

BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**WEST VIRGINIA EDUCATION ASSOCIATION,
and DALE LEE, Association President,**

Plaintiffs,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, W. CLAYTON
BURCH, in his capacity as State Superintendent,
WEST VIRGINIA STATE SUPERINTENDENT OF
SCHOOLS, KANAWHA COUNTY BOARD OF
EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

COMES NOW the West Virginia Education Association on behalf of its Members and Dale Lee, President of the WVEA, by counsel Andrew J. Katz and pursuant to Rule 65 of the West Virginia Rules of Civil Procedure petitions this honorable Court for injunctive relief in the form of an ORDER preventing Defendants The West Virginia Department of Education, The West Virginia Board of Education, W. Clayton Burch, Kanawha County Board of Education and Monongalia County Board of Education from enforcing the State Board of Education's policy prohibiting a county school system from implementing a uniform remote learning procedure until all employees of the two county boards of education named herein are completely vaccinated for COVID 19. In support of this Complaint, Plaintiffs allege the following:

1. The West Virginia Education Association (WVEA) is a voluntary organization consisting of education employees of the public school system. The WVEA has members in both Kanawha and Monongalia counties.

2. The WVEA has members in both Kanawha and Monongalia counties

3. Dale Lee is the president of the WVEA.

4. The West Virginia Department of Education is an administrative entity over education throughout the state created by West Virginia Code Section 18-3-3 *et seq.* Mr. Burch is the West Virginia State Superintendent of Schools

5. The West Virginia State Board of Education provides general oversight to the public schools of West Virginia by virtue of West Virginia Code Section 18-2-21 *et seq.*

6. Defendants Kanawha County Board of Education and Monongalia Board of Education are the governing bodies of Kanawha and Monongalia County Schools respectively and are created by virtue of West Virginia Code Section 18-5-1

PRAYER FOR INJUNCTIVE RELIEF

Paragraphs 1 through 6 are incorporated herein as if set forth verbatim hereinafter.

7. The COVID 19 virus has created a public health emergency, both in the United States generally and in the State of West Virginia in particular.

8. Over 400,000 residents of the United States have died from this virus. As of January 18, 2021, in West Virginia the total number of deaths is 1836 souls. The number of total cases of COVID 19 in West Virginia is 111,677, with 866 occurring on January 18th. This number has been rising exponentially. On September 1, 2020, there were a total of 10,697 cases, with 156

occurring on that date. By November 1, 2020, there were 25,336 total cases, with 362 occurring on that date. By January 1, 2021, there were 89,853 total cases, with 1731 occurring on that day¹.

9. The results of this spreading health threat is being seen in school communities. For example, the COVID 19 virus has spread throughout the school community in Mingo County, as a football coach apparently spread the virus to his school and then to his mother, who works in the Central Office, who then spread the virus to several central office administrators and others.

10. The virus and the push to open schools to in school instruction has created problems with school personnel. For example, in excess of 12 schools throughout the state, the number of quarantined teachers is such that there are not enough substitute teachers to replace them. Moreover, in several counties, teachers are being required to teach many additional classes and do significant additional work due to the fact that some of their students in the same class are learning in the school building and some are taking the class virtually or working completely online.

11. The entire school system in Tucker County had to close due to the lack of substitute teachers to replace the teachers in quarantine due to COVID exposure.

12. As detailed in an article at [Chalkbeat.org](https://www.chalkbeat.org), a study was made of the states of Washington and Michigan to determine the effect of students returning to “in school” instruction on the community spread of COVID 19. This report found that whether or not students returning to school effects the spread of COVID 19 depends on the rate of community spread already in existence at the time the students returned. The study found that in Michigan, students returning to school caused greater spread in counties that had at least 20 new incidents per day per 100,000

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individuals. In Washington, that same study showed, the spread of the coronavirus worsens with students returning to school in counties with five new incidences per day per 100,000 people. (See article at <https://www.chalkbeat.org/2021/1/4/22214312/covid-spread-schools-research> and the studies referenced therein). While the studies referred to in such article researched the issue of student attendance at school and its effect community wide, the study done of Washington and Michigan also referred therein to an earlier study of the effect of student school attendance on the health of the school employee population. The cited study found that between 43-51% of school employees were at a greater risk of contacting COVID-19 with in school learning. (See study at https://caldercenter.org/sites/default/files/WP%20247-1220_updated_typo.pdf at p.6).

13. According to an article posted online on the Wall Street Journal's web site, the ability of children to pass COVID 19 to others is causing many schools in Europe to close again after re-opening in the spring. (<https://www.wsj.com/articles/europes-schools-are-closing-again-on-concerns-they-spread-covid-19-11610805601>).

14. While death is the ultimate irreparable harm, it is not the only example of such harm for those unfortunate enough to catch COVID 19. According to the Center for Disease Control (CDC), "we are learning that many organs besides the lungs are effected by COVID 19 and there are many ways the infection can affect someone's health." (CDC "Coronavirus Disease 2019 (COVID-19) Long Term Effects of COVID-19). One specific area of concern the CDC discussed is that suffering from COVID 19 can have a long term effect to heart health. COVID 19 can cause "inflammation and damage to the heart muscle itself, known as myocarditis, or inflammation of the covering of the heart, known as pericarditis." Id. This heart damage can not only lead to death, but "might also explain some frequently reported long-term symptoms like

shortness of breath, chest pain and heart palpitations.” Id. Importantly, the CDC also noted that “[t]he risk of heart damage may not be limited to older and middle aged adults. . . [that] young adults with COVID 19, including athletes, can also suffer from myocarditis.” Id. And while severe heart damage in young otherwise healthy people is rare, younger people with even mild symptoms of the disease can have detectable effects on the heart, the long term significance of which is unknown at this time. Id.

15. The World Health Organization (WHO) has also studied the possible long term health effects of being stricken with the COVID 19 virus. In its Coronavirus Update 36, “What we know about the long term effects of COVID-19,” the WHO outlines what is known to date. While most people suffering from COVID-19 recover in 2-6 weeks, some symptoms may be present weeks or months following the initial recovery. Id. at p. 8. This can happen with people who had only mild symptoms. Id. Symptoms that may persist include “fatigue, cough, congestion or shortness of breath, loss of taste or smell, headache, body aches, diarrhea, nausea, chest or abdominal pain [and] confusion.” Id. at p. 9. In a telephone survey of symptomatic adults who had a positive test result for the SARS-CoV-2 virus, 35% still had health issues 2-3 weeks after testing. Id. at p. 1. According to the World Health Organization, even young adults or children without underlying chronic medical conditions can suffer prolonged illness after the COVID 19 virus invades their body. Id. at p. 10. In fact, 20% of those 18-34 years of age in good health reported that some COVID 19 symptoms were prolonged. Id.

16. While the long term effects of a mild case of COVID 19 is not well known, studies have been done on the long term effects of “severe acute respiratory syndrome (SARS), the coronavirus that emerged in 2003.” Id. at p. 11. One such study showed that “there was **persistent and significant impairment of exercise capacity** and health status in survivors of

SARS over 24 months.” *Id.* (Emphasis in original). The WHO continued: “[a]nother study, revealed that 40% of people recovering from SARS still had chronic fatigue symptoms 3.5 years after being diagnosed.” *Id.* (Emphasis in original). While these studies were not of people suffering from COVID-19, they did study individual inflicted with a similar coronavirus disease.

**DEFENDANTS WEST VIRGINIA STATE BOARD OF EDUCATION,
STATE DEPARTMENT OF EDUCATION AND STATE SUPERINTENDENT BURCH**

17. With the stated goal of providing direction for the safe opening of schools, Governor Justice in August of 2020 caused to be created a color-coded system that results in each county being assigned a color each week based on their rate of exposure. The Governor stated that his “Map” was based on the mapping system created by the Harvard Global Health Initiative, however, Governor Justice made several significant changes. On each Saturday, Governor Justice and/or his agents determined what color is each county in West Virginia and published a color coded map. Originally, counties that were designated as “green” or “yellow” could begin having students attend school, while counties that were “orange” or “red,” could not open their schools to students. Similarly, extracurricular activities such as football and soccer were also effected by the color coding. Counties that were green and yellow could play games. In counties that were in orange, athletes could only do conditioning. Counties that were red could not conduct extracurricular sports at all.

18. On or about January 13, 2021, Defendant West Virginia Board of Education enacted a new policy for schools limiting the options county boards of education have in order to protect their students, employees and the general public. Per the motion adopted by Defendant State Board of Education, beginning the week of January 19, 2021 all Pre-K to 8th grade students “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.” Countywide remote learning is prohibited, though a county can close individual schools or classes “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.” In regard to 9th-12th grade schools. “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.” Both high schools and Pre-K-8 can adopt a “blended” schedule whereby there is a mixture of remote and in person schooling so long as there is at least two days on in person schooling.

19. Defendants West Virginia Board of Education, West Virginia Department of Education and Superintendent Burch (State Defendants) have a duty to Plaintiffs, their students and the families of their students to provide a safe school environment. See e.g. West Virginia Code Section 18-9F-1 *et seq* (mandating, among other things, that school buildings be safe); West Virginia Department of Education Policy 4733 (mandating, among other things, that students and teachers be given a safe and healthy school environment).

20. The new policy adopted by the State Defendants violate their duties by preventing a county board of education from providing county wide remote learning.

21. As a result of the change in policy discussed herein, which increase the risk of exposure to COVID 19 beyond what is prudent for students, education personnel, their families and ultimately the entire state population. such individuals have suffered and will continue to suffer irreparable harm as COVID 19 has and will continue to lead to death and serious long term physical disability and suffering of Plaintiffs and others.

22. Moreover, by preventing county boards of education from providing exclusively remote learning, the State Defendants are preventing the county boards of education from fulfilling their legal duties set forth below.

**DEFENDANTS KANAWHA COUNTY SCHOOL BOARD
MONONGALIA COUNTY SCHOOL BOARD**

23. On January 13, 2021, Defendant Kanawha County Board of Education voted to provide fully remote education until February 8, 2021. All Defendants' employees were vaccinated on or about the first week of January and the end date named herein is the approximate time that the second vaccine was thought to be available.

24. This decision is supported by the fact that, according to statistics kept by the West Virginia DHHR, on January 18, 2021, Kanawha County's daily infection rate was just under 41 per 100,000 people. During the five days before January 18th, the infection rate ranged from 51.25 to 42.27 per 100,000 people.

25. Similarly, on January 13, 2021, Defendant Monongalia County Board of Education determined that safety required exclusively remote learning until February 12, 2021. All Defendants employees were vaccinated on or about the first week of January and the end date named herein is the approximate time that the second vaccine was thought to be available.

26. Similarly, this decision is justified by the fact that, according to statistics kept by the West Virginia DHHR, on January 18, 2021 Monongalia's daily infection rate was 51.67 per 100,000 people. During the five days before January 18th, the infection rate ranged from 56.68 to 52.48 per 100,000 people..

27. Both Kanawha County and Monongalia County have infection rates well above the level that in-building student instruction will increase the community spread of COVID 19.

28. As a result of the West Virginia Board of Education's change in policy at issue here, both Defendant Kanawha County Board of Education and Monongalia County Board of Education changed their policy to "blended learning" where students would attend two days a week in conformity with such policy, the former doing so on January 13, 2021 and the latter doing so on January 19, 2021.

29. Both Defendant Kanawha County Board of Education and Monongalia Board of Education (County Defendants) have the same duty to provide a safe building and a safe environment for students and their staff as the State Respondents have as outlined in Paragraph 19 above.

30. Additionally, both County Defendants have a duty to provide their employees with a safe place to work. See West Virginia Code Section 23-3-1.

31. Moreover, both County Defendants have the ability to close any school in their jurisdiction "on account of the prevalence of contagious disease" among other reasons. See West Virginia Code Section 18A-5-2.

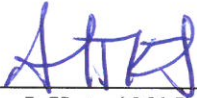
32. Taken together, West Virginia Code Sections 23-3-1 and 18A-5-2 demonstrate that the County Respondents have both the duty and the authority to mandate remote learning until such time as it is safe for their students and employees to have students attend in person.

33. The County Respondents are violating their legal duties by not maintaining their remote learning as they had originally planned, which results in increased exposure to COVID and the irreparable harm including death or lingering disease as described above.

WHEREFORE Plaintiffs request that this Court issue an immediate “Temporary Restraining Order/Preliminary Order and, eventually, a permanent Injunction, ordering the following:

1. That Defendants do not enforce Defendant State Board of Education’s Policy prohibiting countywide remote learning until all school employees have been able to be vaccinated twice against COVID 19

WEST VIRGINIA EDUCATION ASSOCIATION ET AL
By Counsel



Andrew J. Katz (6615)
West Virginia Education Association
1558 Quarrier Street
Charleston, West Virginia 25311

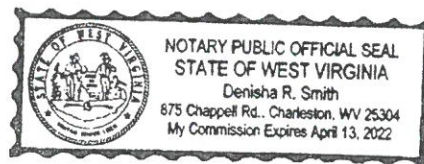
VERIFICATION

I, Dale Lee, swear and affirm that I have read the Verified Complaint in the matter of West Virginia Education Association et al v. The West Virginia Department of Education et al and that the facts and allegations therein are, to the best of my knowledge, true and accurate.


DALE LEE

Sworn before me on this the 20th day of January, 2021


NOTARY PUBLIC



BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**WEST VIRGINIA EDUCATION ASSOCIATION,
and DALE LEE, Association President,**

Plaintiffs,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, CLINTON
BURCH as West Virginia State Superintendent of
Schools, KANAWHA COUNTY BOARD OF
EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Defendants.

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**

Plaintiffs West Virginia Education Association et al ,respectfully moves the Court, pursuant to Rule 65(b) of the West Virginia Rules of Civil Procedure, to issue a temporary restraining order and a preliminary and permanent injunction enjoining the enforcement of the policy enacted by Defendant West Virginia Board of Education at its meeting on January 13, 2021, pertaining to prohibiting county boards of education to have exclusively remote learning. Based upon the allegations in the verified **COMPLAINT** filed by Plaintiffs today, such policy violates Defendant's policies regarding safe schools and interferes with the duty of Defendant Kanawha County Board of Education and Monongalia County Board of Education to provide a safe place to work. As alleged in the **COMPLAINT**, Plaintiffs are at substantial risk of suffering immediate and irreparable

injury or loss before Defendants can be heard in opposition. In short, this policy violates Plaintiffs' right to a safe place to work, free from infectious disease.

Counsel for Plaintiff certifies that he has provided notice by email or telephone of the **COMPLAINT** and this **MOTION** to State Board of Education, State Department of Education and Superintendent Burch counsel Heather Hutchens, to Kanawha County Board of Education counsel Lindsey MacIntosh, to Monongalia County Board of Education counsel Jennifer Caradine and to Kerri Talbott of the Attorney General's Office.

WEST VIRGINIA EDUCATION ASSOCIATION ET AL
By Counsel



Andrew J. Katz (6615)
West Virginia Education Association
1558 Quarrier Street
Charleston, West Virginia 25311

BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**WEST VIRGINIA EDUCATION ASSOCIATION,
DALE LEE and HOLLY RHINEHART,**

Petitioners,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, W. CLAYTON
BURCH, in his capacity as WEST VIRGINIA STATE
SUPERINTENDENT OF SCHOOLS, KANAWHA COUNTY
BOARD OF EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**

I. Introduction

In conjunction with his verified **COMPLAINT**, Plaintiffs have filed **PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**. This **MEMORANDUM OF LAW** is submitted in support of this **MOTION**.

II. Facts

As alleged in some detail in the verified **COMPLAINT**, Plaintiffs' right to a safe school and a safe place to work are being threatened by Defendant West Virginia State Board of Education's policy, and the implementation of such policy, which pro prohibits the use of exclusively remote

learning at the elementary school level. This policy violates Plaintiffs' right to a safe place to work under West Virginia Code Section 23-3-1, to work in a safe building under West Virginia Code Section 18-9F-1 and to work in a safe environment under West Virginia Department of Education Policy 4377.

III. Standard for Temporary Restraining Order and Preliminary Injunctive Relief

The West Virginia Supreme Court of Appeals has ruled noted that: "The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. Natural Energy LLC v. Pachira Energy LLC, 844 S.E.2d 133, 137 (W. Va. 2020). Applying these factors here demonstrate that a preliminary injunction/temporary restraining order should be issued.

1. There is a reasonable likelihood of Irreparable Harm if no Immediate Relief is Provided.

Plaintiff's Complaint demonstrates that if they are required to attend school with students, there is a reasonable likelihood of irreparable harm. The study cited within states that at the daily infection rate in both Kanawha and Monongalia Counties, having in building instruction will increase community transmission of COVID-19. Importantly, transmission to the community is likely to occur through education employees. In another study referred to in the Complaint, approximately half of the education employees will have an enhanced risk of suffering from COVID-

19. And finally, as referred to in the Complaint, even the non-lethal the effects of COVID-19 can be long lasting.

2. The Absence of Other Remedy at Law.

There is no other remedy that would afford timely relief.

3. Balancing the Hardships Favors Plaintiffs.

In balancing the hardships, again this Court is to consider the likelihood of irreparable harm to Plaintiffs. As stated above, there is a very reasonable likelihood of irreparable harm here. The Court is also to consider the risk of irreparable harm to Defendants. Here, there is no irreparable harm. This is particularly true in light of the fact that Plaintiffs are only seeking an injunction for approximately three weeks. Moreover, the Kanawha Board of Education and the Monongalia County Board of Education both sought to have exclusively remote learning due to the dangers of contacting COVID 19. The next factor for the Court to consider is the likelihood that Plaintiffs will prevail. Here, in light of the surge in COVID 19 both across the country, across the state and in the two counties named herein and the clear duty on the part of Defendants to provide Plaintiffs with a safe place to work, there is a high likelihood that Plaintiffs will prevail in this matter. The last factor is the public interest. Again, this factor favors Plaintiffs. As the studies in the Complaint demonstrate, in school education in counties with the rates of infection that exist in Kanawha and Monongalia counties enhance the community spread of COVID 19. Certainly, the spread of this potentially fatal disease is in the public interest, especially in light of the fact that instruction will be on-going and there will can be safe in school instruction once school employees receive their second vaccine.

IV. Conclusion

For all of the reasons stated in the verified **COMPLAINT** and in this **MEMORANDUM**, Plaintiff respectfully request for temporary restraining order and a preliminary injunction be granted.

WEST VIRGINIA EDUCATION ASSOCIATION ET AL
By Counsel



(6615)

General Counsel, West Virginia Education Association
1558 Quarrier Street
Charleston, WV. 25311

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
CIVIL CASE INFORMATION STATEMENT

**WEST VIRGINIA EDUCATION ASSOCIATION,
DALE LEE and HOLLY RHINEHART,**

Plaintiffs,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, W. CLAYTON
BURCH, in his capacity as State Superintendent,
WEST VIRGINIA STATE SUPERINTENDENT OF
SCHOOLS, KANAWHA COUNTY BOARD OF
EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Defendants.

Days to
Answer
20 days

Type of Service
US Postal Regular Mail

Original Complaint furnished herewith.

PETITIONER: Dale Lee

RESPONDENT: The above-named parties Defendant

II. TYPE OF CASE:

TORTS	OTHER	CIVIL
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil

Product Liability Mental Health Other

Other Tort Appeal of Administrative Agency

III. JURY DEMAND YES NO

CASE WILL BE READY FOR TRIAL BY: N/A

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? YES NO

IF YES PLEASE SPECIFY:

- Wheelchair accessible hearing room and other facilities
- Interpreter or other auxiliary aid for the hearing impaired
- Reader or other auxiliary aid for the visually impaired
- Spokesperson or other auxiliary aid for the speech impaired
- Other: _____

Attorney Name: Andrew J. Katz (6615)
Firm: West Virginia Education Assoc

Representing:
 Plaintiff Defendant

Address: 1558 Quarrier Street
Charleston, West Virginia 25311

Cross Complainant Cross Defendant

Telephone: (304) 346-5315 x 121

Dated: 1/20/2021

Signature  _____

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BOARD OF EDUCATION,**

Defendants.

CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel for Plaintiffs West Virginia Education Association, et al do hereby certify that I have on the 20th day of October, 2020 caused to be served a true copy of a **VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION** and **MEMORANDUM OF LAW IN SUPPORT OF , PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION** via electronic mail to the following individuals: Heather Hutchens, Lindsey MacIntosh and Jennifer Caradine.



Andrew J. Katz (6615)
The West Virginia Education Association
1558 Quarrier Street
Charleston, West Virginia 25311

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Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

COMES NOW the West Virginia Education Association on behalf of its Members and Dale Lee, President of the WVEA, by counsel Andrew J. Katz and pursuant to Rule 65 of the West Virginia Rules of Civil Procedure petitions this honorable Court for injunctive relief in the form of an ORDER preventing Defendants The West Virginia Department of Education, The West Virginia Board of Education, W. Clayton Burch, Kanawha County Board of Education and Monongalia County Board of Education from enforcing the State Board of Education's policy prohibiting a county school system from implementing a uniform remote learning procedure until all employees of the two county boards of education named herein are completely vaccinated for COVID 19. In support of this Complaint, Plaintiffs allege the following:

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5. The West Virginia State Board of Education provides general oversight to the public schools of West Virginia by virtue of West Virginia Code Section 18-2-21 *et seq.*

6. Defendants Kanawha County Board of Education and Monongalia Board of Education are the governing bodies of Kanawha and Monongalia County Schools respectively and are created by virtue of West Virginia Code Section 18-5-1

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occurring on that date. By November 1, 2020, there were 25,336 total cases, with 362 occurring on that date. By January 1, 2021, there were 89,853 total cases, with 1731 occurring on that day¹.

9. The results of this spreading health threat is being seen in school communities. For example, the COVID 19 virus has spread throughout the school community in Mingo County, as a football coach apparently spread the virus to his school and then to his mother, who works in the Central Office, who then spread the virus to several central office administrators and others.

10. The virus and the push to open schools to in school instruction has created problems with school personnel. For example, in excess of 12 schools throughout the state, the number of quarantined teachers is such that there are not enough substitute teachers to replace them. Moreover, in several counties, teachers are being required to teach many additional classes and do significant additional work due to the fact that some of their students in the same class are learning in the school building and some are taking the class virtually or working completely online.

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13. According to an article posted online on the Wall Street Journal's web site, the ability of children to pass COVID 19 to others is causing many schools in Europe to close again after re-opening in the spring. (<https://www.wsj.com/articles/europes-schools-are-closing-again-on-concerns-they-spread-covid-19-11610805601>).

14. While death is the ultimate irreparable harm, it is not the only example of such harm for those unfortunate enough to catch COVID 19. According to the Center for Disease Control (CDC), "we are learning that many organs besides the lungs are effected by COVID 19 and there are many ways the infection can affect someone's health." (CDC "Coronavirus Disease 2019 (COVID-19) Long Term Effects of COVID-19). One specific area of concern the CDC discussed is that suffering from COVID 19 can have a long term effect to heart health. COVID 19 can cause "inflammation and damage to the heart muscle itself, known as myocarditis, or inflammation of the covering of the heart, known as pericarditis." Id. This heart damage can not only lead to death, but "might also explain some frequently reported long-term symptoms like

shortness of breath, chest pain and heart palpitations.” Id. Importantly, the CDC also noted that “[t]he risk of heart damage may not be limited to older and middle aged adults. . . [that] young adults with COVID 19, including athletes, can also suffer from myocarditis.” Id. And while severe heart damage in young otherwise healthy people is rare, younger people with even mild symptoms of the disease can have detectable effects on the heart, the long term significance of which is unknown at this time. Id.

15. The World Health Organization (WHO) has also studied the possible long term health effects of being stricken with the COVID 19 virus. In its Coronavirus Update 36, “What we know about the long term effects of COVID-19,” the WHO outlines what is known to date. While most people suffering from COVID-19 recover in 2-6 weeks, some symptoms may be present weeks or months following the initial recovery. Id. at p. 8. This can happen with people who had only mild symptoms. Id. Symptoms that may persist include “fatigue, cough, congestion or shortness of breath, loss of taste or smell, headache, body aches, diarrhea, nausea, chest or abdominal pain [and] confusion.” Id. at p. 9. In a telephone survey of symptomatic adults who had a positive test result for the SARS-CoV-2 virus, 35% still had health issues 2-3 weeks after testing. Id. at p. 1. According to the World Health Organization, even young adults or children without underlying chronic medical conditions can suffer prolonged illness after the COVID 19 virus invades their body. Id. at p. 10. In fact, 20% of those 18-34 years of age in good health reported that some COVID 19 symptoms were prolonged. Id.

16. While the long term effects of a mild case of COVID 19 is not well known, studies have been done on the long term effects of “severe acute respiratory syndrome (SARS), the coronavirus that emerged in 2003.” Id. at p. 11. One such study showed that “there was **persistent and significant impairment of exercise capacity** and health status in survivors of

SARS over 24 months.” Id. (Emphasis in original). The WHO continued: “[a]nother study, revealed that 40% of people recovering from SARS still had chronic fatigue symptoms 3.5 years after being diagnosed.” Id. (Emphasis in original). While these studies were not of people suffering from COVID-19, they did study individual inflicted with a similar coronavirus disease.

**DEFENDANTS WEST VIRGINIA STATE BOARD OF EDUCATION,
STATE DEPARTMENT OF EDUCATION AND STATE SUPERINTENDENT BURCH**

17. With the stated goal of providing direction for the safe opening of schools, Governor Justice in August of 2020 caused to be created a color-coded system that results in each county being assigned a color each week based on their rate of exposure. The Governor stated that his “Map” was based on the mapping system created by the Harvard Global Health Initiative, however, Governor Justice made several significant changes. On each Saturday, Governor Justice and/or his agents determined what color is each county in West Virginia and published a color coded map. Originally, counties that were designated as “green” or “yellow” could begin having students attend school, while counties that were “orange” or “red,” could not open their schools to students. Similarly, extracurricular activities such as football and soccer were also effected by the color coding. Counties that were green and yellow could play games. In counties that were in orange, athletes could only do conditioning. Counties that were red could not conduct extracurricular sports at all.

18. On or about January 13, 2021, Defendant West Virginia Board of Education enacted a new policy for schools limiting the options county boards of education have in order to protect their students, employees and the general public. Per the motion adopted by Defendant State Board of Education, beginning the week of January 19, 2021 all Pre-K to 8th grade students “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.” Countywide remote learning is prohibited, though a county can close individual schools or classes “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.” In regard to 9th-12th grade schools. “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.” Both high schools and Pre-K-8 can adopt a “blended” schedule whereby there is a mixture of remote and in person schooling so long as there is at least two days on in person schooling.

19. Defendants West Virginia Board of Education, West Virginia Department of Education and Superintendent Burch (State Defendants) have a duty to Plaintiffs, their students and the families of their students to provide a safe school environment. See e.g. West Virginia Code Section 18-9F-1 *et seq* (mandating, among other things, that school buildings be safe); West Virginia Department of Education Policy 4733 (mandating, among other things, that students and teachers be given a safe and healthy school environment).

20. The new policy adopted by the State Defendants violate their duties by preventing a county board of education from providing county wide remote learning.

21. As a result of the change in policy discussed herein, which increase the risk of exposure to COVID 19 beyond what is prudent for students, education personnel, their families and ultimately the entire state population. such individuals have suffered and will continue to suffer irreparable harm as COVID 19 has and will continue to lead to death and serious long term physical disability and suffering of Plaintiffs and others.

22. Moreover, by preventing county boards of education from providing exclusively remote learning, the State Defendants are preventing the county boards of education from fulfilling their legal duties set forth below.

**DEFENDANTS KANAWHA COUNTY SCHOOL BOARD
MONONGALIA COUNTY SCHOOL BOARD**

23. On January 13, 2021, Defendant Kanawha County Board of Education voted to provide fully remote education until February 8, 2021. All Defendants' employees were vaccinated on or about the first week of January and the end date named herein is the approximate time that the second vaccine was thought to be available.

24. This decision is supported by the fact that, according to statistics kept by the West Virginia DHHR, on January 18, 2021, Kanawha County's daily infection rate was just under 41 per 100,000 people. During the five days before January 18th, the infection rate ranged from 51.25 to 42.27 per 100,000 people.

25. Similarly, on January 13, 2021, Defendant Monongalia County Board of Education determined that safety required exclusively remote learning until February 12, 2021. All Defendants employees were vaccinated on or about the first week of January and the end date named herein is the approximate time that the second vaccine was thought to be available.

26. Similarly, this decision is justified by the fact that, according to statistics kept by the West Virginia DHHR, on January 18, 2021 Monongalia's daily infection rate was 51.67 per 100,000 people. During the five days before January 18th, the infection rate ranged from 56.68 to 52.48 per 100,000 people..

27. Both Kanawha County and Monongalia County have infection rates well above the level that in-building student instruction will increase the community spread of COVID 19.

28. As a result of the West Virginia Board of Education's change in policy at issue here, both Defendant Kanawha County Board of Education and Monongalia County Board of Education changed their policy to "blended learning" where students would attend two days a week in conformity with such policy, the former doing so on January 13, 2021 and the latter doing so on January 19, 2021.

29. Both Defendant Kanawha County Board of Education and Monongalia Board of Education (County Defendants) have the same duty to provide a safe building and a safe environment for students and their staff as the State Respondents have as outlined in Paragraph 19 above.

30. Additionally, both County Defendants have a duty to provide their employees with a safe place to work. See West Virginia Code Section 23-3-1.

31. Moreover, both County Defendants have the ability to close any school in their jurisdiction "on account of the prevalence of contagious disease" among other reasons. See West Virginia Code Section 18A-5-2.

32. Taken together, West Virginia Code Sections 23-3-1 and 18A-5-2 demonstrate that the County Respondents have both the duty and the authority to mandate remote learning until such time as it is safe for their students and employees to have students attend in person.

33. The County Respondents are violating their legal duties by not maintaining their remote learning as they had originally planned, which results in increased exposure to COVID and the irreparable harm including death or lingering disease as described above.

WHEREFORE Plaintiffs request that this Court issue an immediate “Temporary Restraining Order/Preliminary Order and, eventually, a permanent Injunction, ordering the following:

1. That Defendants do not enforce Defendant State Board of Education’s Policy prohibiting countywide remote learning until all school employees have been able to be vaccinated twice against COVID 19

WEST VIRGINIA EDUCATION ASSOCIATION ET AL
By Counsel



Andrew J. Katz (6615)
West Virginia Education Association
1558 Quarrier Street
Charleston, West Virginia 25311

VERIFICATION

I, Dale Lee, swear and affirm that I have read the Verified Complaint in the matter of West Virginia Education Association et al v. The West Virginia Department of Education et al and that the facts and allegations therein are, to the best of my knowledge, true and accurate.

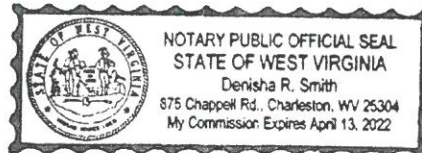


DALE LEE

Sworn before me on this the 20th day of January, 2021



NOTARY PUBLIC



BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA EDUCATION ASSOCIATION,
and DALE LEE, Association President,

Plaintiffs,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, CLINTON
BURCH as West Virginia State Superintendent of
Schools, KANAWHA COUNTY BOARD OF
EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Defendants.

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**

Plaintiffs West Virginia Education Association et al ,respectfully moves the Court, pursuant to Rule 65(b) of the West Virginia Rules of Civil Procedure, to issue a temporary restraining order and a preliminary and permanent injunction enjoining the enforcement of the policy enacted by Defendant West Virginia Board of Education at its meeting on January 13, 2021, pertaining to prohibiting county boards of education to have exclusively remote learning. Based upon the allegations in the verified **COMPLAINT** filed by Plaintiffs today, such policy violates Defendant's policies regarding safe schools and interferes with the duty of Defendant Kanawha County Board of Education and Monongalia County Board of Education to provide a safe place to work. As alleged in the **COMPLAINT**, Plaintiffs are at substantial risk of suffering immediate and irreparable

injury or loss before Defendants can be heard in opposition. In short, this policy violates Plaintiffs' right to a safe place to work, free from infectious disease.

Counsel for Plaintiff certifies that he has provided notice by email or telephone of the **COMPLAINT** and this **MOTION** to State Board of Education, State Department of Education and Superintendent Burch counsel Heather Hutchens, to Kanawha County Board of Education counsel Lindsey MacIntosh, to Monongalia County Board of Education counsel Jennifer Caradine and to Kerri Talbott of the Attorney General's Office.

WEST VIRGINIA EDUCATION ASSOCIATION ET AL
By Counsel



Andrew J. Katz (6615)
West Virginia Education Association
1558 Quarrier Street
Charleston, West Virginia 25311

BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**WEST VIRGINIA EDUCATION ASSOCIATION,
DALE LEE and HOLLY RHINEHART,**

Petitioners,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, W. CLAYTON
BURCH, in his capacity as WEST VIRGINIA STATE
SUPERINTENDENT OF SCHOOLS, KANAWHA COUNTY
BOARD OF EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**

I. Introduction

In conjunction with his verified **COMPLAINT**, Plaintiffs have filed **PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**. This **MEMORANDUM OF LAW** is submitted in support of this **MOTION**.

II. Facts

As alleged in some detail in the verified **COMPLAINT**, Plaintiffs' right to a safe school and a safe place to work are being threatened by Defendant West Virginia State Board of Education's policy, and the implementation of such policy, which prohibits the use of exclusively remote

learning at the elementary school level. This policy violates Plaintiffs' right to a safe place to work under West Virginia Code Section 23-3-1, to work in a safe building under West Virginia Code Section 18-9F-1 and to work in a safe environment under West Virginia Department of Education Policy 4377.

III. Standard for Temporary Restraining Order and Preliminary Injunctive Relief

The West Virginia Supreme Court of Appeals has ruled noted that: "The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. Natural Energy LLC v. Pachira Energy LLC, 844 S.E.2d 133, 137 (W. Va. 2020). Applying these factors here demonstrate that a preliminary injunction/temporary restraining order should be issued.

1. There is a reasonable likelihood of Irreparable Harm if no Immediate Relief is Provided.

Plaintiff's Complaint demonstrates that if they are required to attend school with students, there is a reasonable likelihood of irreparable harm. The study cited within states that at the daily infection rate in both Kanawha and Monongalia Counties, having in building instruction will increase community transmission of COVID-19. Importantly, transmission to the community is likely to occur through education employees. In another study referred to in the Complaint, approximately half of the education employees will have an enhanced risk of suffering from COVID-

19. And finally, as referred to in the Complaint, even the non-lethal the effects of COVID-19 can be long lasting.

2. The Absence of Other Remedy at Law.

There is no other remedy that would afford timely relief.

3. Balancing the Hardships Favors Plaintiffs.

In balancing the hardships, again this Court is to consider the likelihood of irreparable harm to Plaintiffs. As stated above, there is a very reasonable likelihood of irreparable harm here. The Court is also to consider the risk of irreparable harm to Defendants. Here, there is no irreparable harm. This is particularly true in light of the fact that Plaintiffs are only seeking an injunction for approximately three weeks. Moreover, the Kanawha Board of Education and the Monongalia County Board of Education both sought to have exclusively remote learning due to the dangers of contacting COVID 19. The next factor for the Court to consider is the likelihood that Plaintiffs will prevail. Here, in light of the surge in COVID 19 both across the country, across the state and in the two counties named herein and the clear duty on the part of Defendants to provide Plaintiffs with a safe place to work, there is a high likelihood that Plaintiffs will prevail in this matter. The last factor is the public interest. Again, this factor favors Plaintiffs. As the studies in the Complaint demonstrate, in school education in counties with the rates of infection that exist in Kanawha and Monongalia counties enhance the community spread of COVID 19. Certainly, the spread of this potentially fatal disease is in the public interest, especially in light of the fact that instruction will be on-going and there will can be safe in school instruction once school employees receive their second vaccine.

IV. Conclusion

For all of the reasons stated in the verified **COMPLAINT** and in this **MEMORANDUM**, Plaintiff respectfully request for temporary restraining order and a preliminary injunction be granted.

WEST VIRGINIA EDUCATION ASSOCIATION ET AL
By Counsel



(6615)

General Counsel, West Virginia Education Association
1558 Quarrier Street
Charleston, WV. 25311

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
CIVIL CASE INFORMATION STATEMENT

WEST VIRGINIA EDUCATION ASSOCIATION,
and DALE LEE, Association President,

Plaintiffs,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, W. CLAYTON
BURCH, in his capacity as State Superintendent,
WEST VIRGINIA STATE SUPERINTENDENT OF
SCHOOLS, KANAWHA COUNTY BOARD OF
EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Defendants.

Days to
Answer
20 days

Type of Service
US Postal Regular Mail

Original Complaint furnished herewith.

PETITIONER: West Virginia Education Association

RESPONDENT: The above-named parties Defendant

II. TYPE OF CASE:

TORTS	OTHER	CIVIL
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil

Product Liability Mental Health Other

Other Tort Appeal of Administrative Agency

III. JURY DEMAND YES NO

CASE WILL BE READY FOR TRIAL BY: N/A

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? YES NO

IF YES PLEASE SPECIFY:

- Wheelchair accessible hearing room and other facilities
- Interpreter or other auxiliary aid for the hearing impaired
- Reader or other auxiliary aid for the visually impaired
- Spokesperson or other auxiliary aid for the speech impaired
- Other: _____

Attorney Name: Andrew J. Katz (6615)
Firm: West Virginia Education Assoc

Representing:
 Plaintiff Defendant

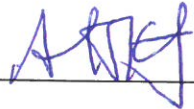
Address: 1558 Quarrier Street
Charleston, West Virginia 25311

Cross Complainant Cross Defendant

Telephone: (304) 346-5315 x 121

Dated: 1/20/2021

Signature _____



BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA EDUCATION ASSOCIATION,
and DALE LEE, Association President

Plaintiffs,

vs.

Docket No.: _____

**THE WEST VIRGINIA DEPARTMENT
OF EDUCATION, THE WEST VIRGINIA
STATE BOARD OF EDUCATION, W. CLAYTON
BURCH, in his capacity as State Superintendent,
WEST VIRGINIA STATE SUPERINTENDENT OF
SCHOOLS, KANAWHA COUNTY BOARD OF
EDUCATION AND MONONGALIA COUNTY
BOARD OF EDUCATION,**

Defendants.

CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel for Plaintiffs West Virginia Education Association, et al do hereby certify that I have on the 20th day of October, 2020 caused to be served a true copy of a **VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION** and **MEMORANDUM OF LAW IN SUPPORT OF , PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION** via electronic mail to the following individuals: Heather Hutchens, Lindsey MacIntosh and Jennifer Caradine.



Andrew J. Katz (6615)
The West Virginia Education Association
1558 Quarrier Street
Charleston, West Virginia 25311