

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ORLEANS

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In the Matter of

DEBORAH A. HILLBURN, as President of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS' ASSOCIATION  
and ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS' ASSOCIATION,

VERIFIED  
PETITION

Petitioners,

Index No.:

-against-

Date Filed:

BOARD OF EDUCATION of the ORLEANS-NIAGARA  
BOARD OF COOPERATIVE EDUCATIONAL SERVICES,  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES and CLARK GODSHALL, Ed.D.  
in his official capacity as Superintendent of the ORLEANS-NIAGARA  
BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondents,

For an Order and Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules and Labor Law § 27-a.

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Petitioners, Deborah A. Hillburn as president of the Orleans-Niagara Board of Cooperative Educational Services Teachers' Association and Orleans-Niagara Board of Cooperative Educational Services Teachers' Association ("BOCESTA") (collectively "Petitioners"), for their petition to compel Respondents Board of Education of the Orleans-Niagara Board of Cooperative Educational Services ("Board"), Orleans-Niagara Board of Cooperative Educational Services ("O/N BOCES"), and Clark Godshall, Ed.D., in his official capacity as superintendent of the Orleans-Niagara Board of Cooperative Educational Services (collectively "Respondents") to act

as mandated by Executive Orders 202.45 and 202.60, NYSDOH guidance, and their own rules and regulations, respectfully allege:

### **PRELIMINARY STATEMENT**

Petitioners ask this Court to order Respondents to do what is required of all school districts and BOCES around the state during the COVID-19 pandemic: adhere to and enforce a reopening plan that is consistent with NYSED and NYSDOH guidance. Respondents have failed to fully adhere to and enforce the most basic provisions of their reopening plan. The areas of non-compliance are not technical or minor in nature. Rather, Respondents have not adhered to and/or enforced the most widely accepted health and safety precautions to prevent the spread of COVID-19 (namely, physical distancing, face coverings, proper cleaning, and health screenings). Unscreened and unmasked students, crammed into classrooms that have not been properly cleaned and disinfected will inevitably have dire results for the O/N BOCES school community. BOCESTA is sounding the alarm before it is too late.

To comply with the State's school 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.

Respondents' adopted reopening plan clearly and unambiguously incorporates NYSED and NYSDOH requirements to be followed by all staff, students and visitors in order to stem the spread of COVID-19.

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<sup>1</sup> <https://www.onboces.org/Domain/250>. Last accessed on October 1, 2020.

Petitioners and Respondents share a common goal to educate and provide much needed services to O/N BOCES' students. But, Respondents are unreasonably exposing staff, students and visitors to COVID-19. Respondents' unconscionable disregard of their own reopening plan as well as Executive Orders 202.45 and 202.60, puts staff, students and visitors at significant and unnecessary risk of serious illness or death.

Petitioners commence this hybrid special proceeding for an order and judgment: (a) for a mandamus to compel Respondents to comply with their reopening plan together with NYSED and NYDOH guidance and (b) an injunction pursuant to Labor Law § 27-a.

### **JURISDICTION**

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

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

3. On September 17, 2020, BOCESTA filed a complaint on behalf of its members with the New York State Department of Labor ("DOL") pursuant to NY Labor Law § 27-a.

4. There, BOCESTA complained of the above to the DOL and requested its intervention.

5. The DOL has not acted within forty-eight hours of the filing of the complaint. As a result, NY Labor Law § 27-a grants this Court jurisdiction over this health and safety claim.

### **VENUE**

6. The basis for venue is that Respondents' principle place of business is located in Orleans County.

## **PARTIES**

7. Petitioner Deborah A. Hillburn is President of BOCESTA. Ms. Hillburn resides in Niagara County.

8. Petitioner BOCESTA 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 professional certified personnel at O/N BOCES except for the chief executive officer and administrative staff. BOCESTA is comprised of 241 active members. BOCESTA has its principal place of business located in Orleans County.

9. Respondent Board is the governing body of the Orleans-Niagara BOCES pursuant to Article 40 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 4232 Shelby Basin Road, Medina, NY 14103.

10. Respondent Clark Godshall is the Superintendent of Schools of O/N BOCES and is the executive officer of the Board, and has the duties, powers, and responsibilities set forth in Article 40 of the Education Law.

## **FACTS**

11. The United States remains gripped by the COVID-19 pandemic with no apparent end in sight.

12. The State of New York has been under a continuous State disaster emergency since March 7, 2020.

13. As of September 21, 2020, COVID-19 has killed 200,000 people in the United States<sup>2</sup>, including more than 32,961 New Yorkers.<sup>3</sup> These numbers increase daily.

14. In Western New York, nearly 1000 Western New Yorkers have died and more than 14,100 people have been infected with COVID-19.

15. Western New York has been in the top three for highest positive test rate of any region in New York State every day for the last six weeks with a daily test rate consistently being over 1% and at times reaching over 5% in certain parts of the region.<sup>4</sup> The daily positive test rate reflects the percentage of tests that are positive and is considered by experts to be a key indicator of the virus' spread.

16. All schools in the State of New York, including the sites 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.

17. 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>5</sup>

18. COVID-19's dangers are compounded by transmission risk from asymptomatic and pre-symptomatic infected persons.<sup>6</sup> It is understood that COVID-19 can be spread by human contact with surfaces contaminated with droplets of the virus.<sup>7</sup>

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<sup>2</sup> <https://www.reuters.com/article/us-health-coronavirus-usa-deaths/u-s-nears-grim-milestone-of-200000-covid-19-deaths-idUSKCN26C11Z>. Last accessed September 22, 2020.

<sup>3</sup> <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>. Last accessed September 22, 2020.

<sup>4</sup> <https://forward.ny.gov/percentage-positive-results-county-dashboard>. Last accessed September 23, 2020.

<sup>5</sup> <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>. Last accessed September 22, 2020.

<sup>6</sup> <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>. Last accessed September 22, 2020.

<sup>7</sup> *Id.*

19. 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.

20. For instance, according to the CDC, an individual having chronic kidney disease, at any 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>8</sup>

21. 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.”

22. On March 14, 2020, Orleans County declared a state of emergency regarding the COVID-19 pandemic.<sup>9</sup> Paul A. Pettit, Public Health Director for the Genesee & Orleans County Health Departments, 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>10</sup>

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<sup>8</sup><https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#chronic-kidney-disease>. Last accessed September 22, 2020.

<sup>9</sup> <https://www.whcc.com/coronavirus/orleans-county-declares-state-of-emergency-schools-will-close/5674370/>. Last accessed September 22, 2020.

<sup>10</sup> <https://orleanscountyny.com/departments/publichealthhold/covid-19/>. Last accessed September 22, 2020.

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

23. 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.

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

### **The State’s Planned Reopening of Schools for In Person Instruction for the 2020-2021 School Year**

25. 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.”

26. That COVID-19 remains an imminent threat was most recently experienced at State University of New York, Oneonta, which will be closing its campus after 680 students tested positive for the coronavirus less than two weeks after classes began.<sup>11</sup>

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<sup>11</sup> <https://suny.oneonta.edu/covid-19>. Last accessed on September 22, 2020.

27. 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.

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

29. 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.”

30. On August 7, 2020, Governor Cuomo permitted schools in the State to open for in person instruction.<sup>12</sup> Governor Cuomo required school districts to adopt and submit detailed reopening plans compliant with the NYSDOH Guidance.<sup>13</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>14</sup>

31. Governor Cuomo unequivocally stated the public policy of the State is that teachers must feel safe in order to return to the classroom.<sup>15</sup>

32. 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>16</sup>

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<sup>12</sup> <https://www.governor.ny.gov/news/governor-cuomo-announces-based-each-regions-infection-rate-schools-across-new-york-state-are>. Last accessed September 22, 2020.

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (emphasis added).



33. Governor Cuomo further stated “teachers have to feel safe, they can’t teach if they don’t feel safe”<sup>17</sup> and “you can’t order a teacher into a classroom.”<sup>18</sup>

34. 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 .

...

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

35. 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.

36. 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>19</sup> A copy of the framework presented by NYSED to the Regents is attached as Exhibit “I.”

37. 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>20</sup> A copy of NYSED’s Guidance is attached as Exhibit “J.”

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<sup>17</sup> <https://www.nytimes.com/2020/08/07/nyregion/cuomo-schools-reopening.html>. Last accessed September 22, 2020.

<sup>18</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.

<sup>19</sup> <http://www.nysed.gov/news/2020/state-education-department-presents-framework-guidance-reopen-new-york-state-schools>. Last accessed September 22, 2020.

<sup>20</sup> <http://www.nysed.gov/news/2020/state-education-department-issues-guidance-reopen-new-york-state-schools>. Last accessed September 22, 2020.

38. 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.

39. Under NYSED's Guidance, school districts had to submit comprehensive reopening plans for the 2020-2021 school year.<sup>21</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.

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

41. 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.

42. 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.

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<sup>21</sup> The NYSED Guidance refers to local educational agencies ("LEAs"), which includes school districts. *See* Ex. "J" at p. 14.

**NYSED and NYSDOH Require School District Reopening Plans to Comply with Their Guidance**

43. NYSDOH 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.”

44. 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.”

45. 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.

46. 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.”

**O/N BOCES’s Reopening Plan for In Person Instruction for the 2020-2021 School Year Adopted NYSED and NYSDOH Guidance, Yet it is not Complying with that Guidance**

47. In response to NYSED’s Guidance, Respondents drafted a document entitled “O/N BOCES Reopening Plan” (“Reopening Plan”).

48. Upon information and belief, Respondent Board adopted and approved the District Reopening Plan as its procedures for the 2020-2021 school year. The O/N BOCES Reopening Plan is posted on its website.<sup>22</sup>

49. Upon information and belief, Respondents also submitted the O/N BOCES Reopening Plan to NYSED's Portal. The Reopening Plan is linked to NYSED's database for reopening plans.<sup>23</sup>

50. 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.

51. The O/N BOCES Reopening Plan was revised on September 6, 2020 and submitted to NYSED (hereinafter Reopening Plan-9/6/2020). A copy of the September 6, 2020 O/N Reopening Plan is attached to Deborah A. Hillburn's Affidavit as Exhibit 1.

52. Respondents expressly adopted the mandatory provisions of NYSED and NYSDOH Guidance when it submitted the O/N BOCES Reopening Plan to NYSED's Portal. Indeed, the Reopening Plan explicitly links to and incorporates the NYSED and NYSDOH Guidance. *See Hillburn Aff. Ex. 1 at pp. 1-2.*

53. With respect to physical distances, the Reopening plan requires "[a]ll faculty, staff, and visitors will refrain from physical contact with one another to the greatest extent practicable. Proper social distancing is defined as a six (6) foot separation between individuals." *See Hillburn Aff. Ex. 1 at p. 8.* It also requires "[e]ach student, teacher, and support staff will receive not less than six feet of separation from others, to the extent practicable. As stated on page 7 of the

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<sup>22</sup> <https://www.onboces.org/Domain/250>. Last accessed October 1, 2020.

<sup>23</sup> <http://www.nysed.gov/reopening-schools/school-reopening-plans>. Last accessed September 22, 2020.

Reopening Plan-9/6/2020, there is to be “six (6) feet of distance between individuals, unless safety or a core function of the work activity requires a shorter distance. Any time personnel are less than six (6) feet apart from one another, personnel must wear acceptable face coverings.” *See Hillburn Aff. Ex. 1 at p. 20*

54. In fact, “[c]lass size will reflect the need to ensure that students’ desks/seats are positioned no less than six feet apart.” *See Hillburn Aff. Ex. 1 at p. 38.*

55. In addition, according to the Reopening Plan, “[w]henver possible students will utilize outside space for physical education instruction. We will adhere to 12 feet between students when engaging in physical activity.” *See Hillburn Aff. Ex. 1 at p. 38.*

56. Notwithstanding this mandate, an O/N BOCES physical education teacher is providing instruction in classrooms where there is approximately 3 feet of distance between individuals. *See Jeffrey Hart Affidavit ¶¶ 7-9.*

57. Upon information and belief, and as detailed in Deborah A. Hillburn’s affidavit, O/N BOCES is not fully adhering to and/or enforcing the portions of the Reopening Plan pertaining to physical distancing requirements.

58. With respect to face coverings, the Reopening Plan states that “[a] face covering must be worn by all individuals, students, staff, and visitors on O/N BOCES facilities when social distancing cannot be maintained.” *See Hillburn Aff. Ex. 1 at p. 5; see also Hillburn Aff. Ex. 1 at p. 8.*

59. Per the Reopening Plan, “[s]tudents must wear masks or face coverings” (except in limited circumstances for medical exemption). *See Hillburn Aff. Ex. 1 at p. 8.*

60. Upon information and belief, and as detailed in Deborah A. Hillburn's affidavit, O/N BOCES is not fully adhering and/or enforcing the portions of the Reopening Plan pertaining to face covering requirements.

61. With respect to cleaning and disinfecting, according to the Reopening Plan, "[f]requently touched surfaces and objects will be cleaned and disinfected to further reduce the risk of germs on surfaces and objects." *See* Hillburn Aff. Ex. 1 at p. 9.

62. Upon information and belief, and as detailed in Deborah A. Hillburn's affidavit, O/N BOCES is not fully adhering to and/or enforcing the portions of the Reopening Plan pertaining to cleaning and disinfecting insofar as staff have a) not been provided adequate training on cleaning protocols; b) lack sufficient time in their schedules for cleaning and c) are improperly being asked to disinfect areas in contravention of NYSDOH guidance. *See* Hillburn Aff. Exs. 3-5; *see also* Affidavit of Anne Mussell ¶¶ 20-24.

63. With respect to required health screenings, the Reopening Plan states that "[o]nly after all individuals have been accounted for, cleared through the medical screening and wearing proper face coverings, will access to the building be granted." *See* Hillburn Aff. Ex. 1 at p. 9.

64. The Reopening Plan also states that "[o]ur BOCES and component district nursing staff when applicable will be familiar with CDC, OSHA protocols, and DOH guidelines in each building. Screeners will wear appropriate employer-provided PPE, including at a minimum, a face covering." *See* Hillburn Aff. Ex. 1 at p. 11.

65. Upon information and belief, and as detailed in Deborah A. Hillburn's affidavit, O/N BOCES is not fully adhering to and/or enforcing the portions of the Reopening Plan pertaining to mandatory health screenings. *See also* Mussell Aff. ¶¶ 26-29.

66. With respect to training, the Reopening Plan states that “[t]raining will be provided to all staff members and students on the proper use of face coverings including: How to wear face coverings appropriately; how to put on and remove face coverings; and proper care of face coverings.” *See* Hillburn Aff. Ex. 1 at p. 8.

67. The Reopening Plan further states that “O/N BOCES will ensure all students are taught or trained how to follow new COVID-19 protocols safely and correctly, including but not limited to hand hygiene, proper face covering wearing, social distancing, and respiratory hygiene.” *See* Hillburn Aff. Ex. 1 at p. 11.

68. Upon information and belief, and as detailed in Deborah A. Hillburn’s affidavit, O/N BOCES is not fully adhering to and/or enforcing the portions of the Reopening Plan pertaining to required training of staff and students. *See also* Mussell Aff. ¶ 30.

69. Upon information and belief, and as detailed in Deborah A. Hillburn’s affidavit, O/N BOCES is not complying with other portions of the Reopening Plan. These items include, but are not limited to, inadequate PPE levels, insufficient staff to monitor students in separate classrooms, no physical distancing at entry and egress of buildings, and congregating of staff for meetings and classrooms over capacity when accounting for both students and staff. *See* Hillburn Aff.; Mussell Aff.; Hart Aff.

### **FIRST CAUSE OF ACTION**

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

70. Petitioners repeat and reallege paragraphs 1 through 69 as if set forth herein.

71. 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*.

72. The Respondents' failure to fully adhere to its own Reopening Plan and the incorporated NYSED and NYSDOH guidance, as required by Executive Order 202.45 and 202.60 is *ultra vires* arbitrary, capricious, irrational and contrary to law and public policy.

73. 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.

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

75. 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.”

76. 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.”

77. NYSDOH Guidance *mandates* that, during this state of emergency, school districts and BOCES develop plans addressing amongst other things: PPE and face coverings, social distancing, space and social density, in-person instruction, screening, hygiene, cleaning and disinfection, contact tracing, and capacity. *See* Ex. “L.”

78. 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” at p. 5.

79. Unilaterally, O/N BOCES drafted and submitted its reopening plan on or about July 31, 2020. *See* Hillburn Aff. ¶ 6.

80. The reopening plan was later revised at least three times on August 18, September 6 and September 24, 2020. *See* Hillburn Aff. ¶ 7.



81. The September 6, 2020 Reopening Plan (hereinafter “Reopening Plan-9/6/2020”) was in effect when staff began reporting to work on September 1, 2020 for the 2020-2021 school year. *See Hillburn Aff. ¶ 8.*

82. Students returned to in-person learning at various O/N BOCES sites on September 8, 2020. *See Hillburn Aff. ¶ 9.*

83. Almost immediately upon the students’ return, BOCESTA received concerns/complaints from BOCESTA members regarding health and safety issues related to COVID-19 health and safety protocols. *See Hillburn Aff. ¶ 10.*

84. O/N BOCES stated in the Reopening Plan-9/6/2020 that their “primary commitment is to the students and families we serve. Our priority must be keeping them safe.” *See Hillburn Aff. Ex. 1 at 1.*

85. The O/N BOCES Reopening Plan-9/6/2020 acknowledged and assured Respondents’ compliance with NYSDOH and NYSED guidance.

86. Nevertheless, Respondents have failed to implement the Reopening Plan-9/6/2020 with fidelity.

87. The widespread and blatant disregard of some of the most basic provisions of the Reopening Plan unnecessarily exposes staff, students and visitors and their families to COVID-19.

88. Just days ago, and without any input from BOCESTA prior to its completion, O/N BOCES revised the reopening plan again (hereinafter “Reopening Plan-9/24/2020”). *See Hillburn Aff. ¶ 47 & Exhibit 9.*

89. As it must, the Reopening Plan-9/24/2020 still requires O/N BOCES to adhere to NYSED and NYSDOH guidance. *See Hillburn Aff. ¶ 47 & Exhibit 9.*

90. The Reopening Plan-9/24/2020 appears less rigorous with respect to training (*see e.g.*, Hillburn Ex. 9 at 8, 11, 12) and provides O/N BOCES with more flexibility regarding sick students and staff (*see e.g.*, Hillburn Ex. 9 at 16-17), among other things.

91. The Reopening Plan-9/24/2020 nonetheless maintains the requirements of physical distancing of students, staff and visitors (Hillburn Aff. Ex. 9 at 7, 8, 20), face coverings (Hillburn Aff. Ex. 9 at 20]; health screenings (Hillburn Ex. 9 at 6) and cleaning and disinfecting (Hillburn Aff. Ex. 9 at 13-14), among other things.

92. One notable improvement in the Reopening Plan-9/24/2020 is that it expressly includes “classrooms” as a common area where a “face covering must be worn” (Hillburn Aff. Ex. 9 at 8).

93. O/N BOCES’s non-compliance with its reopening plan (in any version) 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 COMPLY WITH THE REOPENING PLAN)**

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

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

96. 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 adhere to and enforce its Reopening plan.

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

98. By failing to adhere to and enforce the Reopening Plan, Respondents violated a duty enjoined upon them by law.

99. Petitioners have no other adequate remedy at law to enforce compliance with the Executive Orders 202.45 and 202.60, NYSDOH Guidance, or the O/N BOCES Reopening Plan.

**THIRD CAUSE OF ACTION**  
**(INJUNCTION PURSUANT TO LABOR LAW 27-a)**

100. On September 17, 2020 Petitioners filed a complaint with the New York State Commissioner of Labor detailing the recognized hazards presented by the Respondents' failure to follow the Reopening Plan. *See Hillburn Aff.* ¶ 34.

101. To date, the Commissioner of Labor has not sought an injunction against O/N BOCES based on the imminent danger presented by O/N BOCES's failure to adhere to and enforce the Reopening Plan. *See Hillburn Aff.* ¶ 35.

102. Notwithstanding assurances from PESH's Supervising Safety and Health Inspector that the agency would take "solid action" on or before September 28, 2020, PESH has not inspected O/N BOCES nor taken any other meaningful action to compel O/N BOCES to comply with and enforce its Reopening Plan. *See Hillburn Aff.* ¶ 35.

**WHEREFORE**, Petitioners respectfully demand an order and judgment as follows: (a) permanently enjoining Respondents from failing to adhere and enforce its Reopening Plan together with NYSED and NYSDOH guidance (b) mandating that Respondents comply with Executive Orders 202.45 and 202.60 and Respondents' rules and regulations; (c) declaring that the Respondents have and continue to violate NY Labor Law § 27-a; (d) enjoining Respondents

pursuant to Labor Law § 27-a; (e) ordering disclosure pursuant to CPLR 408 and a trial pursuant to CPLR 7804(h) on any issues of fact; and (f) attorneys' fees and costs, and (g) other such relief as this Court deems just and proper.

Dated: Williamsville, New York  
October 2, 2020

ROBERT T. REILLY

By:



Claire T. Sellers  
Jacquelyn Hadam  
Elizabeth Jackson  
Of Counsel  
Attorneys for Petitioners  
Centerpointe Corporate Park  
270 Essjay Road  
Williamsville, New York 14221-8276  
716-634-7132  
claire.sellers@nysut.org  
jacquelyn.hadam@nysut.org  
elizabeth.jackson@nysut.org

VERIFICATION

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF ERIE         )

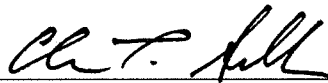
CLAIRE T. SELLERS, being duly sworn, deposes and says:

1. That deponent is an attorney duly admitted to the practice of law in the courts of the State of New York and is associated with and is of counsel to Robert T. Reilly, Esq., attorney for Petitioners.

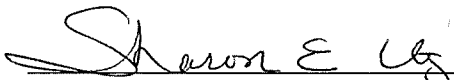
2. That deponent has read the foregoing and knows the contents thereof; that deponent has consulted with the Petitioners regarding the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein to be alleged on information and belief, and that as to those matters deponent believes them to be true.

3. Deponent states that the reasons this verification is made by deponent and not by Petitioners is that Petitioners are not located within the county of Albany, the county in which deponent has her office.

4. The grounds of deponent's belief as to all matters not stated upon deponent's own knowledge are as follows: review of all pleadings, documents and correspondence, and conversations with the Petitioners.

  
\_\_\_\_\_  
Claire T. Sellers

Subscribed and sworn to before me this  
2nd day of October, 2020

  
\_\_\_\_\_  
Notary Public – State of New York

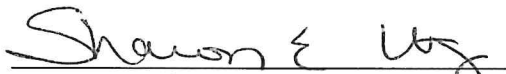
SHARON E. UTZ  
Notary Public, State of New York  
No. 01UT6247881  
Qualified in Erie County  
Commission Expires September 8, 2023

STATE OF NEW YORK     )  
  )ss.:  
COUNTY OF ERIE         )

DEBORAH A. HILLBURN, being duly sworn, deposes and says that she is the president of petitioner Orleans-Niagara BOCES Teachers' Association, in the above proceeding, which is an unincorporated labor organization created under and by virtue of the laws of the State of New York; that the foregoing verified petition is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

  
\_\_\_\_\_  
DEBORAH A. HILLBURN

Subscribed and sworn to before me this  
1<sup>st</sup> day of October 2020

  
\_\_\_\_\_  
Notary Public – State of New York

SHARON E. UTZ  
Notary Public, State of New York  
No. 01UT6247881  
Qualified in Erie County  
Commission Expires September 8, 2023

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ORLEANS

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In the Matter of

DEBORAH A. HILLBURN, as President of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS ASSOCIATION  
and ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Petitioners,

-against-

BOARD OF EDUCATION of the ORLEANS-NIAGARA  
BOARD OF COOPERATIVE EDUCATIONAL SERVICES,  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES and CLARK GODSHALL, Ed.D.  
in his official capacity as Superintendent of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES,

Respondents,

For an Order and Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules and Labor Law § 27-a.

---

STATE OF NEW YORK    )  
                                  ) SS.:  
COUNTY OF ERIE        )

DEBORAH A. HILLBURN, being duly sworn deposes and states:

1. I am employed as a math teacher with the Orleans-Niagara Board of Cooperative Educational Services (“O/N BOCES”). I first began my employment with O/N BOCES sixteen (16) years ago in August 2004.

2. I am the duly elected president of the Orleans-Niagara BOCES Teachers’ Association (“BOCESTA”). This is my fifth year as BOCESTA president.

AFFIDAVIT OF  
DEBORAH HILLBURN

Index No.:

Date Filed:

3. BOCESTA is the official bargaining unit for all professional certified personnel at O/N BOCES except for the chief executive officer and administrative staff. BOCESTA is comprised of 241 active members.

4. Per New York State Education Department's (NYSED) guidance on school reopening, issued on July 16, 2020, I made numerous efforts to engage in a productive dialog with O/N BOCES administration generally, and with Superintendent Clark J. Godshall, Ed.D., specifically, in order to draft a reopening plan that would keep staff and students safe while continuing to provide in-person services to students.

5. I specifically raised concerns related to the classroom sizes, face coverings, cleaning and disinfecting high touch areas, the availability of Personal Protective Equipment (PPE) and concerns around mandatory health screenings, among other things.

6. With little to no input from BOCESTA representatives, O/N BOCES drafted and submitted its reopening plan on or about July 31, 2020.

7. The reopening plan was later revised at least three times on August 18, September 6 and September 24, 2020.

8. The September 6, 2020 Reopening Plan (hereinafter "Reopening Plan-9/6/2020") was in effect when staff began reporting to work on September 1, 2020 for the 2020-2021 school year. *See* copy of the September 6, 2020 O/N BOCES Reopening Plan attached here as *Exhibit 1*.

9. Students returned to in-person learning at various O/N BOCES sites on September 8, 2020.

10. Almost immediately upon the students' return, I received concerns/complaints from BOCESTA members regarding health and safety issues related to COVID-19 health and safety protocols.



11. In order to collect and compile the various concerns, BOCESTA sent out a survey to the entire BOCESTA membership to determine whether O/N BOCES was complying with its Reopening Plan-9/6/2020.

12. In just four days of the survey being open, 149 members responded.

13. As detailed in the attached “2020 Orleans Niagara BOCES Reopening Survey Results and Appendix,” upon information and belief, O/N BOCES is not fully complying with its Reopening Plan. *See copy of 2020 Orleans Niagara BOCES Reopening Survey Results and Appendix attached as Exhibit 2.*

14. Upon information and belief, numerous classrooms at various O/N BOCES sites do not have enough physical space to maintain the required six feet of physical separation between individuals. In the first survey, I received reports that student desks were as close as three feet apart. I also received reports that even where student desks were 6 feet apart, staff desks are much closer.

15. In fact, 44 BOCESTA members responded that students, teachers and support staff do not have six feet of separation in the classroom (*see Ex. 2 at 2*).

16. 47 BOCESTA members indicated that there is not six feet of distance at entrances and egresses (*see Ex. 2 at 2*).

17. 58 BOCESTA members reported that there was no adequate physical distancing through the use of tape in corridors etc. (*see Ex. 2 at 3*).

18. Upon information and belief, in the CTE program, staff report there are 24 to 25 students in the machine shop at all times with no seats standing around mechanical equipment. The students do not have any prior training and have not completed the safety requirements to be in the shop. In one CTE program, there are more students than workstations.

19. Not only do students and staff have insufficient physical space, but BOCESTA members also raised concerns about face coverings.

20. In the first survey, 22 BOCESTA members reported that all students were not wearing face coverings (*see Ex. 2 at 4*).

21. The health and safety risks for COVID-19 exposure due to lack of physical spacing (as stated above) are compounded by improper face coverings worn by students and/or lack of face coverings entirely.

22. Upon information and belief, all students are not wearing acceptable face coverings in all classrooms.

23. Upon information and belief, O/N BOCES is not requiring medical documentation in order to excuse a student from wearing an acceptable face covering.

24. Even where proper medical documentation is being provided, students who are medically exempt from wearing face coverings nonetheless present health and safety risks to staff and students in physical proximity to those students. According to the CDC, “[m]asks are a critical preventive measure and are most essential in times when social distancing is difficult. If masks cannot be used, make sure to take other measures to reduce the risk of COVID-19 spread, including social distancing, frequent hand washing, and cleaning and disinfecting frequently touched surfaces.”<sup>1</sup>

25. Upon information and belief, and as indicated above, BOCESTA members have not been provided with adequate physical space or other measures recommended by the CDC or the NYSDOH to safely interact with students who have been medically exempt from wearing proper face coverings.

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<sup>1</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#feasibility-adaptations> (last visited Sept. 16, 2020).

26. O/N BOCES has failed to ensure adherence to the most basic portions of the Reopening Plan-9/6/2020 – physical distancing and face coverings.

27. To make matters worse, dozens of BOCESTA members reported that there was insufficient time for hand washing, cleaning and disinfecting. Even more troubling, 19 BOCESTA members reported that there are not even adequate facilities for hand washing with warm water (see Ex. 2 at 5).

28. Upon information and belief, O/N BOCES is not complying with the cleaning and disinfecting mandates of the Reopening Plan-9/6/2020 or with the New York State Department of Health (NYSDOH) guidance on the topic.

29. Specifically, BOCESTA members are being instructed to clean and disinfect high touch areas, but are: 1) given insufficient time (or absolutely no time) for such cleaning and disinfecting; and 2) per NYSDOH guidance, disinfecting must be done by trained custodial staff. *See copy of Interim Cleaning and Disinfection Guidance for Primary and Secondary Schools for COVID-19 issued August 12, 2020 attached as Exhibit 3; see also email dated September 21, 2020 regarding directions for disinfecting wipes attached as Exhibit 4 and the Directions for using wipes attached as Exhibit 5).*

30. More than 75 BOCESTA members reported that they are required to clean and disinfect throughout the school day, yet 40 members reported that there is no time allotted for such activities in the school day (Ex. 2 at 5).

31. In addition, the training of staff and students has been completely lacking in rigor and scope (*see Ex. 2 at 5-6*).

32. Upon information and belief, O/N BOCES has not adequately enforced the completion of the required health screenings for staff, students and visitors. For example, upon

information and belief, paper copies of health screenings were left unreviewed at the Orleans Career and Technical Center. In addition, staff have reported inadvertently failing to complete the screening prior to entry, without any follow up from O/N BOCES administration.

33. O/N BOCES administrators from the Orleans Career and Technical Education Center and Niagara Academy acknowledged, that students were not completing the daily health screenings. In response, teachers are now expected to have students complete the survey upon the students' arrival. Where the children are too young to complete the survey, teachers are expected to complete the survey on behalf of the student.

34. Based on the above complaints, BOCESTA filed a complaint with the NYS Department of Labor's Public Employee Safety and Health Bureau pursuant to Labor Law § 27-a (*see copy of the complaint is attached hereto as Exhibit 6 hereinafter "PESH complaint"*).

35. To date, notwithstanding assurances from PESH's Supervising Safety and Health Inspector that it would take "solid action" on or before September 28, 2020, PESH has not inspected O/N BOCES nor taken any other meaningful action to compel O/N BOCES to comply with and enforce its reopening plan.

36. On or about September 11, 2020, I sent the survey out again to the entire BOCESTA membership. More than 100 members responded to the second survey.

37. BOCESTA received similar responses to those previously received in the first survey (*see 2020 Orleans Niagara BOCES Reopening Survey Results & Appendix 09.15.20 attached hereto as Exhibit 7*).

38. The second survey revealed that COVID-19 protocols at O/N BOCES had not improved.

39. 68 BOCESTA members reported either that no health screenings were being conducted or that they were not sure if they were being conducted (*see* Ex. 7 at 2).

40. 42 BOCESTA members reported that they do not have six feet of separation from others while in the classroom (Ex. 7 at 2) and 56 BOCESTA members reported that class sizes had not been reduced in order to accommodate for the necessary health and safety parameters (Ex. 7 at 3). In addition, members continued to report that there was not the required 12 feet of separation for physical activity or music (Ex. 7 at 8).

41. Shockingly, members described students being “crammed” into classrooms (Ex. 7 at 16-17).

42. BOCESTA members described students and staff desks as close as two feet apart (Ex. 7 at 12).

43. Twenty-three (23) BOCESTA members reported that students were not wearing face coverings when social distancing could not be maintained (Ex. 7 at 4). Others reported concerns about staff not wearing face coverings (Ex. 7 at 16).

44. Both in the survey and through emails, BOCESTA members have expressed doubt as to whether cleaning and disinfecting are occurring in the buildings at all (Ex. 7 at 18-21).

45. One member sent photos from their classroom in the Orleans Learning Center soiled with dirt and dead insects that remained for days (*see copy of picture taken at OLC Room E15 attached hereto as Exhibit 8*).

46. Upon information and belief, the two surveys sent to BOCESTA members revealed other failures by O/N BOCES to comply with its Reopening Plan. These items include inadequate PPE levels, lack of training of students and staff, insufficient staff to monitor students in separate

classrooms, no physical distancing at entry and egress of buildings, congregating of staff for meetings and classrooms over capacity when accounting for both students and staff.

47. Just days ago, and without any input from BOCESTA prior to its completion, O/N BOCES revised the reopening plan again (hereinafter “Reopening Plan-9/24/20”). *See copy of the September 24, 2020 O/N BOCES Reopening Plan is attached hereto as Exhibit 9.*

48. As it must, the Reopening Plan-9/24/2020 still requires O/N BOCES to adhere to NYSED and NYSDOH guidance.

49. The Reopening Plan-9/24/2020 appears less rigorous with respect to training (*see e.g.*, Ex. 9 at 8, 11, 12) and provides O/N BOCES with more flexibility regarding sick students and staff (*see e.g.*, Ex. 9 at 16-17), among other things.

50. The Reopening Plan-9/24/2020 nonetheless maintains the requirements of physical distancing of students, staff and visitors (Ex. 9 at 7, 8, 20), face coverings (Ex. 9 at 20) health screenings (Ex. 9 at 6) and cleaning and disinfecting (Ex. 9 at 13-14), among other things.

51. One notable improvement in the Reopening Plan-9/24/2020 is that it expressly includes “classrooms” as a common area where a “face covering must be worn” (Ex. 9 at 8).

52. Without fidelity to the Reopening Plan (in either version), O/N BOCES is exposing BOCESTA members, staff and students to recognized hazards related to contracting and spreading COVID-19.

53. BOCESTA members are committed to a successful reopening of O/N BOCES, but it must be done consistent with the health and safety guidance issued by the NYSDOH and NYSED and the O/N BOCES’s own Reopening Plan.

*Deborah Hillburn*

DEBORAH A. HILLBURN

Signed and sworn to before me  
this 1<sup>st</sup> day of October 2020

*Sharon E. Utz*

Notary Public – State of New York

SHARON E. UTZ  
Notary Public, State of New York  
No. 01UT6247881  
Qualified in Erie County  
Commission Expires September 6, 2023

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ORLEANS

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In the Matter of

DEBORAH A. HILLBURN, as President of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS ASSOCIATION  
and ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

AFFIDAVIT OF  
JEFFREY HART

Index No.:

Petitioners,

Date Filed:

-against-

BOARD OF EDUCATION of the ORLEANS-NIAGARA  
BOARD OF COOPERATIVE EDUCATIONAL SERVICES,  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES and CLARK GODSHALL, Ed.D.  
in his official capacity as Superintendent of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES,

Respondents,

For an Order and Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules and Labor Law § 27-a.

---

STATE OF NEW YORK    )  
                                  )SS.:  
COUNTY OF ERIE        )

JEFFREY HART, being duly sworn deposes and states:

1.       I am employed as a physical education and health teacher with the Orleans-Niagara Board of Cooperative Educational Services (“O/N BOCES”) at the Royalton Hartland Learning Center (“Roy-Hart”) and Orleans Learning Center (“Orleans”). I first began my employment with O/N BOCES four years ago.



2. I am a member of the Orleans-Niagara BOCES Teachers' Association ("BOCESTA")

3. BOCESTA is the official bargaining unit for all professional certified personnel at O/N BOCES except for the chief executive officer and administrative staff. BOCESTA is comprised of 241 active members.

4. Staff began reporting to work on September 1, 2020 for the 2020-2021 school year.

5. On September 8, 2020, students returned to in person schooling following six months of remote learning due to the COVID-19 pandemic.

6. I teach at Roy-Hart, which is an elementary school for children in grades kindergarten through fifth grade who need a special education setting. I also teach at Orleans, which is a high school with special needs students up to the age of 21. At Roy-Hart and Orleans, I primarily teach the students physical education and health in a 6 to 1 to 1 setting. This means, according to the children's individualized education plan, they can be in a classroom with up to six children, one teacher (me) and one aide. In addition to teaching students in a 6 to 1 to 1 setting, I teach two classes in a 12 to 1 to 3 setting at Roy-Hart, which means that, according to the children's individualized education plan, they can be in a classroom with up to 12 children, one teacher (me), and three aides. At Orleans, I teach one class in a 12 to 1 to 3 setting.

7. At Roy Hart, I "push-in" to classrooms approximately four to five times a day on Monday, Tuesday, Thursday and Friday. This means that I teach my students physical education and/or health in another teacher's classroom. On Wednesday, I teach approximately seven classes in the Royalton Hartland Elementary School gymnasium. At Orleans, I push-in to approximately one classroom per day Monday, Tuesday, Thursday and Friday, and I teach in the Orleans gym approximately two times a day on Monday, Tuesday, Thursday and Friday.

8. When I push-in to classrooms at both Roy-Hart and Orleans, the students' desks are barely six feet apart, but many are not. There is not enough space in these classrooms to maintain twelve feet of distance for physical education classes, as mandated by the O/N BOCES reopening plan. At times, it is impossible for the students to maintain six feet of distance at all.

9. For example, during the week beginning September 21, 2020, I conducted a yoga class with first-grade students in teacher Anne Mussell's classroom. Due to space restrictions, the students and I were only able to maintain approximately three feet of distance between one another. A photograph of the yoga class is attached as Exhibit "1".

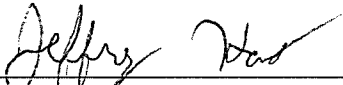
10. At the Royalton Hartland Elementary School gym and the Orleans gym, there is barely enough room to maintain twelve feet of distance among students. Therefore, I try to go outdoors for physical education classes as much as possible, but when the weather becomes colder, I will be unable to conduct classes outside.

11. At Roy-Hart, I have five minutes in between my classes to clean and disinfect any physical education equipment and to set up for my next class. On September 30, 2020, I discovered, through another teacher, that the disinfectant that I was given by O/N BOCES to clean the equipment needs to stand for five minutes in order to properly disinfect surfaces. This means, the surfaces cannot be properly disinfected in between classes.

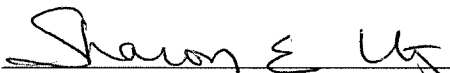
12. Additionally, on October 1, 2020, I discovered, through another teacher, the "disinfectant" I have been using to clean the physical education equipment is in fact only a multi-purpose cleaner and not a disinfectant.

13. I have never received training by O/N BOCES on cleaning and disinfecting high touch areas. The only training I received was through three short videos. One of the videos was about handwashing, and I do not recall what the other two videos were about.

14. O/N BOCES failure to publicly acknowledge and address the lack of proper social distancing, cleaning and disinfecting, ventilation, health screening and training in accordance with its own reopening plan, New York Stated Department of Health (“NYSDOH”) Guidance and New York State Education Department (“NYSED”) Guidance is exposing BOCESTA members, staff and students to recognized hazards related to contracting and spreading COVID-19.

  
\_\_\_\_\_  
JEFFREY HART

Signed and sworn to before me  
this 1<sup>st</sup> day of October 2020

  
\_\_\_\_\_  
Notary Public – State of New York

SHARON E. UTZ  
Notary Public, State of New York  
No. 01UT6247881  
Qualified In Erie County, 2023  
Commission Expires September 8, 2023

# EXHIBIT “1”



STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ORLEANS

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In the Matter of

DEBORAH A. HILLBURN, as President of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS ASSOCIATION  
and ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Petitioners,

-against-

BOARD OF EDUCATION of the ORLEANS-NIAGARA  
BOARD OF COOPERATIVE EDUCATIONAL SERVICES,  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES and CLARK GODSHALL, Ed.D.  
in his official capacity as Superintendent of the  
ORLEANS-NIAGARA BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES,

Respondents,

For an Order and Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules and Labor Law § 27-a.

---

STATE OF NEW YORK    )  
                                  )SS.:  
COUNTY OF ERIE        )

ANNE MUSSELL, being duly sworn deposes and states:

1.       I am employed as an elementary special education teacher with the Orleans-Niagara Board of Cooperative Educational Services (“O/N BOCES”) at the Royalton Hartland Learning Center (“Roy-Hart”). I first began my employment with O/N BOCES 23 years ago on September 1, 1998.

AFFIDAVIT OF  
ANNE MUSSELL

Index No.:

Date Filed:

2. I am a member of the Orleans-Niagara BOCES Teachers' Association ("BOCESTA"). I serve as a building representative for BOCESTA at the Roy-Hart site.

3. BOCESTA is the official bargaining unit for all professional certified personnel at O/N BOCES except for the chief executive officer and administrative staff. BOCESTA is comprised of 241 active members.

4. I teach at Roy-Hart the site which is located at Gasport Elementary which part of the Royalton Hartland Central School District. We teach children in grades kindergarten through fifth grade who need a special education setting. This year, I am teaching children between the ages of five and seven in a 6 to 1 to 1 special education setting. This means, according to the children's individualized education plan, they can be in a classroom with up to six children, one teacher (me) and one aide.

5. Staff began reporting to work on September 1, 2020 for the 2020-2021 school year.

6. On September 8, 2020, students returned to in person schooling following six months of remote learning due to the COVID-19 pandemic.

7. Since school reopened, BOCESTA members have come to me with concerns about health and safety including classroom sizes, face coverings, cleaning and disinfecting high touch areas, the availability of Personal Protective Equipment (PPE) and concerns around mandatory health screenings, among other things.

### **Social Distancing**

8. Prior to school reopening, in July and August 2020, BOCESTA raised distancing concerns with O/N BOCES administration.

9. On September 4, 2020, Daniel Connolly, O/N BOCES Director of Facilities, and Melanie Conley, O/N BOCES Director of Business Services, came to the Roy-Hart site and

conducted a walkthrough of the classrooms. They did not have a tape measure but instead eyeballed the distance or it was reported to me by teachers in my building that Connolly used arm length to measure space between desks. This is inconsistent with the NYSED's August 26, 2020 COVID 19 Reopening Guidance – Facilities Clarifications attached hereto as *Exhibit 1*.

10. In my classroom, I was able to seat the students six feet apart because only four of my six students currently are attending in person this semester. If one or both of the remote students switch to in person instruction, I will not be able to maintain six feet of distance between everyone in the room.

11. When I explained to Daniel Connolly and Melanie Conley that there was not enough room in my classroom to maintain six feet of distance, Conley told me to get rid of more furniture. I do not have any more furniture that I can remove without disadvantaging me and my students.

12. In one of our classrooms, which services students in a 6 to 1 to 3 setting, to fit six student desks at six feet apart, the staff had to replace the teacher aide's desk with a smaller table. Even then, all the student desks are not six feet from the teacher's desk.

13. In another room that currently has four students but six enrolled, with only four students in attendance the students' desks are roughly six feet apart. In order to get the students as far apart as possible, one student does not have a clear view of the promethean board.

14. In another 6 to 1 to 3 classroom, that room is approximately two and a half feet narrower than the other classrooms. There are five students in the room for in person school. Since this class has the smallest room in the building and 9 people in the room, there is not enough room to maintain six feet of distancing between desks and for all of the children to be able to efficiently see the promethean board.



15. Even if student desks are able to be placed six feet apart, it is impossible for students and staff to maintain six feet of distance throughout the school day due to the nature of our work.

16. It was reported to me that when a BOCESTA member questioned administration about student desks not being six feet from staff desks, Dan Connolly said it did not matter if staff desks were six feet from students. This is inconsistent with the O/N BOCES Reopening Plan and is not in compliance with NYSED and NYSDOH guidance.

17. Physical education is currently being taught in the classroom. On September 22, 2020, the physical education teacher did yoga with the students. See redacted photo of my students and teacher doing yoga attached as *Exhibit 2*. As you can see from the photo, due to space restrictions, the children and teacher are less than three feet apart.

18. In the hallways, classes pass each other with less than six feet of distance between the classes.

19. When using the playground, there have been multiple occurrences where children from the Royaltan-Hartland Central School District (“Roy-Hart District”) came out on the playground during O/N BOCES students’ playground time. On these occasions, it was reported to me that some of the Roy-Hart District students were not wearing masks.

### **Cleaning and Disinfecting**

20. The classrooms are not being deep cleaned and disinfected by custodial staff during the student day. It is physically impossible to deep clean during the school day because the students are in the classroom.

21. The only log indicating that an area has been cleaned is in the staff bathroom. The log only indicates the staff bathroom is being cleaned once a day by the custodian. It is the teaching staff who are cleaning the staff and student bathrooms during the school day. There was no log in

the staff bathroom until September 17, 2020. There are no other logs or signage in the school indicating whether or not an area has been cleaned or disinfected.

22. Responsibility for cleaning high touch areas during the school day has been left to the teachers and aides.

23. When a student becomes symptomatic, he or she is sent to an isolation room. I have been told that, after the child is picked up from school, the isolation room is disinfected. However, I was told that the classroom the student was in prior to going to isolation is not deep cleaned unless the school receives confirmation that the child is COVID-19 positive.

### **Health Screenings**

24. Prior to entering the school, staff are supposed to complete a questionnaire.

25. I do not know if it is required for parents to complete the questionnaire prior to sending students to school.

26. In my class of four students, I am aware of one parent who is completing the screening each day.

27. I have not received instruction from my supervisor or O/N BOCES to screen children.

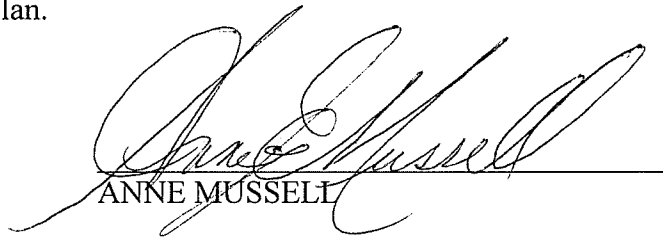
### **Training**

28. Prior to students returning, we received training from O/N BOCES. We were required to watch three videos that were each about 90 seconds long. One video was on hand washing and another was on mask wearing. I cannot recall the topic of the third video.

29. O/N BOCES failure to publicly acknowledge and address the lack of proper social distancing, cleaning and disinfecting, ventilation, health screening and training in accordance with its own reopening plan, New York State Department of Health (“NYSDOH”) Guidance and New

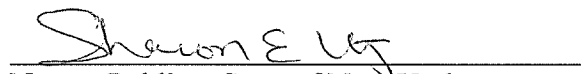
York State Education Department (“NYSED”) Guidance is exposing BOCESTA members, staff and students to recognized hazards related to contracting and spreading COVID-19.

30. BOCESTA members are committed to a successful reopening of O/N BOCES, but it must be done consistent with the health and safety guidance issued by the NYSDOH and NYSED and O/N BOCES’s own Reopening Plan.



ANNE MUSSELLI

Signed and sworn to before me  
this 1<sup>st</sup> day of October 2020



Notary Public – State of New York

**SHARON E. UTZ**  
Notary Public, State of New York  
No. 01UT6247881  
Qualified in Erie County  
Commission Expires September 8, 2023

# EXHIBIT “1”



Assistant Commissioner  
Office of School Governance, Policy, and Religious and Independent Schools  
Room 1075 Education Building Annex  
89 Washington Ave.  
Albany, NY 12234  
Tel: (518) 474-7206  
[Christina.Coughlin@nysed.gov](mailto:Christina.Coughlin@nysed.gov)

August 26, 2020

TO: District Superintendents, School Building Leaders, Nonpublic School Leaders, Charter School Leaders

From: Christina Coughlin, Assistant Commissioner

Re: **COVID 19 Reopening Guidance – Facilities Clarifications**

The attached five Questions & Answers are intended to provide clarification to the Facilities Mandatory Requirements outlined on pages 46 thru 54 of the [NYSED School Reopening Guidance](#).

The attached Q & A's also respond to the [Office of Facilities Planning's \(OFP\) August 5, 2020 COVID FAQ](#) document.

In response to concerns NYSED received from district administrators related to the requirements set for facilities found in the two documents noted above we have revised the guidance as indicated in the five points listed in the document.

The five changes/clarifications are as follows:

1. **Architects' Stamps:** We clarified that there is no requirement for a design professional to certify and sign and seal the submitted floor plan.
2. **Technical Assistance:** School administrators are encouraged to call the Office of Facilities Planning with any questions regarding facilities issues as school reopening plans are developed. Technical assistance does not require that a project be in process with the Department; we want to assist our colleagues in districts during these challenging times.
3. **Transparent Sneeze Guards:** The requirements for sneeze guards/separators remain as issued in the July 28 guidance (Titled: Light Transmitting Plastic Sneeze Guards or Separators). Because these are useful strategies for separating spaces/individuals, many districts have been interested in their use. However, they can be flammable in certain circumstances. Seeking to balance the risks in these unusual times, we have requested advice from the NYS Department of State, which promulgates the fire code. We expect further guidance from the Department of State shortly and will update our guidance at that time.
4. **Desk Separation:** Measurements to facilitate social distancing in classrooms have been clarified and revised to conform with the DOH distance of at least six feet between persons.
5. **Hallway Doors:** While OFP policy requires all corridor doors to remain closed at all times to slow the potential spread of fire, we are making a temporary change for the duration of the COVID-19 emergency. This temporary measure will allow doors without automatic door

closers to be left open - to improve ventilation and reduce contact with door handles to prevent the spread of COVID-19.

We are grateful for the thoughtful feedback we received from the field on these issues. Navigating this new environment, while continue to address continuing risks, is challenging for all of us. The collegial process was followed by extensive internal review. It has resulted in these new requirements and clarifications. We believe they will aid the districts in finalizing their reopening plans and help to facilitate the mitigation of the effects of COVID-19.

If you have any further questions, please contact the Office of Facilities Planning at 518-474-3906.

**Office of Facilities Planning, New York State Education Department August 17, 2020  
COVID-19 Reopening Guidance – Facilities Issues Clarifications**

1. **Is an architect's stamp necessary for Repurposing Plans?** Repurposing of an existing space is addressed in the FAQ Document recently posted on our web page. Question No. 3 is clarified below. Repurposing involves adding student desks/chairs to gymnasiums, cafeterias and large school spaces to create additional classroom space for social distancing. **These changes to room function should be designed in consultation with your design professional but do not require a design professional's stamp and signature.**

**FAQ No.3 (Revised)**

**What is the process for Repurposing of Existing Rooms associated with the COVID Reopening?**

Repurposing of Rooms includes changing the configuration of the room furniture by adding, removing or relocating furniture (desks, tables, chairs, shelving) or casework to accommodate a change in function or use. The furniture layout needs to be done in consultation with a design professional to ensure that existing exits are not obstructed and new code compliant egress access aisles are provided between desks, tables, chairs and other furniture.

- For smaller spaces (such as, but not limited to, classrooms) this means removing and/or relocating furniture and equipment in the space to promote social distancing. If reduction in class size is planned the layouts of desks should follow social distancing guidelines but floor plans need not be submitted.
- For larger assembly spaces (such as cafeterias, gyms, cafetorium's, multi-purpose rooms and other large spaces), this means adding desks, chairs, teaching consoles, tables and temporary partitions to the space to create additional teaching space, office space, etc. within the larger assembly space. The layouts of these spaces should follow social distancing guidelines.

Floor plans of repurposed rooms of larger assembly spaces only, shall be incorporated into the Reopening Plans required to be posted on the district's website. Floor plans are not required to be submitted directly to the Office of Facilities Planning (OFP) for buildings which utilize repurposed rooms.

The floor plans for repurposed spaces shall include the following:

- Brief description of proposed changes
- Graphic scale
- Seating and furniture layout, temporary partitions
- Existing furnishings and fixtures to remain
- Area and occupant loads
- Exit door locations and exit capacity
- Exit sign locations
- Description of any changes to HVAC, plumbing, electrical/lighting or fire alarm systems

2. **Technical Assistance:** District Administrators are encouraged to call the Office of Facilities Planning (OFP) 518 474 3906, with any questions regarding changes to facilities including but not limited to: alterations, new buildings, leased modular and tents, leased spaces, repurposing space, sneeze guards, mechanical, electrical & plumbing equipment and COVID-19 submission requirements.

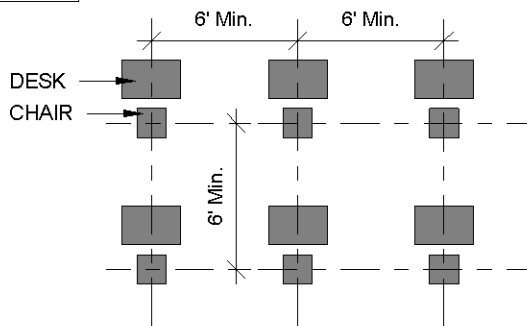
3. **Sneeze Guards:** The guidance Titled, “Light Transmitting Plastic Sneeze Guards or Separators,” dated July 28, 2020, is posted on the OFP website. We are continuing discussions with the Department of State’s Division of Building Standards & Codes (DOS) about possible changes to the document. Until the DOS has directed SED to revise our Guidance the requirements found therein still apply.

4. **FAQ No.11 (Revised)**

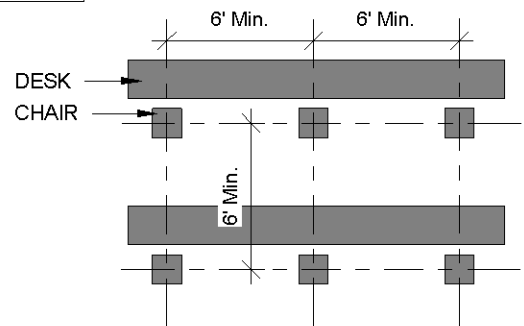
**Where do we take measurements from to establish social distancing; for example in the layout of furniture/equipment/etc.?**

To achieve acceptable social distancing between the occupants of classroom desks, chairs and teaching consoles, establish a minimum of 6' separation measured to the centerline of individual's space. Measurements should be taken in a manner consistent with the example diagrams below.

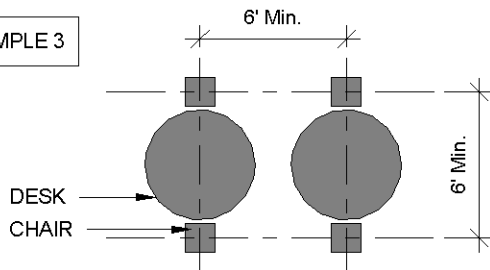
EXAMPLE 1



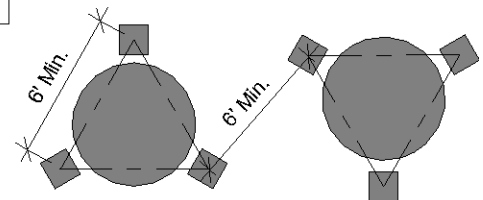
EXAMPLE 2



EXAMPLE 3



EXAMPLE 4





**5. FAQ No.15 (Revised)**

**If classroom doors are not fire rated and do not have door closers or automatic hold opens, NYSED Re-Opening Guidance states “doors may be fixed in the open position”. Our fire safety inspector states “Doors opening onto a corridor are required to be maintained closed” per MPS S105-1(b) and the School Security and Door Hardening memo issued by NYSED on March 5th, 2019. Please advise.**

On page 48 of the Re-Opening Guidance it states that “to reduce the spread of virus from touching door levers and knobs, doors may be fixed in the open position. This is only permitted at doors without door closers and doors which are not fire rated.” Although this statement differs from NYSED policy that all corridor doors remain closed at all times to prevent the spread of smoke and fire, to temporarily address the risks of contracting the COVID 19 virus we are permitting doors which do not have closers or are not fire rated to be left in the open position. Staff should be directed to manually close the door following room evacuation during a fire situation.

# EXHIBIT “2”

