

IN THE CIRCUIT COURT OF KANAWHA COUNTY

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KANAWHA COUNTY CIRCUIT COURT

WEST VIRGINIA FEDERATION OF TEACHERS,
AFL-CIO and FRED A. ALBERT, its President, and
its members,
JERRY THROCKMORTON,
GREG GARBER, and
AMY HADEN,

Petitioners,

v.

Civil Action No. 21-C-56

WEST VIRGINIA DEPARTMENT OF EDUCATION,
and W. CLAYTON BURCH, in his official capacity as State
Superintendent of Schools;
WEST VIRGINIA BOARD OF EDUCATION,
KANAWHA COUNTY BOARD OF EDUCATION and
DR. TOM WILLIAMS, in his official capacity Kanawha
County Superintendent,

Respondents.

**VERIFIED COMPLAINT OF THE WEST VIRGINIA FEDERATION OF TEACHERS,
AFL-CIO, FRED A. ALBERT, ITS PRESIDENT, AND ITS MEMBERS, GREG
THROCKMORTON, GREG GARBER, AND AMY HADEN SEEKING A TEMPORARY
RESTRAINING ORDER, PRELIMINARY INJUNCTION, A PERMANENT
INJUNCTION, A RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT LIE
AND DECLARATORY JUDGMENT**

Comes now the American Federation of Teachers - West Virginia ("AFT-WV") and its President Fred Albert, by counsel Jeffrey G. Blaydes, and, on behalf of its professional and service personnel members, petitions this Court for a temporary restraining order, preliminary injunction, as well as a writ of mandamus and declaratory judgment, and an injunction requiring the West Virginia Department of Education ("WVDOE"), West Virginia Board of Education ("WVBOE") and the Kanawha County Board of Education ("KCBOE") to:

(1) refrain from requiring in-person schooling until all professional and service personnel

who elect to be vaccinated have, in fact, received a complete vaccination (which should be completed on or by February 15, 2021, and would be fully effective soon thereafter); and

(2) require the WVDOE and WVBOE to permit local control by county boards of education to determine how and when professional and service personnel shall renew in-person instruction and school activity during the pandemic.

I. Introduction

In support of its Petition, AFT-WV states as follows:

1. It is beyond cavil that the State of West Virginia has experienced the lethal and unforgiving novel coronavirus known as COVID-19. The novel coronavirus knows no boundaries and has impacted all facets of our society. Indeed, this has been a fact of life for West Virginians since mid-March of 2020, when in-person school was impacted, the high school girls state basketball tournament was shut down mid-tournament, and the spring semester was disrupted for all of the school students of West Virginia.

2. It is clear that the novel coronavirus – some ten months later – remains a deadly threat in our State. It is even worse and certainly more widespread now than before. According to the official website of the West Virginia Department of Health and Human Resources for COVID-19, as of December 1, 2020, West Virginia had experienced 50,016 COVID positives. Approximately six or seven weeks later, that cumulative number is now at least 109,809. Thus, in just over six weeks, West Virginia has experienced 54.4% of its positives.¹ A very recent snapshot of the West Virginia Department of Health and Human Resources “West Virginia COVID 19” dedicated web

¹ dhhr.wv.gov

page establishes that the tragic destruction is widespread and ongoing. The web page indicates² that West Virginia has experienced:

- 1,836 deaths
- 111,677 total cases reported
- 857 cases reported in the last 24 hours
- 21 deaths in the prior 24 hours
- 26,217 active cases
- 7.7% daily percent positivity

3. Kanawha County has experienced the same massive increase in COVID positives. Over the same period of time, Kanawha County has experienced an approximate 44% increase in its total COVID positives. That is, on December 1, 2020, Kanawha County had 5,785 positives.³ It now has 10,336. Within the public schools of Kanawha County, the county has experienced thirty-eight (38) confirmed positive staff or student cases in the past two weeks.⁴ On January 19, 2021, – the date upon which in-person instruction resumed – two COVID positives have already been identified at a Kanawha County high school.

4. The public schools of the State of West Virginia are an integral part of the fabric of our society and democracy. Clearly, novel coronavirus has greatly impacted the operation of public schools in West Virginia. Undoubtedly, the education of our youth must continue (and it has). However, our public schools must also be operated safely. There is no question that all education stakeholders in this State – including professional education and school service personnel – seek a return to the normal routines of life, work, and the daily, personal interaction that is vital to the

² dhhr.wv.gov/COVID-19 updated January 20, 2021 at 10 am.

³ County statistics are based upon “Update and News” on the West Virginia DHHR COVID-19 website and may be modified from time to time based upon new data.

⁴ Kanawha County Schools “School COVID Case Procedure and Tracking.”

educational process. However, the desire to return to normalcy must be tempered by the fact that a vaccine for the novel coronavirus has only been introduced in West Virginia in past weeks; that the distribution of the vaccine has been, understandably, prioritized for the most vulnerable and elderly in West Virginia and then for first responders; and that, to date, very few, if any, public education employees have been fully inoculated and that a fraction of those employees have received a single dose.⁵ As of the filing of this Petition, the reality is that West Virginia is close – but has not quite completed – the vaccination of most, if not all, public education employees in West Virginia. KCBOE needs only a few weeks to complete vaccination for many employees.

5. The West Virginia Constitution, Article XII, Section I, mandates that our children receive a “thorough and efficient system of free schools” and makes education a fundamental, constitutional right in the State of West Virginia. Syl. Pt. 3, Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). Of course, the “thorough and efficient” clauses require “a safe and secure school environment.” The West Virginia Supreme Court of Appeals has found:

Implicit within the West Virginia constitutional guarantee of “a thorough and efficient system of free schools” is the need for a safe and secure school environment. Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.

(emphasis supplied) Phillip Leon M., et al. v. Greenbrier Cnty. Bd. of Educ., 199 W. Va. 400, 484 S.E.2d 909 (1996). Clearly, Petitioners and all school personnel and students have a clear, legal right to a safe and secure school system.

6. KCBOE (and numerous other county boards of education) considered the safety of the school system – its students and their families, as well as all public education employees and the

⁵Upon information and belief, approximately 2,500 individuals received the first round of the vaccine provided by KCBOE on January 7th and 18th.

community at large – and recently voted to return to in-person instruction only after many, if not all, of their employees had been fully vaccinated in or around the second week of February 2021.⁶ However, the WVDOE and the WVBOE intervened and overturned the decision of the local board of education and mandated that all public education employees in the State return to work with students four days per week beginning January 19, 2021. Thereafter, KCBOE determined (possibly under a threat of loss of funding from the State) that it would follow the directive of the WVDOE and require its employees to return to work in this unsafe manner. It is clear that the Respondents' unconstitutional handling of their duties has infringed upon the mandate of safe schools and requires this Court to issue necessary and appropriate relief. West Virginia and Kanawha County students, parents, teachers, and the public deserve, and are constitutionally entitled to, the protections that will assure a safe return to in-person instruction.

7. Therefore, Petitioners bring this action to safeguard the health and welfare of West Virginia and Kanawha County students, educators, staff, parents, and the general public, including residents of Kanawha County, following the failure of Respondents to allow public education employees to receive the required two doses of the vaccine and the passage of about seven to fourteen days after the vaccination prior to a return to in-person instruction. Petitioners urge this Court to issue a temporary restraining order and injunctive relief to allow teachers to be fully vaccinated over the next several weeks and return to work with dispatch thereafter. Such injunctive relief would provide additional safeguards to the health and welfare of Kanawha County public school students, educators, staff, parents, and the general public, including the residents of Kanawha County. This is particularly true given the facts as will be discussed *infra*, that the WVBOE has

⁶In fact, KCBOE's motion considered the possibility that the WVBOE might direct otherwise.

eliminated the use of its primary method to insure safe schools – the color coded map – for all students except those in high school who are in a red county (as determined by the most recent iteration of the map).

8. KCBOE has provided a mix of in-person instruction and remote/virtual during the pandemic. In lieu of in-person instruction, KCBOE – after providing extensive training to teachers this summer – has offered remote instruction during which teachers provide live instruction via computer in the form of lectures, classwork, and examinations. Additionally, for years, the State of West Virginia has provided virtual education programs that have educated students effectively in many areas including, for example, Advanced Placement courses that may not be offered at a particular school. Under the present circumstances, Petitioners are simply requesting that the status quo provision of remote and virtual instruction continue for a few additional weeks until the vast majority of public education employees in this county (and State) receive the vaccine.

9. An actual case or controversy exists in this case.

10. Pursuant to action taken on January 13, 2021, by the WVBOE, KCBOE schools reopened on January 19, 2021, without their employees having had the benefit of the completed vaccination. This reopening plan unnecessarily jeopardizes the health and safety of education stakeholders in Kanawha County. Emergency relief is essential to protect the community from Respondents' arbitrary and unconstitutional actions. Thus, Petitioners respectfully request that a temporary restraining order and preliminary injunction be issued until the public education employees are able to secure their second vaccination in an effective manner.

II. Jurisdiction and Venue

11. This Court has jurisdiction pursuant to West Virginia Code §§ 53-1-2; 53-5-4; and

55-13-1.

12. Venue is proper in the Circuit Court of Kanawha County, West Virginia, as the cause of action accrues in Kanawha County, West Virginia. See W. Va. Code § 14-2-2.

13. Pursuant to West Virginia Code § 55-17-3, and because Petitioners seek injunctive relief, irreparable harm would occur if Petitioners were required to provide thirty-days notice of this action.

14. Petitioners' claim requires the grant of a temporary restraining order pursuant to Rule 65(b) of the West Virginia Rules of Civil Procedure because Petitioners Throckmorton, Garber, and Haden, and the Kanawha County members of AFT-WV, were required to report to school on January 19, 2021, for in-person instruction prior to the provision of a second COVID vaccination in the first or second week of February 2021. The threat to Petitioners is immediate with all risks presented by the novel coronavirus as more fully set further herein. This is particularly true given the recent substantial surge in COVID viruses in our state and the introduction of a more contagious strain in the United States.

III. Parties

15. Petitioner AFT-WV is an organization comprised of approximately 10,000 education employees including teachers, service personnel, psychologists, counselors, social workers, and other professional personnel in the public school districts of West Virginia. In Kanawha County, AFT-WV represents approximately 1,400 service and professional school personnel. AFT-WV advocates on behalf of its members on a local and statewide basis with regard to all terms and conditions of employment, including the safety of its members. AFT-WV is affiliated with one of the largest national teachers' union in America, the American Federation of Teachers. The President of AFT-

WV is Petitioner Fred Albert.

16. Petitioner Jerry Throckmorton is a high school history teacher at Sissonville High School, a public school in Kanawha County, West Virginia. Petitioner Throckmorton is 64 years of age and, therefore, at higher health risk of negative outcome with regard to the novel coronavirus. Petitioner Throckmorton received the first dose of the vaccine on January 7, 2021, at Capitol High School. He has not received the second vaccine, but plans to when it is available on or about February 3, 2021. He is not fully inoculated and was not fully inoculated when he was required to return to in-person teaching on January 19, 2021, which will require him to be in class with a portion of his students four days per week.

17. Petitioner Greg Garber has taught in the public schools of West Virginia for approximately thirty-one years, the vast majority of that time in Kanawha County. He is currently an elementary physical education teacher who splits time between Montrose and Ruth Lawn Elementary Schools. He is 57 years of age and has coronary heart disease and atrial fibrillation, for which he had surgery several years ago. He suffers from high blood pressure for which he is medicated, and presents other additional risk factors. He received the first vaccine on January 14, 2021, at South Charleston High School, and was informed at that time that he would receive the second dose on February 10, 2021. He is not fully inoculated and was not fully inoculated when he was required to return to in-person teaching on January 19, 2021, which will require him to be in class with a portion of his students four days per week.

18. Petitioner Amy Haden is a high school social studies teacher at George Washington High School, a public school in Kanawha County. Petitioner Haden is 60 years of age and, therefore, is at high risk should she contract the novel coronavirus. Petitioner Haden received her first dose

of the vaccination on January 7, 2021, and is scheduled for her second dose on February 3, 2021. She is not fully inoculated and was not fully inoculated when she was required to return to work to in-person teaching on January 19, 2021, which will require her to be in class with a portion of her students four days per week.

19. Respondent WVBOE is authorized to provide general oversight to the public schools of West Virginia. See W. Va. Code § 18-2-21, et seq.

20. Respondent WVDOE is the administrative agency responsible for implementing education policies and programs promulgated by the State of West Virginia. See W. Va. Code § 18-3-9. Respondent Superintendent of Schools Clayton Burch serves as the chief executive officer of the state board of education. See W. Va. Code § 18-3-3.

21. Respondent KCBOE is the governing body of Kanawha County's public education system and is mandated to supervise and control the county school district. See W. Va. Code § 18-5-1. Respondent Dr. Thomas Williams is the superintendent of KCBOE.

IV. Factual Allegations

22. West Virginia has been ravaged by COVID-19, a severe acute respiratory illness caused by SARS-CoV-2, that can spread among humans through respiratory transmission. COVID-19 spreads easily from person to person, even when an infected person shows no symptoms. People of all ages with chronic medical conditions and those who are older are at a higher risk of developing severe illness resulting in death. COVID-19 does not discriminate and has caused serious illness and death to people of all ages regardless of whether they have underlying medical conditions. More than half (54%) of the positive COVID results in West Virginia, and approximately 44% of the positives in Kanawha County, have occurred in the past six or seven weeks.

23. According to the Center for Disease Control and Prevention (“CDC”), the virus is spread mainly through person-to-person contact typically when people are within six feet of each other and through respiratory droplets.⁷ In recent days, the CDC has warned that a highly transmissible variant of the virus will become the dominant strain in the United States over the next two months. Research estimates that this strain is “roughly 50% more transmissible” than the more common one.⁸

24. The devastating impact of COVID-19 is well documented. To date, the New York Times reports that there have been 401,823 deaths in the United States and 24,300,000 reported cases nationwide. While our citizenry has had to endure this pandemic for months, the threat has not diminished and it continues to severely threaten health and welfare.⁹

25. As noted *supra*, West Virginia has experienced 1,733 deaths due to COVID-19. It has endured 109,809 total cases. In the twenty-four hours prior to the snapshot provided, West Virginia has had 1,430 cases reported and 31 deaths. During that same time, the State has 27,016 active cases and a 5.17% daily percent positivity. As noted, 54% of the total cases in West Virginia have occurred in the past six weeks. Two hundred and thirty-seven (237) Kanawha County residents

⁷When Vaccine is Limited, Who Should Get Vaccinated First?, [cdc.gov/coronavirus/2019-ncov/vaccine/recommendations](https://www.cdc.gov/coronavirus/2019-ncov/vaccine/recommendations)

Information about the Moderna COVID-a9 Vaccine, [cdc.gov/coronavirus/2019-n-cov/vaccines](https://www.cdc.gov/coronavirus/2019-n-cov/vaccines)

⁸“CDC warns highly transmitted coronavirus variant to become dominate in U.S.” Washington Post, January 15, 2021.

⁹On January 31, 2020, the Secretary of Health and Human Services declared a public emergency in response to COVID-19.

On March 11, 2020, the World Health Organization declared the outbreak to be a “pandemic.”

On March 13, 2020, a national emergency was declared as a result of this pandemic, On Governor Jim Justice closed West Virginia schools.

have died from COVID-19, by far the most deaths in the State. And, as noted, approximately 44% of the positive tests in Kanawha County have occurred in the past six-plus weeks. Of course, statistics related to current cases and overall positives are limited only to those who have been tested. Moreover, the long-term effects of COVID-19 are currently unknown.

26. On March 16, 2020, Governor Jim Justice declared a State of Emergency in West Virginia.¹⁰ West Virginia remains in a State of Emergency.¹¹

27. In light of the undisputed public emergency, school systems throughout the country have been forced to take drastic measures to respond to and mitigate this public health crisis. School safety is a critical public health and constitutional imperative. The State Constitution and our Supreme Court of Appeals guarantee safe schools.

"A Race Against the Virus"

28. While this public health crisis emerged some ten months ago, it obviously continues to this day. The new presidential administration is proposing a 1.9 trillion dollar coronavirus plan to speed up vaccines and provide financial assistance.¹² Moreover, as noted, it has recently been reported that a "highly contagious variant of the coronavirus" will soon become the dominant strain within the United States and speaks to the "urgency of getting more vaccines out." William Hanage, an epidemiologist from the Harvard School of Public Health, referred to the urgency of vaccinating

¹⁰"West Virginia's Response to COVID-19," Governor.wv.gov/Pages/WV-COVID-19-actions-and-executive-orders.

¹¹On April 2, 2020, Governor Justice and WVDOE announced new programming to aid in the remote education of school children. (Time line cite)

¹²"Biden Unveils \$1.9T Plan to Stem COVID-19 and Steady Economy," Washington Post, January 15, 2021.

our populace as a “race against the virus.”¹³

29. Given the current state of public health in Kanwaha County and the State of West Virginia, the value of the “race against the virus” – obtaining vaccinations, in part, for public education employees – is paramount for all public education stakeholders. A review of the current West Virginia map indicates thirty-three counties are in red and sixteen are in orange. Thus, forty-nine counties remain in the two most dangerous classifications.¹⁴ As noted, the spread of the virus has significantly increased in the past weeks. And a 50% more contagious strain of the virus has reached the United States. A brief delay of the return to in-person instruction is justified and should be mandated when it is only a matter of weeks before public education employees are fully vaccinated.

Availability of COVID-19 Vaccine to Public and Public Education Employees

30. As this Court is well aware, the COVID-19 vaccine has recently been made available to the public and, more recently, to some public education employees.¹⁵

31. KCBOE provided initial doses of the vaccinations to some public education employees on January 7 and 14, 2021. On January 7, 2021, initial doses were provided to employees over the age of 50. On January 14, 2021, initial doses were provided to teachers age 40-49. The doses were provided at South Charleston and Capitol High Schools. The vaccinations provided were

¹³“CDC Warns Highly Transmissible Coronavirus Variant to become Dominant in U.S.,” Washington Post, January 15, 2021.

¹⁴“COVID-19 Update: Governor Justice announces West Virginia reaches U.S. - leading 93.7 percent first dose vaccination rates; secure more therapeutic treatments,” governor.wv.gov., January 15, 2021.

¹⁵The CDC has recommended that healthcare personnel and residents of long-term care facilities be vaccinated first in Plan 1(a). Teachers, educational personnel, among others, are recommended to receive the vaccination next in Phase 1(b). “When Vaccine is Limited Who Should Get Vaccinated First?” CDC, January 8, 2021.

manufactured, upon information and belief, by Moderna. Therefore, to be fully vaccinated by the Moderna vaccine, the recipient must receive his or her first and second doses within twenty-eight days of each other.

32. The second round of doses are scheduled to be provided on February 3 and 10, 2021, at South Charleston and Capitol High Schools.

33. Most, if not all, public education employees have not received both doses of the vaccine as required to have maximum effectiveness.

34. In recognition of this fact, several county boards of education (including KCBOE) previously voted to continue utilizing remote instruction until either February 8 or 12, 2021, based upon when the public education employees of those counties were first vaccinated. Clearly, KCBOE wanted its employees to be fully vaccinated before returning to in-person instruction.

35. Similarly, representatives of the WVDOE and WVBOE have echoed this sentiment. While emphasizing the importance of in-person instruction, Respondent State Superintendent Burch and WVBOE President Miller Hall recently wrote in a January 4, 2021, letter to the West Virginia Association of School Administrators the following:

West Virginia's aggressive vaccination plan for school employees is yet another critical layer of defense and a testament given to our school employees. These proactive measures provide even more assurance of the safety of our schools. Vaccine rollout plans are being shared with superintendent this week and vaccines will soon be administered quickly and efficiently statewide for school personnel.¹⁶ Vaccinations for teachers began statewide January 7, 2021, as noted herein.¹⁷

(Footnotes added).

¹⁶January 4, 2021, correspondence from Burch and Hall to West Virginia Association of School Administrators.

¹⁷"West Virginia Response to COVID," governor.wv.gov., p. 48

Disregarding the Map Fork - 8

36. Despite the reasonable decision of the KCBOE to remain in remote or virtual instruction until vaccination is complete, the WVBOE, by its vote on January 13, 2021, is now forcing school employees to head to the classroom without complete vaccinations. In doing so, the WVBOE and/or WVDOE sidestepped the process it had been following for months.

37. For many months, public school activities in West Virginia have been determined by a color-coded map that has undergone several iterations. In-person instruction, virtual and on-line schooling and extracurriculars were subject to a map that has been modified several times. However, on January 13, 2021, the WVDOE inexplicably discarded the map for students who are in eighth grade or below.

38. On January 13, 2021, the WVBOE passed a motion regarding in-person instruction in West Virginia. This motion provided, in pertinent part, that all PreK through 8th grade students would return to in-person learning on January 19, 2021, **regardless of their county's color on the West Virginia Department of Health and Human Resources (DHHR) County Alert System.** Moreover, the WVBOE stripped county boards of the ability to provide "full countywide remote learning for PreK-8 students."¹⁸ See attached, West Virginia Board of Education Motion Adopted Regarding In-Person Instruction for West Virginia Schools.

39. Meanwhile, the WVBOE also determined that high schools were still subject to the map, but only if a county is red. It determined that high school students will attend in-person class unless a County Alert System map is red.

40. Notably, for many months, students were not permitted to attend school when the

¹⁸ Rather, the county may close individual classrooms or schools where needed.

County Alert System was in red. Rather, those counties school systems were required to teach by remote learning. With the latest iteration of WVBOE policy, on or after January 19, 2021, a county may be red and (1) elementary and middle school students and staff will still be in school for in-person instruction; and (2) high school students and staff will not. One can surmise that this arrangement is based upon the belief that younger students are less susceptible to the virus or contributing to its spread than high school students.¹⁹ However, this arrangement fails, at a minimum, to take into consideration the health interests of the adult staff at the schools. It must be noted that of the thirty-eight (38) recent positives for Kanawha County, twenty-two (22) occurred in middle school or elementary school. Kanawha County Schools, School COVID Procedure Tracking, January 18, 2021.

41. While it can be argued that the new WVBOE policy is fraught with inconsistencies given past adherence to the map and current discarding of the same for most school students, it is particularly troubling that the map is being abandoned in some instances (but not others) while pandemic conditions in this State are getting worse. As noted, 54% of the virus cases in West Virginia have occurred in the last six-plus weeks and the more virulent version of the virus is in the United States.

42. Given that Respondent WVBOE now is ignoring the map (except for counties in red for high school), it is particularly reasonable to first allow full vaccinations of employees. If the map was a safeguard for students and employees, it has nearly been eliminated as a safeguard. At the

¹⁹ As discussed, *infra.*, there are mixed studies relating to this topic. It is worthy of note that The Wall Street Journal reported this week that six European countries are currently closing schools based upon the belief that schoolchildren do, in fact, play a “significant role in spreading infection.” Europe’s Schools Are Closing Again on Concern They Spread COVID-19.” The Wall Street Journal, January 16, 2021.

same time, Respondents are denying employees full vaccination prior to returning to the classroom. It is clear that the safeguard of vaccination prior to in-person instruction must occur.

43. Prior to action by the WVDOE, KCBOE had taken the position that all public education employees who sought vaccination would receive it prior to in-person instruction being provided. As such, KCBOE prudently voted to remain with remote instruction until February 8, 2021 (absent State action), so that its employees could be fully vaccinated.

44. The difference between the mandated reopening date of January 19, 2021, and the date selected by KCBOE for all of its employees to be vaccinated by February 8, 2021, is approximately fourteen (14) total schools days.

45. January 19 to February 5, 2021: Rather than permit all of those public education employees to be fully vaccinated, should they wish, all public education employees will be required to be in school four days per week with the full student populations. KCBOE's blended schedule beginning January 19, 2021, will require all teachers and service personnel to be in school five days per week. Students with IEP's will be on school premises five days per week as well. Students with the last name starting with A-L will attend school on Monday and Tuesday, and students with the last name starting with M-Z will attend school on Thursday and Friday. Wednesdays will be a work day during which faculty and staff will be required to be on school premises. Upon information and belief, during that period, not a single KCBOE employee will have been fully vaccinated via the KCBOE vaccination program.

46. February 8, 2021: All students will return to school for full-time instruction. Only a portion of the public education employees will be fully vaccinated by this date.

47. There are many employees of KCBOE who are at higher risk due to age or other

health conditions and who will be required to teach in settings with limited social distancing – without having been fully inoculated.

48. Upon information and belief, no employee of KCBOE will have been fully vaccinated by January 19, 2021.

49. Notably, one or more county boards of education have elected to ignore the WVBOE edict to reopen schools on January 19, 2021, because, at least in part, their employees have not yet been fully vaccinated.

50. Importantly, upon information and belief, WVDOE, WVBOE, and the State Superintendent have, to date, taken no legal action to compel in-person instruction in those counties. Such unequal enforcement of the January 19th edict belies the weaknesses in Respondents contention that in-class instruction is a constitutional imperative for the next several weeks to meet its obligation to public school students. Of course, it begs the question, why are education employees in Kanawha County and their students forced into a potentially unsafe school-setting before vaccinations are incomplete while, in at least one other county, WVDOE and WVBOE are permitting teachers there to continue to safely instruct their students virtually or remotely for several weeks until vaccinations are complete?

Local Control of Public Education Designed to Protect the Public

51. With the January 19th edict of the WVBOE, the State has usurped the authority of county boards of education. Instead of allowing county boards of education to manage their affairs, consider their demographics and unique characteristic, and adjust as needed, the WVBOE has unlawfully imposed a directive causing a premature and potentially unsafe environment in the classroom.

52. The Legislature of the State of West Virginia (“Legislature”) has firmly placed certain safety issues in the hands of each of county board of education in this State. To-wit,

Each county superintendent is authorized to:

close a school temporarily when conditions are detrimental to the health, safety or welfare of the pupils;

In case of emergency, act as the best interests of the schools demand. An emergency, as contemplated in this section, is limited to an unforeseeable, catastrophic event including natural disaster or act of war[.]

W. Va. Code § 18-4-10(5) and (11).

A superintendent, county board of education or proper authority is authorized as follows:

Any school or schools may be closed by proper authorities on account of the prevalence of contagious disease, conditions of weather or any other calamitous cause over which the board has no control.

W. Va. Code § 18A-5-2.

By its own Legislative Rule, WVDOE has authorized county boards of education to establish their own “communicable disease policies” to protect students, staff members and the general school population. 126 C.S.R. § 41. See *Id.* This rule authorizes each county school system to work cooperatively with its county health department.

Additionally, the “Employees Code of Conduct” requires county board of education “to maintain a safe and healthy environment.” 126 C.S.R. § 162 - 4.2.3.

Finally, the Public Employees Grievance Act makes it a grievable act for a county board of education to take any action that will harm the “health and safety” of an employee. See W.Va. Code § 6C-2-2-(1)(2).

53. As noted, at least one county in West Virginia have determined that it is in the best

interest of the health and safety of their students and employees to remain with remote learning and continue to do so. Petitioners simply seek the same safe and secure school setting at this time.

COUNT I:

Respondents are failing to provide a safe and secure school environment in derogation of their Constitutional duties.

Temporary Restraining Order and Injunctive Relief Against All Respondents

54. The allegations in paragraphs 1 through 53 are incorporated herein by reference.

55. West Virginia Code § 53-5-1 et al. gives the circuit courts of this State the authority to issue temporary restraining orders and injunctions.

56. Petitioners, public school children, and the community in general have a constitutional right to safe schools.

57. Petitioners seek a temporary restraining order, as well as a declaratory judgment and relief in mandamus, and injunctive relief, to prohibit Respondents from unconstitutionally requiring public education employees to return to brick and mortar schools prior to the receipt of a second dose of the vaccine and the expiration of a reasonable time thereafter so that the vaccine reaches maximum effectiveness. The timeline for re-entry on January 19, 2021, for four day per week of instruction, is arbitrary and capricious when one considers that most education personnel will be inoculated within about two weeks of that date. This is particularly true where at least one county has simply ignored the edict and continue to operate remotely and virtually. It, of course, begs the question why not wait a couple of weeks until personnel are vaccinated and employees and students are likely to be much safer?²⁰ By maintaining the status quo for a very short period of time, remote

²⁰The WVBOE President Miller Hall reportedly stated that there was a push to return to in-school teaching because “Remote learning is not teaching. Remote learning is ‘I’m going to give you a packet and you look at it, and do the questions and turn it in.’ But here’s the problem: It’s not equity, because some of them don’t have a computer.” “State school board requires WV counties to offer at least some in-person instruction.” West Virginia

learning by trained teachers could continue as it has for some ten months.

Irreparable Harm to Petitioners

58. The risk to Petitioners is a threat to health, severe illness or death. It is self-evident that in-person instruction requires prolonged indoor contact between students and school employees. In many instances (even with split classes), adequate social distancing can prove challenging, if not impossible, and possibly lead to greater spread of the virus. Thus, the spread of the virus will affect teachers, students, and the community, all of which threatens to increase positivity rates, hospitalizations, stress on the health care system, and deaths. Simply put, education employees are exposed to dire health risks without full vaccination protection. Not only is the premature return to in-person instruction a threat to the physical well-being of the employees, it is also a source of stress and anxiety.

Likelihood of Harm to Respondents

59. There is no risk of harm to Respondents from the requested Temporary Restraining Order or preliminary injunction. Respondents, both on the State and county levels, have been operating safely for approximately ten months with remote and virtual instruction. Respondents will undoubtedly contend that it is better for students to be in a classroom setting – a fact no one disagrees with under normal circumstances. However, given the extraordinary pandemic in which the parties find themselves and the concomitant risk of death or severe health consequences, such classroom instruction must be briefly delayed until vaccinations are administered.

60. There have been mixed reports as to the danger of returning to school for students and teachers. On January 12, 2021, a public health study in Montreal found that schools were a source

Gazette Mail, January 13, 2021.

of spread; that elementary school children are passing the virus to adults; that this leads to community transmission; and that “distance learning” is a safe option. “Schools are spreading COVID-19 in Montreal, new study finds.” Montreal Gazette, January 12, 2021. As noted, Kanawha County has not been immune to the virus being present in its students and staff. Thirty-eight (38) students or employees of the KCBOE have contracted the virus in just the past two weeks. Indeed, two students at a local Kanawha County high school tested positive before 10:15 a.m. on January 19, 2021, the date in which in-person instruction resumed. West Virginia University Law Professor Joshua Weishart observes that efforts by the WVBOE to open schools “at the deadliest, most infectious period in the pandemic yet” could risk “lives unnecessarily.” Professor Weishart astutely notes that the “principal disparities and deprivation” of school children in West Virginia are poverty and unfair school funding and returning to in-school teaching will not cure these educational injustices. He notes that COVID-19 is now “widespread” in West Virginia and that studies show that “community spread” is caused by in-person instruction when pre-existing case rates are high in a given county (and that community spread is less significant where counties there are lower rates). He concludes that the threat to teachers while conditions are still unsafe risks the loss of quality teachers. “Commentary: Remote Learning Highlights Inequities in Public Education But a Premature Return to In-Person Learning Could be Worse,” Joshua Weishart, 100 days in appalachia.com., January 14, 2021.

61. Professor Weishart’s observations are particularly true given that: (1) one or more counties may be ignoring this edict of the WVBOE to resume in-class instruction; and (2) vaccinations will be completed and effective in a matter of weeks.

62. If Respondents are not enjoined from their proposed course of conduct, including

prematurely opening schools to in-person instruction on January 19, 2021, Petitioners face irreparable harm in the form of unquantifiable physical and emotional injuries. The virus will continue to spread and result in severe illness, long-term and unpredictable health complications, and, in some cases, death.

Likelihood of Success On the Merits

63. Petitioners have a substantial likelihood of success on the merits. The constitutional right to a safe school environment is well-established. Moreover, there is little to no threat to the thorough and efficient operation of the schools for several reasons should instruction remain remote temporally. First, WVDOE has been offering – with great success – virtual learning to students for years. This would continue if an injunction were granted. Second, schools and their staff have received additional training to teach virtually during the pandemic. This would also continue. Third, the amount of time needed to vaccinate public education employees is very short – from two to three weeks.

64. The threatened injury to the lives of public school students, Petitioners, and Kanawha County residents outweighs any possible harm to Respondents. Respondents will achieve their objectives through a very short extension of the virtual and on-line instruction until the vaccine process for school employees is complete.

65. Petitioners' injuries cannot be compensated adequately by damages or otherwise remedied at law. This is not an issue that can be cured with money. Lives – and the health and safety of our community – are at stake.

The Public Interest

66. It is imperative that the public schools of this State operate in a safe manner.

Petitioner's propose a method to do that: allow education personnel to be fully vaccinated before mandating a return to in-class instruction. In the interim, remote and virtual instruction would continue until education personnel are or have been fully vaccinated. By allowing most, if not all, education employees to be vaccinated, it will protect not only students and their families, but the community as a whole. In contrast, exposing teachers and others to the virus only harms the public – which is why KCBOE and other counties wished to wait for their employees to be vaccinated – until the WVBOE intervened in these traditionally local decisions.

PRAYER

WHEREFORE, Petitioners seek the following relief:

(A) An order temporarily restraining and enjoining all named Respondents from unnecessarily and unconstitutionally forcing public education employees and students to report to unsafe brick and mortar schools that should remain closed until those employees are fully vaccinated;

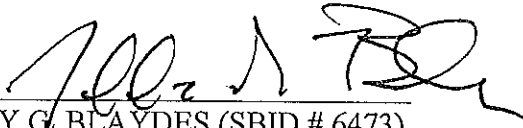
(B) An order enjoining Respondents WVDOE and WVBOE from unlawfully encroaching upon the local rule of the KCBOE;

(C) An order granting a preliminary and permanent injunction as set forth above;

(D) A rule to show cause as to why a writ of mandamus and declaratory judgment should not be issued given the clear constitutional right to a safe and secure school environment; and

(E) All other appropriate relief including, but not limited to, attorneys fees and costs.

WEST VIRGINIA FEDERATION OF TEACHERS
AFL-CIO, FRED A. ALBERT its President, and its
MEMBERS, et al;
By Counsel



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Counsel for Petitioners

VERIFICATION

State of West Virginia

County of Kanawha, To-wlt:

I, Fred A. Albert, after having been duly sworn under oath, do hereby verify and affirm that the facts asserted in the foregoing COMPLAINT are true and to the extent they are based upon information and belief, I believe them to be true.

Fred R. Albert
Fred A. Albert

Sworn to and signed before me this 19th day of January, 2021.



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wvbe.us

West Virginia Board of Education Motion Adopted Regarding In-person Instruction for West Virginia Schools

Motions:

I move that the WVBE adopt the following parameters for in-person instruction:

- The WVBE desires to return students to in-person learning and to ensure that students, teachers, and staff can do so safely. The Board recognizes that in-person learning is the best mode in which to foster a student's intellectual, social-emotional, and physical growth and well-being.
- To continue to ensure that schools remain safe for students, teachers, and staff, education leaders at the local level are directed to continue monitoring and enforcing the WVBE's six identified mitigation strategies, especially mask wearing.
- Parents will continue to have the ability to choose a virtual learning option for their children.

For all PreK-8 students in West Virginia

- PreK-8 schools will attend in-person instruction regardless of their county's color on the West Virginia Department of Health and Human Resources (DHHR) County Alert System map.
- All PreK-8 students will resume in-person instruction on January 19. Counties do not have the option to implement full countywide remote learning for PreK-8 students. However, a local county board of education retains the authority to work with local health officials and to close individual classrooms or schools when a specific health need related to that classroom or school is identified. Such closures shall be of limited duration and related to the specific health need of the school or classroom. Teachers and staff will continue to provide essential student support services including meals, student engagement, all special education services and support to at-risk students.
- Counties are encouraged to resume in-person instruction 4 or 5 days per week on January 19.
- Counties have the option to utilize blended instruction models beginning January 19. Blended models must provide each student with in-person instruction at least 2 days per week.

For West Virginia students in grades 9 through 12

- High schools will attend school in-person unless their county is red on the DHHR County Alert System map. In-person instruction may consist of blended learning models for students in grades 9-12.
- Consistent with the practice that has been in place since the start of the 2020-2021 school year, high schools will move to remote learning the day after the county turns red on the DHHR County Alert System map.
- High schools may stay in remote learning until the following Monday.
- If the county is not red on the DHHR daily map on Saturday, in-person instruction will resume on the following Monday.
- A county superintendent may determine and direct that a county will resume in-person learning without waiting until the following Monday.
- If the county is still in red status on Saturday or Sunday, remote learning will continue for another week unless the county superintendent directs the resumption of in-person instruction earlier.
- A local county board of education retains the authority to work with local health officials and to close individual classrooms or schools when a specific health need related to that classroom or school is identified irrespective of the county's color on the DHHR County Alert System map. Such closures shall be of limited duration and related to the specific health need of the school or classroom.
- Even when a county is red on the DHHR County Alert System map, teachers and staff will continue essential student support services including meals, student engagement, all special education services and support to at-risk students.

Further:

- Every Monday, the state superintendent shall provide the WVBE with an update regarding each county's status regarding the provision on in-person instruction via email.
- The state superintendent, WVBE staff, and all county-level education leaders are directed to continue to provide educational information about the benefit and safety of the COVID vaccination to teachers, education staff, and community members and residents throughout the state.