BEFORE THE NEBRASKA STATE BOARD OF EDUCATION

IN THE MATTER OF THE COVID-19 PANDEMIC - ACCREDITATION SAFETY STANDARDS	)))))	NDE Case No. 20-24 **DETERMINATION DECLINING TO ISSUE DECLARATORY ORDER**

INTRODUCTION

On November 19, 2020, Petitioners Jennifer A. Benson, individually and in her capacity as President of the Nebraska State Education Association ("NSEA"), and the NSEA itself, pursuant to 92 NAC 62 ("Rule 62"), filed a petition for issuance of a declaratory order ("Petition") by the State Board of Education ("State Board"). On December 7, 2020, the Alma Public School District, Minden Public School District, Randolph Public School District, Kearney Public School District, Gretna Public School District, Homer Community School District, Creek Valley Public School District, Northwest Public School District, Laurel-Concord-Coleridge School District, Hastings Public School District, Anselmo-Merna Public School District, Adams Central Public School District, Crawford Public School District and the Friend Public School District ("Intervenor School Districts") filed a petition to intervene in the pending matter.

Paragraph 3 of the Petition states that entities which may have an interest in the proceedings in this matter include all school districts, "public and private," and all educational services units. This statement is roughly the equivalent to stating that these entities are "necessary parties" pursuant to Rule 62, Sec. 002.08, and Petitioners were so informed by the Nebraska Department of Education ("Department"). While these parties were not provided a copy of the Petition upon its filing as required by Rule 62, Sec. 004.03, these entities were subsequently provided a copy of the Petition via email from the Petitioners on November 25, 2020.

Paragraphs 4-14 of the Petition describe various matters concerning the seriousness and effects of the COVID-19 pandemic. The State Board has no reason to dispute any of these matters.

Petitioners allege in paragraph 15 that recommendations for face coverings are "largely ignored by many school districts." The State Board continues to strongly encourage the use of

face coverings to sustain educational opportunities for students and maintain a safe environment. The Petition does not provide any specific evidence to support the allegation; however, it is ultimately immaterial to the issue of the State Board's legal authority to require face coverings for all students and staff as discussed below.

Similarly, the allegations and conclusions in paragraphs 16-17 may well be true, but are not readily capable of being known to the State Board and relate largely to the alleged feelings of other persons.

With respect to paragraph 18, the State Board finds that the Department has in fact taken "meaningful action . . . to identify the mitigation strategies that must be undertaken by schools under its jurisdiction . . . ." In this regard, the Department has issued several guidance documents on its "Launch Nebraska" and COVID-19 Resources web pages. The Department prepared and posted guidance documents on the Department's website and dedicated sites for regular communications with schools. The Department's guidance includes "Conditions for Learning" for facilities and wellness in multiple areas, providing detailed guidance for health conditions generally to include masking, distancing, hygiene, regular cleaning, student screening, and many other areas consistent with Centers for Disease Control and Prevention and Department of Health and Human Services ("DHHS") guidance. Additionally, the Department provided a variety of planning guidance for specific environments in food and nutrition, physical education, and music. These resources remain available and in use by school officials as they craft local plans.

In response to specific concerns brought to the attention of the Commissioner of Education ("Commissioner"), he reminded certain school districts of their legal responsibilities under Rule 10, Sec. 011.01 to secure and maintain a safe school environment. The Commissioner noted that such responsibilities included proactive measures to stop the spread of COVID-19, as well as the districts' full compliance with any local directed health measures. The Commissioner also advised these districts of the need for increased health and safety precautions including, but not limited to, social distancing and wearing masks, in accordance with directed health measures and Department guidance.

Paragraphs 19-23 describe various matters concerning previous actions of the State Board and its legal authority. The State Board generally agrees with these statements.

RELIEF REQUESTED

Petitioners request that the State Board enter a declaratory order identifying the following minimum mitigation strategies as safety standards inherent in Rule 10, Sec. 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. (Petition, ¶ 24.)

Petitioners further request that 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 the Department 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. (Petition, ¶ 25.)

Finally, the Petitioner requests that the Commissioner be 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. (Petition, ¶ 26.)

BASIS FOR DECLINING TO ISSUE DECLARATORY ORDER

For the reasons set forth below, the State Board declines to issue the declaratory order requested by Petitioners.

First, the Petition is not seeking a "declaratory order" as that term is used in statute and regulation. Any person can file a petition with the State Board seeking an order "as to the applicability to specified circumstances of a statute, rule, regulation or order within the primary jurisdiction of the agency." Neb. Rev. Stat. § 84-912.01(1) (2014); Rule 62, Sec. 002.05. "Applicability" means "the appropriateness of the relation of the law to the person, property or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, and how it applies, or which law applies." Rule 62, Sec. 003.03.

The Petition does not seek an order relating to the applicability of any statute, rule or regulation. Instead, it asks the State Board to essentially "issue" *new regulations* not currently in the school accreditation regulation (Rule 10), or anywhere else in the Department's regulations, to effectuate twelve additional requirements and procedures for all accredited schools listed in paragraphs 24(a-j), 25 and 26.

Second, the State Board has no authority to mandate the wearing of facemasks for all students and staff in all schools. *See* Rule 62, Sec. 009.01A. To the contrary, the Nebraska Legislature has provided that the general authority to make rules and regulations concerning the health of students in public schools lies with the *local boards of education.* For example, with respect to the school board or board of education of a Class III or IV school district, "[t]he board shall make rules and regulations as it deems necessary for the government and *health of the pupils* and devise any means as may seem best to secure the regular attendance and progress of children at school." Neb. Rev. Stat. § 79-526 (Cum. Supp. 2018) (emphasis added). Under Neb. Rev. Stat. § 79-522 (2014), "[t]he board of education of a Class V school district has power to . . . make its rules and regulations." Neb. Rev. Stat. § 79-535 (2014) states, in pertinent part, that "[t]he school board . . . may make expenditures for supplies, equipment, travel, meals, and lodging for school programs and activities . . . appropriate for the benefit, government, *and health of pupils enrolled in the school district.*" (Emphasis added.) These local boards have the authority to require protective face coverings for all students, to craft exemptions as they see appropriate, and to impose requirements for their own employees and staff.

Third, the Legislature has committed to DHHS the power and authority over "*all matters* relating to necessary communicable disease control" and the authority to promulgate regulations and issue orders. *See* Neb. Rev. Stat. § 71-502 (emphasis added). Mask wearing or Personal Protective Equipment (PPE) requirements are for "communicable disease control" in regard to COVID-19. This is beyond the general requirement in Rule 10, Sec. 011.01 relating to a safe and sanitary school. In accordance with § 71-502, DHHS has promulgated a regulation, 173 NAC 6, titled *Directed Health Measures to Prevent or Limit the Spread of Communicable Disease, Illness or Poisoning.* Sec. 04.02 of that regulation provides that DHHS Directed Health Measures may include "[u]se of PPE for the performance of specified tasks or at specified premises[.]" The fact that DHHS has not exercised its specific authority to issue a Directed Health Measure to require PPE in schools across the state does not mean that the Department or the State Board can impose such a requirement under its general authority concerning education cited in paragraphs 20 and 22 of the Petition.

Finally, the State Board lacks legal authority to order a statewide mask mandate for students and staff in all schools and the other relief requested in this Petition under its authority concerning regulations for school approval and accreditation pursuant to Neb. Rev. Stat. § 79-

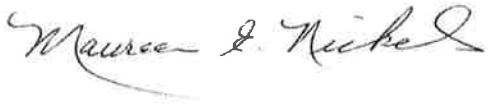
318(5)(c). That statutory provision authorizes the State Board to promulgate approval and accreditation regulations concerning, among other things, "the health and safety factors in buildings and grounds." Requirements concerning the health measures required of individual staff and students' PPE or facial coverings do not concern "*buildings and grounds*." Again, as stated above, such matters are committed by law to local school districts and DHHS.

CONCLUSION

The State Board fully appreciates the seriousness of the COVID-19 pandemic as it relates to our state's schools. The Department as a whole commends the educators and staff who have and continue to provide high-quality teaching during one of the most challenging times of our generation. However, the State Board cannot exercise authority it does not have. Accordingly, based on the foregoing, the State Board declines to issue a declaratory order as requested in the Petition. In light of this decision, Petitioners' pending motion for oral argument and the petition for intervention filed by the Intervenor School Districts are both denied as moot.

So Ordered this _7th_ day of December, 2020.

STATE BOARD OF EDUCATION



BY: _____

Maureen Nickels, President

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Determination Declining to Issue Declaratory Order was served on counsel for the Petitioners, Scott J. Norby, Norby & Welding, LLP, 605 South 14th Street, Lincoln, NE 68508, and counsel for the Intervenor School Districts, Justin J. Knight, Perry, Guthery, Haase & Gessford, P.C., L.L.O., 233 South 13th Street, Suite 1400, Lincoln, NE 68508, via regular U.S. Mail, all on this 8th day of December, 2020.

Brenda L. Wild