

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SCHUYLER

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In the Matter of

Index No.  
Date Purchased

JEANETTE LASKO, as President of the WATKINS GLEN  
FACULTY ASSOCIATION; and WATKINS GLEN  
FACULTY ASSOCIATION,

**VERIFIED PETITION**

Petitioners,

- v -

BOARD OF EDUCATION OF THE WATKINS GLEN  
CENTRAL SCHOOL DISTRICT; WATKINS GLEN  
CENTRAL SCHOOL DISTRICT; and GREG KELAHAN,  
in his official capacity as Superintendent of the WATKINS  
GLEN CENTRAL SCHOOL DISTRICT,

Respondents,

For an Order and Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules.

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Petitioners Jeanette Lasko, as President of the Watkins Glen Faculty Association and the  
Watkins Glen Faculty Association (“Association” or “Union”), by their attorney, Robert T. Reilly  
(Michael J. Del Piano and Christina M. French, of counsel), for their petition to compel  
Respondents Board of Education of the Watkins Glen Central School District (“Board”), Watkins  
Glen Central School District (“District”), and Greg Kelahan, in his official capacity as  
Superintendent of the Watkins Glen Central School District (collectively “Respondents”) to act as  
mandated by Executive Orders 202.45 and 202.60, NYSDOH guidance, and their own rules and  
regulations, to include telework as a viable accommodation, consistent with the essential functions  
of the job, for faculty and staff at increased risk of serious illness or death related to SARS-CoV-  
2 (“COVID-19”) infection, respectfully allege:

## PRELIMINARY STATEMENT

1. Governor Cuomo's Executive Orders 202.45 and 202.60 require schools to consider telework accommodations for vulnerable persons, in accordance with mandatory guidance from the New York State Department of Health. In turn, Respondents adopted rules and regulations mandating them to consider telework accommodations for vulnerable faculty and staff who are at increased risk for COVID-19 illness. Respondents adopted such rules and regulations in compliance with Governor Cuomo's directives for reopening in-person instruction during the 2020-2021 school year. Governor Cuomo required each school district to submit reopening plans and affirm compliance with mandatory guidance promulgated by the New York State Education Department ("NYSED") and the New York State Department of Health ("NYSDOH").

2. The NYSED and NYSDOH guidance required each school district reopening plan to provide policies for vulnerable populations, including telework accommodations, as part of the State's overall plan to not only control transmission of COVID-19, but also to protect the most at-risk school faculty and staff from severe effects and/or death from this relentless virus.

3. Respondents' adopted reopening plan clearly and unambiguously incorporates NYSED and NYSDOH requirements to consider telework accommodations for vulnerable faculty and staff. Nonetheless, Respondents have refused to include telework as an optional accommodation, irrespective of the requestor's unique circumstances ("the Policy"). Respondents' unconscionable disregard of Executive Orders 202.45 and 202.60, and their own rules and regulations puts vulnerable Association represented faculty and staff at significant and unnecessary risk of serious illness or death.

4. Respondents' actions have put vulnerable faculty and staff between the proverbial rock and a hard place; choosing between a paycheck, health and potentially, life.

5. To comply with the State's reopening requirements, Respondents adopted their reopening plan to establish the procedures for instruction during the 2020-2021 school year. Respondents submitted their reopening plan to NYSED and NYSDOH and posted it on their website homepage.<sup>1</sup> In submitting their reopening plan, Respondents' expressly agreed to adopt the mandatory provisions of the NYSED and NYSDOH guidance. Moreover, Respondents' explicitly incorporated the NYSED and NYSDOH guidance in their reopening plan document.

6. Petitioners commence this special proceeding for an order and judgment: (a) declaring the Policy regarding telework accommodation(s) null and void, arbitrary, capricious, *ultra vires*, irrational, in violation of law, in violation of lawful procedure, and a failure to perform a duty enjoined upon Respondents by law; (b) permanently enjoining Respondents from further implementation of the Policy during the COVID-19 pandemic; (c) vacating Respondents' decisions regarding telework accommodation requests made pursuant to the unlawful Policy; (d) making Association members whole who were denied telework accommodation requests under the Policy; (e) mandating that Respondents comply with Executive Orders 202.45 and 202.60 and Respondents' rules and regulations; and (f) mandating that Respondents re-consider previously denied requests for telework accommodations by Association represented faculty and staff.

### JURISDICTION

7. This Court has jurisdiction to issue an order pursuant to CPLR Article 78 to grant the relief requested herein.

8. No prior application has been made for the relief requested herein.

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<sup>1</sup> <https://www.wgcsd.org/>. Last accessed on September 6, 2020.

**VENUE**

9. The basis for venue is that Respondents’ principal place of business is located in Schulyer County.

**PARTIES**

10. Petitioner Jeanette Lasko is President of the Association. Ms. Lasko resides in Chemung County.

11. Petitioner Watkins Glen Faculty Association is an unincorporated association and labor organization within the meaning of Civil Service Law §§ 200, *et seq.* (“Taylor Law”) and is the recognized exclusive bargaining representative for all non-supervisory, professional certified personnel employed by the District, including long-term substitutes who have completed 90 workdays in the same assignment, the registered nurses, and Licensed Service Providers employed by respondents. The Association has its principal place of business located in Schulyer County. The Association represents approximately 132 people.

12. Respondent Board is the governing body of the District pursuant to Article 37 of the Education Law, organized and existing with all of the duties and responsibilities imposed upon it by law, with its principal office located at 303 12th Street, Watkins Glen, New York 14891.

13. Respondent District is a central school district organized and maintained pursuant to Article 37 of the Education Law and existing with all the duties and responsibilities imposed upon it by law, with its principal office located at 303 12th Street, Watkins Glen, New York 14891.

14. Respondent Greg Kelahan is the Superintendent of Schools and Chief Executive Officer of the District, and has the duties, powers, and responsibilities set forth in Article 37 of the Education Law, including the duty to “enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the [Board].” Education Law § 1711(2).

## FACTS

15. The United States remains gripped by the COVID-19 pandemic with no apparent end in sight. The State of New York has been under a continuous State disaster emergency since March 7, 2020. As of September 13, 2020, COVID-19 has killed nearly 200,000 people in the United States, including more than 32,611 New Yorkers.<sup>2</sup> These numbers increase daily. All schools in the State of New York, including those operated by Respondents, were closed to in person instruction from March 2020 to the end of the 2019-2020 school year because of COVID-19.

16. COVID-19 is a severe, acute respiratory virus primarily spread from person to person through respiratory droplets when an infected person coughs, sneezes, or talks.<sup>3</sup> COVID-19's dangers are compounded by transmission risk from asymptomatic and pre-symptomatic infected persons.<sup>4</sup> It is understood that COVID-19 can be spread by human contact with surfaces contaminated with droplets of the virus.<sup>5</sup>

17. COVID-19 can infect anyone. People with certain underlying medical conditions, however, are much more likely to become severely ill if they contract COVID-19, and may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die. People of any age with certain underlying medical conditions are at increased risk for severe illness and death. For instance, according to the CDC, an individual having chronic kidney disease, at any

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<sup>2</sup> <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>. Last accessed September 13, 2020.

<sup>3</sup> <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>. Last accessed September 13, 2020.

<sup>4</sup> <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>. last accessed September 13, 2020.

<sup>5</sup> *Id.*

stage, is *four times* more likely to suffer a severe case than someone without this condition and a person with multiple underlying conditions is five times more likely to suffer severe disease.<sup>6</sup>

18. On March 7, 2020, Governor Cuomo signed Executive Order 202, which declared a State emergency disaster for the entire State of New York. A copy of Executive Order 202 is attached as Exhibit “A”.

19. On March 17, 2020, Schuylar County Administrator Tim O’Hearn issued an Emergency Alert regarding the County’s response to the COVID-19 pandemic.<sup>7</sup> County Administrator O’Hearn has continued to provide up-to-date communications to County residents regarding the County’s COVID-19 plan, including the necessity to continue being vigilant to control community spread of the virus.<sup>8</sup>

**A. The COVID-19 Pandemic and Closure of Schools for In-Person Instruction During the 2019-2020 School Year**

20. On March 16, 2020, Governor Cuomo issued Executive Order 202.4, which required all schools in the State to close for in person instruction for a two-week period by March 18, 2020. Executive Order 202.4 also required all school districts to develop plans for alternative instructional options to submit to NYSED. A copy of Executive Order 202.4 is attached as Exhibit “B”. Executive Order 202.4 was extended five times, by Executive Orders 202.11, 202.14, 202.18, 202.28, and 202.45 to prohibit in person instruction through the end of the 2019-2020 school year. Copies of Executive Orders 202.11, 202.14, 202.18, 202.28, 202.45 are attached as Exhibits “C”, “D”, “E”, “F”, and “G”, respectively.

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<sup>6</sup><https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#chronic-kidney-disease>. Last accessed September 13, 2020.

<sup>7</sup><https://www.schuylarcounty.us/AlertCenter.aspx?AID=Schuylar-Countys-Response-to-COVID19-17>. Last accessed September 13, 2020.

<sup>8</sup> <http://schuylarcounty.us/DocumentCenter/View/9183/Public-info-Covid19>. Last accessed September 13, 2020.

21. In order to comply with Executive Order 202.4, *et seq.*, the District developed and implemented plans for alternative instruction options. The District did not have any in person instruction from the third week in March 2020 to the end of the 2019-2020 school year. All District employed teachers taught remotely during that time period.

**B. The State's Plan Reopening of Schools for In-Person Instruction for the 2020-2021 School Year**

22. The COVID-19 crisis in New York remains acute. The official New York State website displays a large banner on every page declaring: "Coronavirus is still active in New York. We have to be smart. Wear a mask and maintain 6 feet distance in public."

23. That COVID-19 remains an imminent threat was most recently experienced at nearby State University of New York, Oneonta, which will be closing its campus after more than 600 students tested positive for the coronavirus less than two weeks after classes began.<sup>9</sup>

24. Under Executive Law Section 29-a of Article 2-B, the Governor of the State of New York has broad powers to issue executive orders during a declared State disaster emergency.

25. Executive Orders have the full force and effect of law.

26. On June 15, 2020, Governor Cuomo issued Executive Order 202.45 which mandated that "... entities [including Pre-K to Grade 12 Schools] must be operated in compliance with the guidance promulgated by the Department of Health." *See* Ex. "G".

27. On August 7, 2020, Governor Cuomo permitted schools in the State to open for in person instruction.<sup>10</sup> Governor Cuomo required school districts to adopt and submit detailed

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<sup>9</sup> <https://suny.oneonta.edu/covid-19>. Last accessed on September 9, 2020.

<sup>10</sup> <https://www.governor.ny.gov/news/governor-cuomo-announces-based-each-regions-infection-rate-schools-across-new-york-state-are>. Last accessed September 13, 2020.

reopening plans compliant with the NYSDOH Guidance.<sup>11</sup> The Governor further ordered all school districts to post remote learning plans online as well as plans for testing and tracing students and teachers for COVID-19.<sup>12</sup>

28. Governor Cuomo unequivocally stated the public policy of the State is that teachers must feel safe in order to return to the classroom.<sup>13</sup>

29. In discussing potential reopening for in-person instruction, Governor Cuomo stated: “Parents and teachers must feel safe and secure in each district’s plan to return to school, and those plans *must adhere to the Department of Health guidance.*”<sup>14</sup> Governor Cuomo further stated “teachers have to feel safe, they can’t teach if they don’t feel safe”<sup>15</sup> and “you can’t order a teacher into a classroom.”<sup>16</sup>

30. On September 4, 2020, Governor Cuomo released Executive Order 202.60, issuing the following directives through October 4, 2020:

The directive contained in Executive Order 202.45, as extended, requiring closure of all schools statewide to in-person instruction, is hereby modified only insofar as to authorize schools statewide to be open for instruction, effective September 1, 2020, subject to adherence to Department of Health issued guidance and directives .

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A copy of Executive Order 202.60 is attached as Exhibit “H”.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> <https://www.nytimes.com/2020/08/07/nyregion/cuomo-schools-reopening.html>. Last accessed September 13, 2020.

<sup>16</sup> <https://www.nbcnewyork.com/news/local/cuomo-expected-to-reveal-ny-schools-decision-but-says-its-ultimately-not-up-to-him/2556237/>. Last accessed September 13, 2020.



31. The clear mandate of Executive Orders 202.45 and 202.60 is to require schools to operate in compliance with the guidance promulgated by the NYSDOH.

32. In anticipation of potential school reopening for in person instruction for the 2020-2021 school year, NYSED presented a framework of guidance to reopen New York's schools to the New York State Board of Regents ("Regents").<sup>17</sup> A copy of the framework presented by NYSED to the Regents is attached as Exhibit "I".

33. On July 16, 2020, NYSED and the Regents issued the document entitled "Recovering, Rebuilding, and Renewing the Spirit of New York's Schools – Reopening Guidance" ("NYSED Guidance").<sup>18</sup> A copy of NYSED's Guidance is attached as Exhibit "J".

34. NYSED's Guidance expressly provided that "[t]he health and safety of the children and adults in our schools is paramount. Health and safety considerations must always come first in every decision made and every action taken by our schools and districts." *See* Ex. "J" at p. 17.

35. Under NYSED's Guidance, school districts had to submit comprehensive reopening plans for the 2020-2021 school year.<sup>19</sup> *See* Ex. "J" at p. 14. NYSED required all plans to have provisions for in-person, remote, and hybrid models of instruction. *See* Ex. "J" at p. 89.

36. Consistent with Executive Order 202.60, NYSED's Guidance also mandated school districts' reopening plans to follow guidance released by the NYSDOH. On August 26, 2020, NYSDOH issued its guidance entitled "Interim Guidance for In-Person Instruction at Pre-K

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<sup>17</sup> <http://www.nysed.gov/news/2020/state-education-department-presents-framework-guidance-reopen-new-york-state-schools>. Last accessed September 13, 2020.

<sup>18</sup> <http://www.nysed.gov/news/2020/state-education-department-issues-guidance-reopen-new-york-state-schools>. Last accessed September 13, 2020.

<sup>19</sup> The NYSED Guidance refers to local educational agencies ("LEAs"), which includes school districts. *See* Ex. "J" at p. 14.

to Grade 12 Schools During the COVID-19 Public Health Emergency” (“NYSDOH Guidance”). A copy of the NYSDOH Guidance is attached is Exhibit “K”.

37. To facilitate reopening plan submissions, NYSED created a survey to be submitted on the SED Monitoring and Vendor Reporting System (“the Portal”) to collect essential information about reopening plans (“the Portal Survey”). *See* Ex. “J” at p. 14.

38. NYSED’s Guidance further required school district chief executive officers to execute a survey containing a set of mandatory assurances affirming the school district would implement the mandatory portions of the NYSED Guidance to be submitted with the Portal Survey. *See* Ex. “J” at p. 14. Similarly, NYSDOH Guidance also required school district chief executive officers to affirm that the school district read and understands its obligation to operate in accordance with the NYSDOH Guidance. *See* Ex. “K” at pp. 1 and 23.

**C. NYSED and NYSDOH Require School District Reopening Plans to Include Policies for Vulnerable Persons, Including Telework Accommodations**

39. NYSED’s Guidance mandates all school districts’ plans to have a written protocol detailing how the district/school(s) will provide accommodations to all students and staff who are at high risk or live with a person at high risk. *See* Ex. “J” at p. 18.

40. NYSDOH also requires districts to establish accommodation policies for vulnerable populations “including students, faculty and staff who are at increased risk for severe COVID-19 illness, and individuals who may not feel comfortable returning to an in-person educational environment, to allow them to safely participate in educational activities and, where appropriate, accommodate their specific circumstances.” Exhibit “K” at p. 4. In addition, and significantly, NYDOH Guidance explicitly identifies telework as a potential accommodation in compliance with such mandates:

These accommodations may include but are not limited to remote learning or *telework*, modified educational or work settings, or

providing additional PPE to individuals with underlying health conditions. Responsible Parties must also identify and describe any modifications to social distancing or PPE that may be necessary for certain student or staff populations, including individuals who have hearing impairment or loss, students receiving language services, and young students in early education programs, ***ensuring that any modifications minimize COVID-19 exposure risk for students, faculty, and staff, to the greatest extent possible.*** See Ex. “K” at pp 4-5. (emphasis added).

41. NYSDOH also provided the document entitled Reopening New York Checklist for Pre-K to Grade 12 School Reopening Plans (“NYSDOH Checklist”). A copy of the NYSDOH Checklist is attached as Exhibit “L”.

42. The NYSDOH Checklist also requires, at a minimum, that school districts have policies regarding vulnerable populations including as appropriate, accommodations which may include telework. See Ex. “L” at p. 6.

43. On July 17, 2020, NYSED Deputy Commissioner Kimberly Young Wilkins wrote to all school district superintendents, principals, BOCES superintendents, and charter school leaders to notify them about the NYSED Guidance. A copy of Deputy Commissioner Young Wilkins July 17, 2020 letter is attached as Exhibit “M”.

44. Deputy Commissioner Young Wilkins reiterated that all reopening plans must include mandatory elements of the NYSED Guidance and NYSDOH Guidance, and that each district chief executive officer must complete the Portal Survey affirming mandatory assurances that the district will address mandatory elements outlined in the guidance documents. See Ex. “M” at pp. 1-2.

45. On July 29, 2020, Deputy Commissioner Young Wilkins again wrote all school district superintendents, principals, BOCES superintendents, and charter school leaders to extend the time to submit reopening plans to NYSED to August 7, 2020. A copy of Deputy Commissioner Young Wilkins July 29, 2020 Letter is attached as Exhibit “N”.

**D. The District's Reopening Plan for In-Person Instruction for the 2020-2021 School Year Adopted NYSED and NYSDOH Guidance Regarding Telework Accommodations for Vulnerable Persons**

46. In response to NYSED's Guidance, Respondents drafted a document entitled Watkins Glen Central School District Reopening Plan ("District Reopening Plan"). Upon information and belief, Respondent Board adopted and approved the District Reopening Plan as its procedures for the 2020-2021 school year. The District Reopening Plan is posted under District Policies and Plans<sup>20</sup> and on the homepage of Respondents' website.<sup>21</sup>

47. Upon information and belief, Respondents also submitted the District Reopening Plan to NYSED's Portal. The District Reopening Plan is linked to NYSED's database for reopening plans.<sup>22</sup>

48. Upon information and belief, Respondents completed the NYSED Portal Survey and NYSDOH affirmation to confirm that the Respondents would follow the mandatory elements of the NYSED and NYSDOH Guidance in reopening District schools.

49. The most recent version of the District Reopening Plan was revised on September 3, 2020 and submitted to NYSED. A copy of the September 3, 2020 District Reopening Plan is attached as Exhibit "O".

50. Respondents expressly adopted the mandatory provisions of NYSED and NYSDOH Guidance when it submitted the District Reopening Plan to NYSED's Portal. Indeed, the District Reopening Plan explicitly links to and incorporates the NYSED and NYSDOH Guidance. *See* Ex. "O" at pp. 78-79.

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<sup>20</sup> <https://www.wgcsd.org/browse/165525>. Last accessed September 13, 2020.

<sup>21</sup> <https://www.wgcsd.org/>. Last accessed September 13, 2020.

<sup>22</sup> <http://www.nysed.gov/reopening-schools/school-reopening-plans>. Last accessed September 13, 2020.

51. Further, Respondents voluntarily incorporated additional health and safety guidelines issued by the Association of Educational Safety and Health Professionals Plan entitled “Moving New York Forward Practical Guidance for Schools Re-Emerging from the Pandemic” (“AESHP Plan”). See Ex. “O” at Appendix D. A copy of the AESHP Plan is attached as Exhibit “P”.

52. The AESHP Plan also contemplates telework for employees at high risk for contracting COVID-19. The AESHP Plan provides:

**Employees at high risk**

Have conversations with employees if they express concerns. Some people may be at higher risk of serious illness. This includes older adults (65 years of age or older) and people of any age with serious underlying medical conditions. By using strategies that help prevent the spread of COVID-19 in the workplace, you will protect all employees, including those at higher risk. These strategies include:

- Implementing telework and other social distancing practices (emphasis added).

See Ex. “P” at p. 19.

53. Respondents also adopted the AESHP Plan’s Standard Operating Procedures which committed Respondents “[e]xplore opportunities for staff who cannot be at school due to their own high-risk conditions or those of their family members, *to complete work utilizing alternate spaces (telecommute)*. See Ex. “P” at p. 71. (emphasis added).

54. The District Reopening Plan further incorporates the CDC’s Guidance for Operating Schools During COVID-19 (“CDC COVID-19 Guidance”) which instructs schools to consider “options for staff at higher risk for severe illness (including older adults and people of all

ages with certain underlying medical conditions or disabilities) that limit their exposure risk (e.g., telework, modified job responsibilities that limit exposure risk).”<sup>23</sup> See Ex. “O” at p. 78.<sup>24</sup>

55. The District Reopening Plan states that “Watkins Glen follows the guiding principles from the NYS Education Department while developing the plan.” See Ex. “O” at p. 1. The District Reopening Plan further states that “the health, safety, and well-being of the children and adults in our educational community are paramount.” See Ex. “O” at p. 1.

56. The District Reopening Plan contemplates “several scheduling plans for in-person, hybrid, and virtual learning.” The hybrid schedule has all students PK-12 responsible for learning everyday Monday-Friday . . . at about 50% capacity, by having all grade level[s] divided into two cohorts. An example would be on-site (two days per week) with remote learning on the alternate 3 days per week.” See Ex. “O”, at pp. 42-43. And, Respondents have, in fact, implemented the hybrid model for the 2020-2021 school year.

57. On September 4, 2020 District Superintendent Kelahan sent a letter to District parents emphasizing that, in reopening, “**the health and safety of our staff is our first priority.**” A copy of the Letter is attached as Exhibit “Q” (bold in original).

58. The District is also providing a remote only option for grades Prek-12 students which is outlined in the District Reopening Plan and a simplified “Remote Learning Plan” document. The District’s Remote Learning Plan document has since been scrubbed from its website. In addition, Respondents have published a document on their website entitled Reopening WGCSD Frequently Asked Questions (“District FAQs”). A copy of the District FAQs is attached as Exhibit “R”.

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<sup>23</sup> *Id.*

<sup>24</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html>. Last accessed September 13, 2020.

59. Respondents purportedly developed their plan with a goal of ensuring “[t]he health, safety, and well-being of the children and adults in [the] educational community.” *See* Ex. “O” at p. 1.

60. To be sure, Respondents have committed, via the District Reopening Plan, to enable and encourage its “community of parents, teachers, administrators, and students to help . . . develop and deliver workable solutions to unique needs.” *See* Ex. “O” at p. 1. According to Respondents, “We will succeed through our collective effort.” *See* Ex. “O” at p. 1.

61. The District Reopening Plan refers to a “written protocol detailing how the District/school will provide accommodations to all students and staff who are at high risk or live with a person at high risk” which will be maintained by the District’s administration team. *See* Ex. “O” at pp. 32 and 54. The purported protocol does not appear in the District Reopening Plan. The Districts’ actions, however, demonstrate that Respondents’ Policy is to unconditionally deny all requests for telework accommodations for Association represented faculty and staff on the basis that said accommodation is incompatible with the essential functions of the job.

**E. Respondents’ Failure to Follow Executive Orders 202.45 and 202.60, NYSDOH Guidance, and their own Rules and Regulations to Consider Telework Accommodations for Vulnerable Faculty and Staff**

62. Respondents have denied all requests for telework accommodations made by Association represented faculty and staff—irrespective of the ongoing health crisis and resultant state of emergency. This Policy conflicts with Executive Orders 202.45 and 202.60, NYSDOH Guidance, and their own rules and regulations.

63. By way of example, on August 24, 2020, Respondents’ unlawful, arbitrary and capricious policy was implemented with regard to Association member Sarahjane Harrigan’s request for a telework accommodation.

64. The District has employed Ms. Harrigan as a music teacher for approximately 21 years.

65. Ms. Harrigan suffers from Chronic Stage IV kidney disease, which is listed on the CDC's list of underlying conditions that place her at the highest risk of serious illness and mortality from COVID-19 infection. Ms. Harrigan also suffers from an autoimmune disease that requires her to take immunosuppressants. Because of her illnesses, Ms. Harrigan's physician advised her to perform her teaching duties remotely during this state of emergency created by the COVID-19 pandemic.

66. On or about August 10, 2020, Ms. Harrigan submitted an accommodation request to the District's Business Manager, Amy Howell, which would allow Ms. Harrigan to provide remote music instruction to elementary students.

67. After receiving no response, Ms. Harrigan sent Ms. Howell a follow-up email letter dated August 19, 2020, asking for an update on her accommodation request.

68. Ms. Howell responded to Ms. Harrigan that same day, stating only that, "[T]he Board voted and determined that all requests for ADA Accommodations be reviewed by the district's attorneys. Your request is in the review process. We are working to get a determination for you, as soon as possible. I want to thank you for your patience, during this process. I will keep you informed, as it progresses."

69. On August 25, 2020, after six (6) days of receiving no additional response from Respondents, Ms. Harrigan, again, e-mailed Ms. Howell asking for an update regarding her request for accommodation.

70. Respondents finally responded to Ms. Harrigan's request for accommodation via email letter to the Association President on August 25, 2020.



71. Respondents denied Ms. Harrigan's request for a telework accommodation on grounds that such request, "is not a reasonable accommodation under the ADA. It does not allow for teachers to perform the essential functions of the job." The respondents requested that Ms. Harrigan engage in an "interactive discussion" to discuss alternative accommodations.

72. On or about August 26, 2020, a Zoom interactive meeting was held with Ms. Harrigan, Ms. Howell, President Lasko and Renee Angle, the administrative assistant to the Superintendent, in attendance. During that meeting, Ms. Harrigan modified her request for accommodation by offering to provide remote instruction from a classroom within the elementary school building which would then be live streamed into the students' classroom with another adult providing general supervision.

73. At the August 26, 2020 meeting, Respondents rejected Ms. Harrigan's modified request and any alternative involving telework. Respondents offered a one-year leave of absence without pay and/or health insurance; alternatively, Respondents offered Ms. Harrigan additional Personal Protective Equipment ("PPE") (i.e., face shield and gloves). The offer of unpaid leave was later modified to include the District's continuation of the district-provided health insurance.

74. Ms. Harrigan rejected both offers because she would lose the opportunity to continue in her profession and, without her salary, she would most certainly not be able to afford to pay out-of-pocket for her ongoing medical expenses and the needs of her family—husband, daughter and son—without causing an extreme financial hardship. And she would have to use financial resources that she would otherwise need to pay for bare necessities of life, such as mortgage, food, and utilities as well as her daughter's college tuition and living expenses.

75. On September 1, 2020, Ms. Harrigan attended another meeting with Ms. Howell, Renee Angle and Association President Lasko at which they, again, discussed potential

accommodations. Respondents, again, rejected her request for any form of telework and reasserted the offer of one-year unpaid leave of absence with the continuation of health insurance.

76. Upon information and belief, based on discussions she has had with Jeremy LeRoux, the elementary school building principal, Ms. Harrigan's assignment for the 2020-2021 school year will consist of pushing into other teacher's classrooms every 1st period for 5th and 6th grade general music on a four (4) day rotation. As of September 4, 2020, she has been assigned a classroom for "home base" but another teacher could be placed in this room with her at any time. She has also been assigned 1-2 lunch duties (pushing into general education teachers' classrooms to monitor students while they eat lunch at their desks) and dismissal duty for first graders.

77. Placing Ms. Harrigan on lunch duty will require her to supervise students without face coverings and her most recent request for an alternative duty was denied. In addition, pursuant to the District Reopening Plan, students will also not be wearing masks during her general music instruction and/or band lessons at which students will be playing wind and brass instruments.

78. Notably, as part of a larger effort to make face coverings for students mandatory at all times, the Association issued a letter to the Respondent Board requesting the same; this safety measure was rejected by the Board. A copy of the Association's letter is attached as Exhibit "S".

79. On September 4, 2020, Ms. Harrigan requested an accommodation to have students wear face coverings during her regular instructional and duty periods, however, the District rejected this request, as well.

80. Upon information and belief, based on discussions Ms. Harrigan has had with Principal Leroux, instrumental music lessons will be moved to the elementary cafeteria(s) with a reduced number of students in order to comply with the 12' social distance requirements. The small cafeteria will purportedly allow for teaching four to five students and the large cafeteria will

allow for teaching eight to ten students. Individual lessons will be similar with appropriate 12' social distancing.

81. Upon information and belief, Ms. Harrigan will be alternating the use of cafeteria space with the chorus teacher which, upon information and belief, will not be disinfected between use.

82. In addition, according to Principal LeRoux, on days when a classroom teacher is absent, Ms. Harrigan may lose the cafeteria for instruction and will, instead, be assigned different duties throughout the building.

83. On or about March 17, 2020, the District closed due to the pandemic. Ms. Harrigan successfully taught students general music, instrumental music and individual music lessons remotely from home, as a District employee, throughout the remainder of the 2019-2020 school year.

84. In addition, she evaluated students and provided a Pass/Fail grade for the last semester of the 2019-2020 school year which was reported in students' final progress reports.

85. Notably, pursuant to the current hybrid reopening plan, all teachers, including Ms. Harrigan, will be providing remote instruction from a location in the school on Wednesdays each week.

86. Upon information and belief, given the ongoing and imminent threat COVID-19 poses to the health and safety of our communities, nearby school districts including Ithaca, Binghamton, Auburn, Syracuse and Oneonta will be offering full remote instruction for all students.

**F. The Real-Life Impact on Association Members, Their Families, and the Community at Large By Failing to Consider Telework Accommodations for Vulnerable Faculty and Staff is Unconscionable**

87. Respondents' Policy which unconditionally bars telework as an accommodation available to vulnerable faculty and staff unnecessarily exposes high-risk individuals, like Ms. Harrigan, to serious illness and/or death while instruction has been and continues to be provided safely and effectively by teachers from remote locations.

88. Any Association represented staff at increased risk for severe illness or death if they contract COVID-19 due to various medical conditions like cancer, chronic kidney disease, chronic obstructive pulmonary disease, immunocompromised state, obesity, serious heart conditions, and Type 2 diabetes mellitus is negatively affected by Respondents' arbitrary, capricious, and unlawful Policy.<sup>25</sup>

89. Here, the risk for community spread of COVID-19 is exacerbated because Respondents have not faithfully sought to enforce health and safety and social distancing requirements set forth in the District Reopening Plan.

90. For instance, on September 2, 2020, the District required all staff to report to the high school auditorium for a meeting. The Association was told that the auditorium could hold 170 people for the meeting, and that the additional faculty would go to overflow locations in the library and cafeteria. At Ms. Lasko's demand, the District eventually supplied a live stream link to individual classrooms to observe the meeting.

91. Also, on September 3, 2020, the District held teacher faculty meetings for the high school and elementary school. There were approximately 70 people in each meeting. Ms. Lasko

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<sup>25</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. Last accessed August 13, 2020.

again demanded a live stream of the meetings, but the building principals refused. The District did not require faculty to wear masks during the meeting, and more than half the attendees in the elementary school meeting did not wear masks.

92. The District has also permitted the high school library and various classrooms to be used by multiple groups without sanitizing in between.

93. It is wholly arbitrary and capricious to exclude telework as an accommodation to Association represented faculty and staff, particularly in light of the District's fully remote learning option for students, which demonstrates Respondents' recognition that there is a substantial risk of exposure to COVID-19 and that while some children—with unique needs—must avoid in-person instruction altogether, they should not be denied the opportunity to learn safely.

#### **FIRST CAUSE OF ACTION**

##### **(DECLARATION PURSANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES)**

94. Petitioners repeat and reallege paragraphs 1 through 93 as if set forth herein.

95. CPLR § 7803 permits a Court to review and rescind a determination by a public body that is affected by an error of law, arbitrary and capricious and/or *ultra vires*.

96. The Respondents' Policy regarding telework accommodation is *ultra vires* arbitrary, capricious, irrational and contrary to law and public policy.

97. Under Executive Law Section 29-a of Article 2-B, the Governor of the State of New York has broad powers to issue executive orders during a declared State disaster emergency.

98. Executive Orders 202.45 and 202.60 have the force and effect of law.

99. Executive Order 202.45 mandates that “. . . entities [including Pre-K to Grade 12 Schools] must be operated in compliance with the guidance promulgated by the Department of Health.” *See Ex. “G”*.

100. To be sure, Governor Cuomo’s more recent issuance of Executive Order 202.60 further clarified that schools may reopen subject to NYSDOH’s guidance and directives. *See Ex. “H”.*

101. NYSDOH Guidance *mandates* that, during this state of emergency, districts establish accommodation policies for vulnerable populations that includes telework as a potential accommodation.

102. The purpose of NYSED Guidance is to “[w]ithout question . . . ensure the health and safety of everyone in our schools, children and adults alike.” *See Ex. “J” a p. 5.*

103. On or about July 31, 2020, Respondents adopted their reopening plan which is now in full force and effect.

104. The District Reopening Plan constitutes rules and regulations of the District that also have the force and effect of law.

105. Respondents, in their District Reopening Plan, explicitly subscribed to and incorporated NYSDOH and NYSED guidance requiring it to develop a protocol dealing with requests for accommodation during the COVID-19 pandemic and state of emergency.

106. The District Reopening Plan acknowledged and assured Respondents’ compliance with NYSDOH and NYSED guidance.

107. Indeed, the purpose of the District Reopening Plan was to ensure “[t]he health, safety, and well-being of the children and adults in [the] educational community . . . .”

108. Nevertheless, Respondents’ have implemented a Policy which blanketly denies telework as an accommodation for being inconsistent with the essential functions of teaching—irrespective of the severity of an employee’s underlying medical condition(s), and/or the current state of emergency.

109. Nothing in Executive Orders 202.45 and/or 202.60 authorized Respondents' Policy regarding telework accommodations.

110. Respondents' accommodation Policy unlawfully narrows NYSDOH Guidance which explicitly sets forth telework as an optional accommodation for Association represented staff and faculty teachers during the current state of emergency and arbitrarily and capriciously places employees, like Sarahjane Harrigan, in the impossible position of choosing between life and livelihood.

111. Respondents also have no authority to implement rules, policies and/or procedures that conflict with its own policies and procedures as adopted via their reopening plan—the purported purpose of which is to protect the health, safety and welfare of students and employees.

112. Notably, this action does not seek to ask the Court to decide matters of individual accommodation requests under any federal or state discrimination law. While it is terribly unsound, from a health and safety standpoint, to refuse telework accommodations for those with multiple and severe underlying health conditions, the Petitioners do not ask this Court to grant individual accommodation requests.

113. Rather, Petitioners seek to ensure that Respondents follow the evaluation criteria for accommodating vulnerable populations in the context of reopening, as set out by NYSDOH, as adopted in the District Reopening Plan, and as required by law. See Ex. "K", pp. 4-5.

114. The accommodation Policy being implemented by Respondents during this state of emergency is *ultra vires*, arbitrary, capricious, irrational, in bad faith, affected by error of law and otherwise in violation of law, in violation of lawful procedure, in excess of Respondents' authority and/or jurisdiction, and/or contrary to strong public policy.

**SECOND CAUSE OF ACTION****(MANDAMUS UNDER CPLR §§ 7801 AND 7803 TO COMPEL RESPONDENTS TO CONSIDER TELEWORK AS AN ACCOMMODATION)**

115. Petitioners repeat and reallege paragraphs 1 through 114 as if set forth more fully herein.

116. Mandamus is available to enforce a clear legal right where a public official has failed to perform a duty enjoined by law.

117. Executive Orders 202.45 and 202.60 unambiguously require Respondents to adhere to the NYSDOH Guidance in order to provide in-person instruction. Further, the NYSDOH Guidance unquestionably required Respondents to have policies for vulnerable persons that included telework as a viable accommodation requests for vulnerable faculty and staff.

118. Mandamus is further available to compel agencies to follow their own rules and regulations.

119. Respondent Board adopted the District Reopening Plan as the procedures for reopening for the 2020-2021 school year.

120. The District Reopening Plan constitutes rules and regulations of the District that have the force and effect of law.

121. The District Reopening Plan explicitly adopted and incorporated the NYSDOH Guidance regarding vulnerable persons, which mandates policies to accommodate the specific circumstances for faculty and staff who are at increased risk for COVID-19 illness and individuals who may be uncomfortable returning to an in-person educational environment. Such accommodations include remote learning or telework.

122. By refusing to consider telework accommodations for Association faculty and staff, Respondents violated a duty enjoined upon them by law.



123. Petitioners have no other adequate remedy to at law to enforce compliance with the Executive Orders 202.45 and 202.60, NYSDOH Guidance, or the District Reopening Plan.

**WHEREFORE**, Petitioners respectfully demand an order and judgment as follows: (a) declaring the Policy regarding telework accommodation(s) null and void, arbitrary, capricious, *ultra vires*, irrational, in violation of law, in violation of lawful procedure, and a failure to perform a duty enjoined upon Respondents by law; (b) permanently enjoining Respondents from further implementation of the Policy during the COVID-19 pandemic; (c) vacating Respondents' decisions regarding telework accommodation requests made pursuant to the unlawful Policy; (d) making Association members whole who were denied telework accommodation requests under the Policy; (e) mandating that Respondents comply with Executive Orders 202.45 and 202.60 and Respondents' rules and regulations; and (f) mandating that Respondents re-consider previously denied requests for telework accommodations by Association represented faculty and staff.

Dated: Latham, New York  
September 13, 2020

ROBERT T. REILLY

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*Attorney for Petitioners*

**VERIFICATION**

STATE OF NEW YORK     )  
  ) ss.  
COUNTY OF SCHUYLER    )

**JEANETTE LASKO**, being duly sworn, deposes and says:

I am President of the Watkins Glen Teachers Association, Petitioner herein; I have read the foregoing verified petition; I know the contents thereof, and the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those allegations, I believe them to be true.

  
JEANETTE LASKO

Sworn to before me  
this 13<sup>th</sup> day of September, 2020

  
Notary Public

MICHAEL J. DELPIANO  
Notary Public, State of New York  
No. 02DE6277005 *Kings*  
Qualified in ~~Albany~~ County  
Commission Expires Feb. 25, 2021  
*Notarization pursuant  
to Executive Order 202.7*