

BEFORE THE NEBRASKA STATE BOARD OF EDUCATION

IN THE MATTER OF THE COVID-19 PANDEMIC - ACCREDITATION SAFETY STANDARDS)))))	NDE Case No. _____ RULE 62 PETITION FOR DECLARATORY ORDER
---	-----------------------	---

Petitioners, Jennifer A. Benson, individually and in her capacity as President of the Nebraska State Education Association, and the Nebraska State Education Association, hereby submit their Petition for a Declaratory Order pursuant to NDE Rule 62.

1. Petitioner, Jennifer A. Benson, is a resident of the State of Nebraska, is a certificated educator and holds the office of President of the Nebraska State Education Association (“NSEA”). Jennifer A. Benson’s address is 605 South 14th Street, Lincoln, Nebraska 68508.

2. Petitioner, the NSEA, is a professional association of approximately 26,000 Nebraska educators and education support personnel organized and existing as a nonprofit corporation under the Nebraska Nonprofit Corporation Act. It is the mission of the NSEA to provide a great public education for every student and advocate for all education professionals, empowering them to provide an excellent public education for every student.

3. Persons or entities which may have an interest in these proceedings include all school districts, public and private, and educational service units in the State of Nebraska, which are known to and governed by the Nebraska Department of Education (“NDE”).

FACTS

The Pandemic and a State in Crisis

4. Nebraska is facing an exponential and unyielding spread of COVID-19. People with chronic medical conditions, like heart or lung disease, and adults who are 65 years and older

are at a higher risk of death if they contract the virus. However, the virus has resulted in serious illness and death to people of all ages, including those without underlying medical conditions.

5. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency in response to the coronavirus outbreak.

6. On March 11, 2020, the World Health Organization (“WHO”) characterized the coronavirus outbreak as a pandemic.

7. On March 13, 2020, Nebraska Governor Pete Ricketts issued an emergency declaration effectively putting Nebraska in a State of Emergency.

8. On March 13, 2020, Director of Public Health Dr. Gary Anthone entered a Directed Health Measure (“DHM”) Order 2020-001 that prohibited gatherings in various Nebraska counties. Between March 13, 2020, and the filing of this Petition, Dr. Anthone entered several other DHMs with continued limitations on gatherings and other measures to limit the spread of coronavirus.

9. In March 2020, the number of COVID-19 cases increased so dramatically that almost every state, including Nebraska, shut down schools, businesses and workplaces.

10. On July 20, 2020, the NDE published COVID-19 guidance for reopening schools. In the guidance, the NDE indicated four distinct zones: green, yellow, orange and red. The NDE considers number of positive cases, percent of positive cases, hospitalization rate and the increase in positive cases from previous rolling averages to determine the current color zone for Nebraska and the recommended guidance associated with each zone.

11. The NDE suggests that if Nebraska is in the red zone, with significant, uncontrolled community spread, then schools should be closed for in-person instruction and remote learning should be initiated. Although the NDE does not provide specific numbers and

positivity rates to determine the specific zone, Nebraska is currently in the “red” according to guidance published by the Centers for Disease Control (“CDC”), the WHO, the University of Nebraska Medical Center (“UNMC”) and the White House Coronavirus Task Force.

Nevertheless, Nebraska schools opened this fall and remain open and continue to deliver in-person instruction.

12. On November 17, 2020, the White House Coronavirus Task Force issued a report indicating Nebraska has 101 or more new cases per 100,000 population, which is the sixth highest rate in the country. Nebraska is also in the red zone for test positivity, indicating a rate at or above 10.1 percent, with the fourth highest rate in the country. Nebraska had 735 new cases per 100,000 population, compared to a national average of 294 per 100,000.

13. Between November 7 and November 13, on average, 124 patients with confirmed COVID-19 and 38 patients with suspected COVID-19 were reported as newly admitted each day to hospitals in Nebraska. A total of 94 percent of hospitals received new COVID-19 patients in this time period.

14. Nebraska hospitals are currently near capacity and are close to being required to turn away heart attack, stroke and trauma patients because they do not have available beds. Without immediate and meaningful interventions, hospitals will become overwhelmed and will not be able to support those who need care. In a letter signed by 1,700 doctors and nurses on November 17, 2020, “. . . this unimaginable time is fast approaching.”

A School System in Crisis

15. The uncontrolled transmission of the virus has put the Nebraska school system in crisis. Gubernatorial and NDE recommendations regarding use of face coverings continue to be largely ignored by many school districts leaving educators feeling overwhelmed. Failure to

address this crisis will lead to nearly 1 in 4 teachers leaving the profession by the end of the school year. In Lincoln and Omaha, nearly 1 in 3 teachers have indicated they plan to leave teaching. School buildings and education programs are closing on a daily basis largely due to a shortage of teachers.

16. As “Educational Workers” exempt from the quarantine requirements of the current DHM, teachers are pressured to return to their classroom responsibilities while in quarantine. Educators are being pushed to a breaking point. They are worried about their health and safety and that of their students and families. Many teachers are having to teach students both in-person and remotely at the same time. The workload expected of teachers has left them exhausted and makes it nearly impossible for them to provide quality teaching and learning for students. The majority of teachers do not believe that their district’s learning model is equitably meeting the needs of all students. Teachers are not provided adequate plan time and, because there is a shortage of substitute teachers, they are having to cover the classes of colleagues who are quarantined or who are ill, so they lose the little plan time they do have. The current situation in many school districts is not sustainable.

17. If schools are required to close again, it will be harmful to children. It will lead to severe learning loss and will be particularly damaging for students with heightened behavioral needs. Schools provide a stable and secure environment for developing social skills and peer relationships. Social interaction at school among children in grades PK-12 is particularly important for the development of language, communication, social, emotional and interpersonal skills. Extended school closures deprive children who live in unsafe homes and neighborhoods an important layer of protection from neglect as well as physical, sexual and emotional maltreatment and abuse. Schools are essential to meeting the nutritional needs of children with

many consuming up to half of their daily calories at school. When schools are closed, children lose access to important opportunities for physical activity. Schools play a critical role in supporting the whole child, not just their academic achievement.

18. Unless immediate and meaningful action is taken by the State Board to identify the mitigation strategies that must be undertaken by schools under its jurisdiction, unquantifiable and irreparable harm will occur to our state's education system, educators, students and state as a whole.

***The Constitutional Authority and Responsibility
of the Nebraska State Board of Education***

19. On November 13, 2020, the Nebraska State Board of Education ("State Board") passed a Resolution affirming the efficacy of face coverings and strongly recommending a statewide mask mandate to ensure the safety of all students, staff and community members. It is now manifest, however, that such encouragement has not produced the kind of change of behavior necessary in order to meaningfully address the crisis affecting Nebraska's school system. The State Board has the constitutional, statutory and regulatory authority to take meaningful action to address the crisis facing Nebraska's schools, students and educators.

20. The State Board is a constitutional body charged with the responsibility and authority to provide "enlightened professional leadership, guidance, and supervision of the state school system . . ." Neb. Rev. Stat. § 79-318(5) (Reissue 2014).

21. The State Board and Commissioner of Education have the authority and responsibility to undertake and maintain accreditation standards and review. Neb. Rev. Stat. § 79-703 (Reissue 2014).

22. Pursuant to its statutory authority, the State Board has adopted 92 NAC 10 ("Rule 10") which recognizes and requires as an accreditation quality indicator that "school

facilities and the general environment are safe, orderly, and supportive of quality learning for all students.” Rule 10, § 011.01. Rule 10 also requires that “each school system maintain safe, healthful, and sanitary conditions within the school building(s) and on the school grounds . . .” Rule 10, § 011.01(A).

23. The State Board is authorized by Neb. Rev. Stat. § 79-318(11) (Reissue 2014) to “interpret its own policies, standards, rules, and regulations and, upon reasonable request, hear complaints and disputes arising therefrom; . . .” Pursuant to this authority, the State Board has adopted Rule 62 under which Petitioners seek issuance of a binding order by the State Board declaring the specific mitigation strategies that all schools under its jurisdiction must implement as safety standards during this pandemic in order to maintain accreditation status under Rule 10.

RELIEF REQUESTED

24. Petitioners request that the State Board enter a Declaratory Order identifying the following minimum mitigation strategies as safety standards inherent in Rule 10, § 011, to remain in full force and effect until the conclusion of the 2020-2021 school year:

a. All children in grades 3-12 must wear face coverings - with medical caveats - as well as teachers, administrators, staff and volunteers. If tolerated, masks should be used for children between three years of age and third grade.

b. Designate a staff person to be responsible for responding to COVID-19 concerns. Staff, students, parents and volunteers should know who this person is and how to contact the designated staff member if they become sick or are around others diagnosed with COVID-19. The designated staff person should also be aware of state and local regulatory agency policies related to school guidelines and will serve as the contact with local health authorities and

monitor illness among school faculty, staff and students. A backup person should be identified who can fill this role if the designated person becomes unavailable due to illness or other reason.

c. Establish and maintain communication and cooperation with local and state authorities to determine current levels of community mitigation.

d. Review local, state and organization guidelines for schools. Review your facility plans including the size of the building, all points of entry and air handling systems to understand and implement recommended state and local guidelines and the considerations detailed in this Order.

e. Schools are encouraged to continue to use and develop strategies for online and other remote education technologies.

f. Develop strategies to reduce the potential for mass exposure of cases occurring in schools that include social distancing of all persons, defined and consistent groups of students and staff who remain together with limited interaction to others, considerations to reduce the maximum number of people allowed in a building based on social distancing and implementation of mask wearing requirements for indoor activities.

g. ALL sick children and adults will stay home; and, quarantine will be observed by those with COVID-19 infected persons at home.

h. All children and adults with confirmed infection will not be allowed to return to school until completing the DHM-defined period of isolation.

i. Schools and public health authorities will work together to rapidly report, assess and act on frequent per school absenteeism, influenza and other disease reporting health measures.

j. Address the increased behavioral health and emotional needs of students and the mental health of teachers, staff and volunteers.

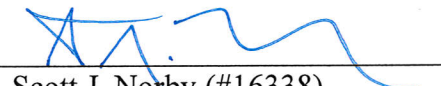
25. All school districts, public and private, and educational service units subject to Rule 10 shall, within three days of the date of service of this Order upon them, confirm in writing to NDE compliance with the face covering requirements of this Order, and identify what action has been or will be taken to comply with all other requirements of this Order.

26. The Commissioner of Education is directed to investigate and report compliance with this Order by all schools and educational service units subject to Rule 10 and submit such reports to the State Board at each State Board meeting through the remainder of the 2020-2021 school year.

JENNIFER A. BENSON, Individually and in Her
Capacity as President of the Nebraska State
Education Association, and the
NEBRASKA STATE EDUCATION
ASSOCIATION, a Nonprofit Corporation,
Petitioners,

BY: NORBY & WELDING LLP
Petitioners' Attorneys
605 South 14th Street
Suite 220
Lincoln, Nebraska 68508
Telephone (402) 434-2390
scott.norby@norbylaw.com

By



Scott J. Norby (#16338)
One of Said Attorneys

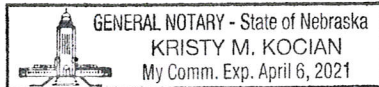
VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

Jennifer A. Benson, being first duly sworn, states that she is one of the Petitioners in the above-entitled matter; that she holds the office of President of the NSEA; that she has read the foregoing Rule 62 Petition for Declaratory Order; and that the allegations of fact therein are true.


Jennifer A. Benson

Subscribed and sworn to before me on this 19th day of November, 2020.




Notary Public

My Commission Expires: April 6, 2021.