**STATE OF RHODE ISLAND**

**DEPARTMENT OF HEALTH**

**:**

**In re Blackstone Valley Mayoral Academy, : RULEMAKING PETITION**

**: REGARDING BINAXNOW RAPID**

**: TESTING OF STUDENTS IN**

**: SCHOOLS**

**Petitioner. :**

**:**

Petitioner Blackstone Valley Prep Mayoral Academy (“BV Prep”) requests that the Rhode Island Department of Health (“RIDOH”) immediately adopt an emergency rule permitting schools within the state of Rhode Island to require either proof of vaccination, proof of having Covid-19 within the last ninety (90) days, or consent to participate in BinaxNOW rapid testing as a condition of participating in in-school attendance. The rule should include a medical exemption, a religious exemption, and any exemption required by federal law, including, but not limited, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. §§ 12111, et seq.

**PETITIONER**

BV Prep is a mayoral academy organized pursuant to R.I. Gen. Laws §§ 16-77-4-1, et seq., serving more than 2,100 students from kindergarten through grade 12 residing in Central Falls, Cumberland, Lincoln, and Pawtucket. BV Prep employs over 300 persons serving as educators, clinicians, support staff, and administrators and engages with dozens of contractors and consultants.

BV Prep operates six schools, serving more than 2,100 students from kindergarten through grade 12. Of these six schools, three were formerly parochial schools that have been renovated, two are new construction, and one is a former traditional public school that has been renovated. The age ranges of the schools span from three years in age to more than 100 years in age. None were built with the social distancing requirements of the Covid-19 pandemic in mind.

**AUTHORITY**

R.I. Gen. Laws § 42-35-6 authorizes BV Prep to petition RIDOH to promulgate a rule.

R.I. Gen. Laws § 42-35-2.10 authorizes the Director of RIDOH and the Governor, or the Governor’s designee, to issue emergency rules upon a finding of an imminent peril to the public health, safety, or welfare.

R.I. Gen. Laws § 16-38-2 and § 23-1-18 authorizes the Director of RIDOH to promulgate regulations regarding immunization and communicable disease testing in preschool, school, colleges, or universities, now codified at 216 R.I.C.R. 30-05-3.

**STATEMENT OF FACTS**

Covid-19 has ravaged the state of Rhode Island. Community spread is a particular problem in Central Falls and Pawtucket, to the degree that the Director of RIDOH has prioritized vaccination of residents of those communities over residents of other communities. According to RIDOH, the percentage of residents in Central Falls who have reported testing positive for Covid-19 is 20.9%, the highest in the state of Rhode Island, and the incidence of Covid-19 per 100,000 in Pawtucket is 13.8%. While the percentages for Cumberland and Lincoln are lower, 10.1% and 10.8% respectively, they are still higher than many other communities in the state. See R.I. Dep’t of Health Covid-19 Data Tracker: Geography, <https://ridoh-covid-19-response-geography-site-rihealth.hub.arcgis.com/> (last viewed on Mar. 9, 2021). It should be beyond purview that Covid-19 is an imminent peril to the public health, safety, or welfare.

To combat Covid-19 in the school environment, the Center for Disease Control and Prevention recommends that schools “[s]pace seating/desks at least 6 feet apart when feasible.” Operating Schools during Covid-19: CDC’s Considerations (Mar. 1, 2021), at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> (last viewed on Mar. 9, 2021). Similarly, RIDOH and the Rhode Island Department of Education (“RIDE”) have stated that “[i]n high schools, occupancy will be based on 6 feet of physical distance between individuals.” Back to School RI: Health and Safety Guidance to Reopen Rhode Island’s Elementary and Secondary Schools 8 (Nov. 6, 2020), available at [https://reopeningri.com/wpcontent/uploads/2020/08/HealthandSafetyReopeningGuidance.pdf](https://reopeningri.com/wpcontent/uploads/2020/08/HealthandSafetyReopeningGuidance.pdf%20)  (last viewed on Mar. 9, 2021). Elsewhere, RIDOH and RIDE have stated, “The spacing of desks/tables should be separated 6 feet as much as possible.” Id. at 11.

The Commissioner of Education has repeatedly expressed her desire that students return to in person learning. See, e.g., Infante-Green: There is No Reason Students in Pawtucket Can’t Return to School in Person, available at <https://www.wpri.com/health/coronavirus/school-updates/infante-green-there-is-no-reason-students-in-pawtucket-cant-return-to-school-in-person/> (last viewed on Mar. 9, 2021). BV Prep concurs. BV Prep cannot, however, guarantee that when students return to in-person education they can be at least six feet apart at all times. As is the case with most high schools in Rhode Island, BV Prep also cannot establish stable pods at its high school.

One way to mitigate these physical limitations is through testing. The leadership of the National Institute of Health has stated that testing saves lives, testing can be easy and quick, and testing matters more in the communities affected the most. Nat’l Inst. of Health, Why COVID-19 Testing Is the Key to Getting Back to Normal (Sept. 4, 2020), available at <https://www.nia.nih.gov/news/why-covid-19-testing-key-getting-back-normal> (last viewed on Mar. 9, 2021).

Administration of the BinaxNOW test is minimally invasive. The BinaxNOW test uses a small swab inserted into the lower part of the nasal cavity. The swab is moved slightly around both nostrils. New At-Home Covid Test a Major Advancement available at <https://www.abbott.com/BinaxNOW-Test-NAVICA-App.html> (last viewed on Mar. 9, 2021).

According to the American Society for Microbiology, the BinaxNOW Covid-19 Ag Card:

is a lateral flow immunoassay that qualitatively detects the presence of the N protein in nasal swab samples. Instrumentation is not needed for this test and all necessary reactions take place on a test card. First, 6 drops of test reagent are added to the top well of the test card. Then, the swab containing the patient sample is inserted into the second well and rotated three times. The card is sealed. Within 15 minutes, a result will be displayed on a paper strip (similar to a pregnancy test) that can be visualized through a small window on the front of the test card.

Am. Soc’y for Microbiologists, How the SARS-CoV-2 EUA Antigen Tests Work (Aug. 31, 2020), available at <https://asm.org/Articles/2020/August/How-the-SARS-CoV-2-EUA-Antigen-Tests-Work> (last viewed on Mar. 9, 2021).

**RELIEF REQUESTED**

BV Prep requests that RIDOH take the following actions:

1. Issue a new rule codified at 216 R.I.C.R. 30-05-3.5.2(B) that states as follows:

A school offering distance learning may require any student as a condition of in-school attendance to submit at no cost to a BinaxNOW rapid test for Covid-19 unless (1) a student (over the age of eighteen (18)) or the student’s parent provides proof of vaccination for Covid-19; (2) a student (over the age of eighteen (18)) or the student’s parent provides proof of having Covid-19 within the last ninety (90) days; (3) the student (over the age of eighteen (18)) or the student’s parent provides a certificate from a licensed physician that the person is not a fit subject for immunization for medical reasons; (4) the student (over the age of eighteen (18)) or the student’s parent provides a certificate stating that testing for Covid-19 is contrary to that person’s religious beliefs; (5) the student is exempt from BinaxNOW rapid test for Covid-19 pursuant to any federal law.

1. Adopt any such other rule as the Director of RIDOH deems necessary.

**CONCLUSION**

In view of the current public health emergency, BV Prep urges that RIDOH immediately adopt an emergency rule permitting any school to require BinaxNOW testing subject to appropriate exceptions.

DATED: March \_\_, 2020 BLACKSTONE VALLEY PREP

MAYORAL ACADEMY

By its attorney,

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