meta-analyses (the most valuable scientific evidence), which are each themselves relied upon by the Claimant.

74. After considering the limited efficiency filtration rate of facemasks (ranging from 0.7% in non-surgical, cotton-gauze woven mask typically worn by children and others), Vainshelboim considers two RCTs.

> A randomized controlled trial (RCT) of 246 participants [123 (50%) symptomatic)] who were allocated to either wearing or not wearing surgical facemask, assessing viruses transmission including coronavirus. The results of this study showed that among symptomatic individuals (those with fever, cough, sore throat, runny nose etc…) there was no difference between wearing and not wearing facemask for coronavirus droplets transmission of particles of >5 μm. Among asymptomatic individuals, there was no droplets or aerosols coronavirus detected from any participant with or without the mask, suggesting that asymptomatic individuals do not transmit or infect other people.[14] This was further supported by a study on infectivity where 445 asymptomatic individuals were exposed to asymptomatic SARS-CoV-2 carrier (been positive for SARS-CoV-2) using close contact (shared quarantine space) for a median of 4 to 5 days. The study found that none of the 445 individuals was infected with SARS-CoV-2 confirmed by realtime reverse transcription polymerase.[15]
>
> (At #)

[14] Leung NHL, Chu DKW, Shiu EYC, Chan KH, McDevitt JJ, Hau BJP, et al. Respiratory virus shedding in exhaled breath and efficacy of face masks. Nat Med 2020;26:676–80.

[15] Gao M, Yang L, Chen X, Deng Y, Yang S, Xu H, et al. A study on infectivity of asymptomatic SARS-CoV-2 carriers. Respir Med 2020;169

75. Not only do the cited RCTs contradict the suggestion that the Policy might reduce transmission, but they also challenge the suggestion that there is *any* need to impose any NPIs on asymptomatic individuals.

76. Vainshelboim goes on to consider meta-analyses, including the following:

> A *meta*-analysis among health care workers found that compared to no masks, surgical mask and N95 respirators were not effective against transmission of viral infections or influenza-like illness based on six RCTs.[16] Using separate analysis of 23 observational studies, this *meta*-analysis found no protective effect of medical mask or N95 respirators against SARS virus. A recent systematic review of 39 studies including 33,867 participants in community settings (self-report illness), found no difference between N95 respirators versus surgical masks and surgical mask versus no masks in the risk for developing influenza or influenza-like illness, suggesting their ineffectiveness of blocking viral transmissions in community settings.[17]

77. The Claimant also relies on the review of evidence of mask efficacy in an open letter to the Prime Minister and others from the UK Medical Freedom Alliance (#).[18] As this letter points out (in para 5):

> A recent Cochrane review, dated November 2020, concluded that there is "uncertainty about the effect of face masks".[19] Detailed analyses by the Oxford Centre for Evidence-Based Medicine highlight the paucity of reliable data on the subject, which do not allow the conclusion that face coverings should be widely recommended.[20] [21] They noted that twelve randomised controlled trials (RCTs) with 13,259 subjects showed no significant effect in interrupting viral spread.

78. Moreover (at para 12)

> Source control of asymptomatic individuals would only be required if they can transmit the virus to others. There is currently no evidence to support the hypothesis of asymptomatic transmission of SARS-CoV-2. On the contrary, data from a recent large Chinese population study suggests there is no risk of viral transmission from PCR positive, asymptomatic people to others.[22] A

[16] Smith JD, MacDougall CC, Johnstone J, Copes RA, Schwartz B, Garber GE. Effectiveness of N95 respirators versus surgical masks in protecting health careworkers from acute respiratory infection: a systematic review and meta-analysis. CMAJ 2016;188:567–74.
[17] Chou R, Dana T, Jungbauer R, Weeks C, McDonagh MS. Masks for Prevention of Respiratory Virus Infections, Including SARS-CoV-2, in Health Care and Community Settings: A Living Rapid Review. Ann Intern Med 2020.
[18] https://uploads-ssl.webflow.com/5fa5866942937a4d73918723/602e6afd2d5e00dbe4cfd228_UKMFA_Open_Letter_Face_Mask_Mandates.pdf
[19] https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD006207.pub5/full
[20] https://www.cebm.net/covid-19/masking-lack-of-evidence-with-politics/
[21] https://www.cebm.net/covid-19/covid-19-masks-on-or-off/
[22] https://pubmed.ncbi.nlm.nih.gov/33219229/

> further detailed analysis of the available published literature highlights the lack of persuasive evidence that asymptomatic transmission is of any clinical significance.[23]

79. The lack of evidence of transmission of the virus by those who are asymptomatic also undermines the rationale behind the Policy for *any* social distancing measures to be imposed by the Trust on children at the School *even if* (which is not the case) there was any justification for imposing any such measures on children who are at no statistical risk of harm from transmission of the virus.

The risk of harm to children from being required to wear face-coverings

80. The Risk Assessment fails to consider whether the Policy risks inflicting harm to the children's physical or mental health or to their Convention rights. Again, this is in itself sufficient to establish that the Trust is in breach of its obligation to *assess* risk, which must include the risk caused to children by the requirement to wear masks and by other NPIs as much as it might include the risk of transmission of the virus.

81. It is the Claimant's case that, were the Court to conclude that the Trust breached statutory and common law duties imposed *to protect children from harm*, that would itself establish that there was a substantial risk of harm to those children. The Court's jurisdiction to grant *quia timet* relief extends to protect persons against risk of harm and the 1974 Act and the 1999 Regulations exist to protect children (amongst others) against a disproportionate risk of harm. By imposing a policy that creates a risk of harm, the Court should exercise its jurisdiction to protect children from that risk until it has been properly assessed by the Trust. Unless and until that risk is assessed, it is sufficiently serious to justify the relief sought.

Expert evidence of risk of harm from the said breach of those duties

82. Further and alternatively, the Claimant relies upon the evidence of actual harm from the Policy. The reports of Ms Plaut and Dr Storah are relied upon in full, including those parts not summarised below. In summary, they establish that the continued imposition of the Policy presents a substantial risk of serious harm.

[23] https://dryburgh.com/wp-content/uploads/2020/12/Clare_Crag_Evidence-of-Asymptomatic-Spread-of-COVID-19-been-Significantly-Overstated.pdf

Findings of Ms Plaut

83. First, children wearing face coverings sold in the community risk inhaling aerodynamic nano-particulate fibres deep into the lungs, reaching the gas exchange surfaces of the alveoli.

> "Pulmonary fibrosis is among the worst diseases that can be suffered or witnessed. It kills exceedingly slowly, by ever-thickening matrix formation, a kind of scar tissue, obstructing the alveoli and reducing their air exchange. The illness worsens over time, and suffocates the victim very gradually. Nothing is available to the sufferer from conventional medicine'.
>
> (Plaut Report, para 5.19,#)

84. Secondly, face-coverings are used:

> '…in a warm, moist environment within the face covering. This creates a vector for carrying bacteria deep into the lungs with the risk of infection, their aerodynamic features transporting a bacterial payload directly towards the undefended surfaces where gas exchange takes place.'
>
> (Para 5.22,#)

85. This process is exacerbated by mouth breathing, caused by wearing a face-covering. Ms Plaut concludes that the wearing of face-coverings for the entire school day 'is a far greater burden on the students than is seen for adult workers in industries where Respiratory Protective Equipment (RPE) is worn. These would be removed during regular work breaks and for the journey to and from the workplace and worn only during the actual time of work exposure to the toxic substance or environment.' (Para 5.24,#).

86. Thirdly, Ms Plaut sets out the onerous requirements imposed on employers before they can require workers to wear respiratory protective equipment:

> '…are subjected to an Occupational Health evaluation to confirm their fitness to wear a restrictive breathing device prior to commencing work. This is to verify that they are fit enough to wear the apparatus throughout their work shift, as detailed in the Personal Protective Equipment Regulations 1992, with repeat evaluations (including Spirometry to check for lung capacity) at regular intervals to check for any health deterioration that might have been caused.'
>
> (Para 5.25, #)

87. Ms Plaut goes on to explain the harm that can be caused by mild to moderate hypercapnia (over-saturation with carbon dioxide), including 'shortness of breath, daytime sluggishness, headaches, daytime sleepiness (hypersomnolence)', all were

reported in the German study of 20,000 children who had been wearing face coverings in school since August 2020 and which are likely to adversely affect learning outcomes and wellbeing. (Para 5.28) This condition is also associated with Chronic Obstructive Airways disease (para 5.29) and the suppression of certain immune systems (para 5.30, #). Ms Plaut observes

> 'the guidance to the Personal Protective Equipment regulations: "The use of PPE must not increase the overall level of risk, i.e. PPE must not be worn if the risk caused by wearing it is greater than the risk against which it is meant to protect."'
>
> (Para 5.31, #)

88. Ms Plaut further outlined the risks to children of carbon dioxide at para 5.40 (#), stating (with reference to citations including the guide to workplace health and safety and welfare regulations) that 'the symptoms of carbon monoxide and carbon dioxide exposure are broadly similar (headaches, dizziness, confusion, reduced attention span, inability to concentrate, lowered consciousness, loss of consciousness) as they are both related to lowered oxygen supply to brain tissue'. Ms Plaut conducted a test on a child of the same age and sex as AB, in which carbon dioxide levels:

> 'rose swiftly within the mask to levels approaching, matching and in some cases exceeding the workplace exposure limit (5,000 Parts per million or 9,150 mg/m3 Time Weighted Average for an eight-hour working day) listed in EH40/2005 and the HSE guide to workplace exposure limits for use with the Control of Substances Hazardous to Health Regulations 2002.'

Those Regulations are for adults and yet AB and other children are required by the Policy to wear face-coverings almost continuously for a day of up to nine hours (including transport to and from school).

89. The above German research into children wearing face coverings reported symptoms identical to those found from carbon dioxide intoxication. This was a study of 20,000 respondents <u>which was not considered by the Department for Education (in the UK) in making its Guidance</u>.

> Distressing signs and symptoms related to wearing a mask were reported by 68% of the parents. These included irritability (60%), headache (53%), difficulty concentrating (50%), less happiness (49%), reluctance to go to school (44%), malaise (42%) impaired learning (38%) and drowsiness or fatigue (37%). These are broadly similar to those listed for carbon dioxide exposure.
>
> (Para 5.45, #)

90. <u>Fourthly</u>, Ms Plaut outlines the failure of the Trust to undertake any impact assessment on those children who are disabled. Nor had the Secretary of State before the Guidance

was issued. At the outset, it must be observed that the Trust Risk Assessment requires children to ask the permission of the head teacher before being permitted an exemption. This is in contrast (for example) to enforcement of face-covering policies on public transport, where passengers are expressly reminded of the fact that some persons might have hidden disabilities; and where officials have a policy of not challenging those not wearing face-coverings for that reason.

91. AB's evidence (including in his/her answers to questions from Dr Storah) suggests, in contrast, that the Trust Policy is imposed aggressively by staff. For example, AB reports teachers shouting across the class asking why a face-covering was not being worn and children being told that not wearing them 'puts everyone at risk' (Storah Report, para 7.10). This is at least likely to persuade children with disabilities not to go to the active step of requesting an exemption. Moreover (as also established by Dr Storah) the pressure of peers and the teenage and pre-teenage dislike of being seen to be different is likely to dissuade children from asking for an exemption – particularly as they will be required to wear a 'lanyard' if exempt (Storah Report, para 7.4, #).

92. Indeed, Dr Storah records AB as saying that a child with asthma not only was not given an exemption but was required to wear a mask until he got to the medical room, making his anxiety worse and making him feel claustrophobic (para 7.25, #).

93. At paras 5.32-5.39 (#-#) Ms Plaut outlines the negative effects on an individual child suffering from a range of disabilities not only of the requirement of that child to wear a face-covering but of the fact that those around them will have facial expressions hidden. These included visually impaired children, hearing impaired (potentially reliant not only on lip-reading but on other facial expressions) and children on the autistic spectrum and who are 'neuro atypical'. Asthmatic children are also put at risk by the cold conditions imposed by the ventilation part of the Policy.

<u>Findings of Dr Storah</u>

94. Dr Storah outlines concerning evidence that the NPIs imposed by the Policy – and particularly the requirement for the almost continuous wearing of face-coverings – have the potential to cause serious psychological injury to children at the school and AB in particular. Her report is relied on in full.

95. Dr Storah outlines the following harms risked by the continued implementation of the Policy:

(1) The Policy has not been risk assessed in terms of potential for physical and psychological harm (para 5.3, #);

(2) Children in AB's class are almost unanimously opposed to the measures (29/30 children) (para 7.19, #); and it is noted that this is a measure impacting upon their bodily integrity (unlike, for example, a uniform policy) about which neither children nor their parents have been consulted;

(3) Children are induced to continue to wear face-coverings by peer pressure even where they suffer from mental or physical ill-health which should lead to exemptions from the Policy being granted (paras 7.24/7.25, #); and the over-zealous implementation of the Policy undermines children's right not to engage in voluntary measures, leading to actual or potential harm to important teacher-pupil and peer-peer relationships (paras 9.1-13, #-#);

(4) Interference with effective communication in lessons, causing 'an impairment of non-verbal communication via the blocking of facial expressions [and] difficulties in the reading of emotional and cognitive states which are crucial for multiple aspects of social interaction' (para 10.4, #) and impairing the learning process (para 10.5-10.8, #-#) and the emotional support that is part of the role of the teacher (para 10.9, #);

(5) Interference in children's communication with each other, their socialising and experience of relationships (paras 11.1-11, #), which Dr Storah concludes (at 11.7 and 11.11):

> '…are significantly interfering with children's development because they suppress human behaviour which is essential for effective communication and interaction. Social relationships are impeded, in the manner described at Section 10 of this document, via the covering of faces and obscuring of facial expressions. Research tells us that subtle changes in facial expressions are used, more or less consciously, in order to achieve a social goal, for example to obtain attention or support, and for interpersonal experience. Moreover, we know that interpersonal interaction is regulated by emotional expression, whilst simultaneously emotional experience is regulated through interaction. Therefore, inhibiting this vital element of social communication significantly limits the ability of students to recognise,

> respond to and regulate each other's social responses and emotional states, especially when they are only just getting to know each other.
> …
>
> 'Given that the current situation of such social curbs is novel, it is plausible that these measures could be harmful to these children's social development and future capacity for normal emotional closeness and intimacy in ways which we do not yet understand. Currently, it seems schools and society at large are making the assumption that when measures are removed, children will return to their previous belief systems and social behaviours. We do not know that this will be the case, however, and in my opinion, the longer these measures remain in schools, children's social behaviour, their capacity for normal intimacy and ability to respond to each other in a pro-social and attuned manner may be permanently changed. The psychological and societal outcomes of such change, for a whole generation, could be devastating.'

(6) Interference with children's development, sense of self and their attitudes to others due to 'fear messaging' within the school (paras 12.1-12. #), including the inaccurate suggestion that children are at a measurable risk from the virus; Dr Storah concludes (at para 12.4, #) that:

> 'As young people's brains are not fully formed, they will be unable to contextualise information relating to risk and harm in the same ways as adults. This could leave them feeling more fear and confusion than adults subjected to the same techniques in the wider community.'

(7) Interference with children's experience of school as safe, comfortable and enjoyable environments in which they can learn and develop (para 13.1-13.4, #-#)

(8) AB identified several difficulties which have arisen due to these measures, including adverse effects on perceptions of self, perceptions of others, teaching, learning, socialising, psychological and physical comfort (paras 5.5/5.6, #/#)

(9) (In conclusion), 'the current policies intended to reduce SARS-CoV-2 transmission within Child A's School, and their manner of implementation, are causing unintended psychological and developmental harm to young people within the school community [and] there is the potential for significant harms to young people's social, emotional and cognitive development and their well-being (para 14.2, #);

(10) And (at para 14.4 and 14.11, # and #):

> 'It is reasonable to extrapolate from accumulated knowledge in this area that, given the importance of adolescence in the developmental trajectory of human beings, and increasing knowledge about the

> sensitivity of the adolescent brain to environmental influences and stressors (39), there is real potential for far-reaching consequences. Findings from recent studies have started to confirm concerns about harm caused to children and young people by such unprecedented social policies.
> …
> In keeping with the principles of the Children's Acts (1989, 2004), there is a professional obligation on the part of all people working with, or on behalf of, children (e.g. teachers, social workers, psychologists, those in local authority, public health officials, civil servants, MPs and cabinet ministers) to consider whether a plan of action does in fact place children's rights as paramount and whether it is in their best interests.

Conclusion on an interim basis

96. The above evidence and submissions establish that there is at least a serious issue to be tried.

97. In assessing the narrow balance of convenience, the Court is asked to have regard to the following factors:

    (1) The transmission of the virus presents no real statistical threat to children;
    (2) The Trust does not, by itself (nor via the Guidance have any reliable evidence that face-coverings have any significant effect on transmission and the substantial evidence (set out above) is that they have no significant effect (but may even increase the risk of transmission)and
    (3) the considerable evidence of the substantial risk of harm to children from the continuation of the policy.

98. The risk of serious physical and/or psychological harm clearly could not adequately be compensated for in damages.

99. The Claimant, in asserting a risk of personal injury to a child litigant, should grant injunctive relief even though no cross-undertaking in damages can be made. Further and alternatively, there is no legal requirement on the Trust to impose this policy and no precedent of a school, academy trust or local education authority being found liable for the transmission of a respiratory virus through conduct of its undertaking. There is thus no foreseeable risk of damages being caused to the Trust by it being required to end this Policy on an interim basis.

RELIEF

100. The Claimant seeks the following prohibitory injunction, on an interim and (following a trial) final basis:

That the Defendant be prohibited, either by itself or any of its employees or agents, from:

(1) Continuing to impose the policy it has introduced imposed requiring the wearing of face-coverings by children throughout the school day or any policy requiring or encouraging face-coverings to be worn by children at X School or at all;

(2) Continuing to impose other Non-Pharmaceutical Interventions on children at the School unless and until it has conducted suitable and sufficient risk assessments;

(3) (Alternatively) Imposing any policy (through the Policy or at all) requiring face-coverings to be worn by children within classrooms; and/or

(4) (In the further alternative), coercing any child to wear a face-covering, irrespective of the policy imposed or that may lawfully be imposed.

101. The Claimant also seeks his/her costs in the claim.

FRANCIS HOAR

STATEMENT OF TRUTH

The litigation friend believes that the facts stated in this Statement of Case are true. The litigation friend understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed..... [redacted] ..... Date: 22 April 2021

STEPHEN JACKSON

(solicitor and director)

Jackson Osborne Ltd, Solicitors for the Claimant.