

**BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

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

**Petitioners,**

**vs.**

**Docket No.:** \_\_\_\_\_

**THE HONORABLE JAMES JUSTICE,  
GOVERNOR OF THE STATE OF WEST VIRGINIA**

**Respondent.**

**PETITION FOR INJUNCTIVE RELIEF,  
INCLUDING A TEMPORARY RESTRAINING ORDER AND  
TO ENFORCE THE WEST VIRGINIA OPEN MEETINGS ACT**

COMES NOW the West Virginia Education Association on behalf of its Members, Dale Lee, President of the WVEA and Holly Rhinehart, by counsel Andrew J. Katz and Petitions this honorable Court for a Temporary Restraining Order and, ultimately, an injunction to order the Governor of West Virginia to follow the "Harvard" map related to what care should be taken according to the level of COVID exposure in the population of any one county and also to order that certain meetings by the be required to comply with the West Virginia Open Meetings Act. In support of this Petition, the Petitioners allege the following:

1. The West Virginia Education Association is a voluntary organization consisting of education employees of the public school system. The WVEA has thousands of members across the State and in every county.

2. Dale Lee is President of the West Virginia Education Association.

3. Holly Rhinehart is a professional educator employed in Kanawha County, West Virginia.

4. James Justice is the current Governor of West Virginia. Governor Justice has assumed responsibility or ensuring that the schools in West Virginia are safe for children to attend and for employees to work

#### **COUNT I-PRAYER FOR INJUNCTIVE RELIEF**

Paragraphs 1 through 4 are incorporated herein as if set forth verbatim hereinafter.

5. 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.

6. Over 200,000 residents of the United States have died from this virus. In West Virginia, the death toll has been on the upswing. A record 98 West Virginians died of COVID 19 in August alone. This record was easily surpassed by the 136 deaths in September.

7. Additionally, West Virginia had one of the nation's highest "reproductive rates," which is the number of people on average one person will infect. Moreover, the number of active cases of COVID has almost doubled in September alone, from around 2,000 cases to over 4,000 cases.

8. The results of this spreading health threat is being seen in school communities. At least four public school personnel have died from COVID 19.

9. Additionally, 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 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, even though Respondent has represented that Tucker County is green, which indicates that students may safely attend school.

12. With the stated goal of providing direction for the safe opening of schools, Respondent 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 states that his "Map" is based on the mapping system created by the Harvard Global Health Initiative, however, Respondent has made several significant changes. On each Saturday, the Respondent and/or his agents determine what color is each county in West Virginia and publishes 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 are green and yellow could play games. In counties that are in orange, athletes could only do conditioning. Counties that are red could not conduct extracurricular sports at all.

13. The Harvard Global Health Initiative is a group of ethicists, policy researchers, epidemiologists, infectious disease experts and public health experts. This group created a color coded mapping system, known as the Harvard Map, that set out different colors for each county in a state based on its rate of exposure. Green and yellow means that communities could re-open. Counties that were orange and red could not. Moreover, the Harvard Global Health Initiative recommends that counties that are in orange be advised to adhere to a stay at home policy and those counties in red be required to do so.

14. While Respondent claims that the color coded map created by West Virginia is based on the Harvard Map, significant differences were immediately apparent. Most significantly, in West Virginia, counties would still be green if they had up to seven times the rate of exposure as green counties on the Harvard Map. Similarly, on the Harvard Map, the cut off for a county going yellow to orange was a COVID infected rate of over 10 people per 100,000, while in West Virginia a county did not move from yellow to orange until it reached 15 people per 100,000 resident suffering from the virus. As a result, from the beginning, the map promulgated by Respondent showed significantly more green and yellow counties than the Harvard Map. After receiving criticism, Respondent changed the color cut offs to be more closely aligned with the Harvard Map.

15. Nonetheless, Respondent, or people working on his behalf, are still manipulating the results to the detriment of the health of West Virginia students and public school employees. One way Respondent and his agents are doing this is by changing the criteria for what color is given to any county. For example, at first, the State only used the "infection rate," which is based on the number of infected people per 100,000 residents as designed by the Harvard Global Health Initiative. When that was producing too many orange and red counties, Respondent and/or his

agents began relying on the **lesser** of the infection rate or the percentage of positive test results. By using this latter metric, great emphasis is being placed on having greater number of tests in the hope of lowering the rate of positive test results to a level where schools would reopen and extracurricular activities would be unaffected. The manipulation here is not only that the State keeps changing its criteria, but by using the percentage of positive tests, the State is creating a false ratio, one not in conformity to the Harvard Map. The State is not creating a ratio of the number of COVID effected individuals and not effected individuals. Rather, it is creating a ratio of positive test results and negative test results.

16. Because one of the State metrics is the percentage of positive test results, there is a concerted effort by some individuals to take the test repeatedly-and to encourage others to do so-in order to drive the ratio of positive to negative tests down. An example of this is shown in a Facebook page. This following exchange was thereon:

Matthew A. Nelson: If you tested negative this week, you need to go get tested again this week and next week.

Christian Wells (who is a member of the Putnum County Board of Education): I went twice. Tuesday and Wednesday (sic). Got both back already. I'll go back every day if that's what it takes.

17. That is not the only way that the results are being manipulated. Not only is there an effort being made to inflate the number of negative test results, agents of Respondent are under counting positive results. For example, the State essentially does not count the significant outbreak in Mount Olive Prison inmates, even though members of the public work there and are at risk of catching the COVID virus and transmitting it back to the general population. Additionally, when an outbreak of 80 students occurred at West Virginia University, this was

counted as only one positive result. Similarly, residents of nursing homes who are suffering from the virus also are all counted as one positive, even if dozens are infected.

18. In addition to inflating the number of negative COVID test screens and under counting the positive, Respondent or his agents are, in at least one instance, using subjective judgments to determine what color a county should be instead of relying on the numeric cut offs. Calhoun County was moved from red to orange based on the judgment that the high number of infected individuals was limited to a certain group and the outbreak had been contained. Such subjectivity is open to manipulation.

19. Another significant way that Respondent is manipulating the results is that he added a fifth color category, gold, to the Harvard metric. As a result, five additional counties were taken off the red and orange lists.

20. Additionally, Respondent has refused to spend tens of millions of dollars that has been given to it by the Federal Government under the CARES Act, money that could be used to increase the safety of students and school personnel when their counties are legitimately in the green, yellow or now gold categories. Two examples where such money could be put to good use: (1) Some counties where students are attending provide students with clear shields that fold along the contours of students' desks. These shields are either carried by students from class to class or fastened to the desk. However, other counties can not afford to purchase these effective safety devices. Another safety measure would be to supply money so that every school has a thermal thermometer that would take every student's temperature as he or she walks into the building. Certainly, spending the CARES money on these types of safety measures would be a wise investment.

21. Respondent, by his actions and words, is demonstrating that his primary concern is not the safety of the students, public school employees and their families. For example, Respondent stated that he decided to add the fifth color to the West Virginia Map while driving to a meeting with his health experts rather than listening to what such experts had to say. Additionally, at the same time, the Governor stated that he was changing the positive count among the WVU students because that “moves us more toward the finish line.” Apparently, the “finish line” is for schools to reopen, not that they reopen safely. Indeed, many of the changes that were made to the West Virginia mapping effort were contemporaneous with public demonstrations by parents and others that have a narrow agenda, for example parents of athletes or band members and their children.

22. As a result of the actions described 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 Petitioners and others.

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

1. That Respondent and his agents strictly follow the criteria of the Harvard Map and its related suggestions in terms of stay at home orders.
2. That Respondent require that the State keep track of the individuals who are taking the tests and that individuals who take the test more than one time in two weeks, without any additional exposure since their first test, are only counted once.

3. That Respondent release additional CARES funds to increase the safety of students, education personnel and their families.

## **COUNT II**

### **ENFORCEMENT OF THE WEST VIRGINIA OPEN MEETINGS ACT**

Paragraphs 1 through 22 are incorporated herein as if set forth verbatim hereinafter.

23. Respondent created the COVID 19 Data Review Panel (hereinafter referred to as the “Panel”), which is comprised of various public health officials.

24. This panel meets on Saturday before the announcement is made regarding the color coding that week. The panel reviews the testing information and makes a determination regarding what colors should be assigned to each county.

25. Similarly, the Governor regularly meets with “health experts” to determine a course of conduct regarding the State’s COVID response.

26. In either case, no agenda is provided and no minutes are published pertaining to these meetings. The public is not permitted to attend.


27. The failure on the part of Respondent to require the Panel to publish an Agenda, provide proper notice of the time date and location of each meeting, permit public attendance and providing minutes or a recording of each meeting is a violation of the West Virginia Open Meetings Act, as is Respondent’s failure to do the same when he meets with others to determine the State’s COVID response.



WHEREFORE Petitioners request that this Court issue an immediate Temporary Restraining Order and ultimately a long term injunction ordering the following:

1. That the Panel provide proper Notice of the time and location of each meeting, along with an Agenda setting forth the subjects to be discussed at each such meeting.
2. That the Panel keep minutes or a recording of each meeting and that the same be made available to the public.
3. That the Panel publish the minutes or recordings of all past meetings.
4. And that the Governor do the same when he meets with his advisors on these issues.

WEST VIRGINIA EDUCATION ASSOCIATION  
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By Counsel

  
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