E-FILED
Transaction ID: 4-22-0090
File Date: 2/9/2022 3:56 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

No. 4-22-0090
(consolidated appeal with 4-22-0092, 4-22-0093, 4-22-0094)

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

ROBERT GRAVES and KIM GRAVES, as Parents and Guardian of K.G.; NATHAN C. THOMPSON and BARBARA J. THOMPSON, as Parents and Guardian of G.T., Plaintiffs-Appellees, v. JAY ROBERT PRITZKER, in His Official Capacity as Governor of Illinois; ILLINOIS STATE BOARD OF EDUCATION; DR. CARMEN I. AYALA, in Her Official Capacity as State Superintendent of Education, ILLINOIS DEPARTMENT OF PUBLIC HEALTH; and DR. NGOZI EZIKE, in Her Official Capacity as Director of the Illinois Department of Public Health, Defendants-Appellants and PLAINFIELD COMMUNITY SCHOOL DISTRICT #202; LANE ABRELL Superintendent of District #202; YORKVILLE COMMUNITY UNIT SCHOOL DISTRICT #115; and TIMOTHY SHIMP, Superintendent of District #115, Defendants.	Sangamon County Case no.: 21CH500003

Motion for Leave To File Brief/Memorandum *amicus curiae* Pursuant to Illinois Supreme Court Rule 345(a)

(Applicants: Board of Education Hutsonville CUSD. #1,
Board of Education Vandalia CUSD. #203, and
Board of Education of Brownstown CUSD. #201)

Applicants, Board of Education Hutsonville CUSD. #1, Board of Education Vandalia CUSD. #203 and Board of Education of Brownstown CUSD. #201 [collectively, Applicants] by their attorney, Jerrold H. Stocks of Featherstun, Gaumer, Stocks, Flynn & Eck, LLP, and for their Motion for Leave to File Brief *amicus curiae*

Pursuant to Illinois Supreme Court Rule 345(a), they state:

I. APPLICANTS' STATEMENT OF INTEREST

Unlike the school district defendants below, Applicants are three local schools that set local board policy that masks were recommended, but, optional to be determined by each respective student (parent) or staff member. Consequently, each Applicant is defending in administrative proceedings under the ISBE Emergency Rules that the Trial Cout declared invalid in the Order appealed. ISBE continues enforcement of the Emergency Rules to render a determination that Applicants are Non-Recognized or to coerce Applicants to act as the front-line force that deprives the parents'/students' statutory and due process rights which Plaintiffs seek to protect. Applicants align with Plaintiffs/Appellees because Applicants contest the validity of the ISBE Emergency Rules and contest the enforceability of Executive Order 18 directly against school districts by the Governor or indirectly through ISBE. An Appellate Court declaration related to the ISBE Emergency Rules and/or Executive Order 18 likely will impact, not only the interests of the Applicants in the administrative proceedings before ISBE, but, the operations of all school districts in Illinois.

II. APPLICANTS BRIEF TO ASSIST COURT

The alignment of parties to the litigation[1] effectively silences a major perspective in the dispute, that is, the impact of the challenged rules/orders on the school districts. Because Plaintiffs' Complaint aligned defendant local districts with the State defendants, the litigation's party alignment conceals from the Court's consideration the hardships, legal dilemmas and existential threat to local control inflicted on the local school districts

[1] Applicants are not defendants because Applicants were not submitting to the coercive enforcement and exercising local control of mitigation.

caused by the ISBE Emergency Rules and Executive Order 18. Applicants are not silenced by litigation alignment restricting their advocacy and are free to speak from the school district perspective to assist the Court. The dispute, for all its complexity, is also quite simple, asking who controls whom and who gets to be heard in defining those controls? Here, Applicants offer a voice for this Court to hear, which should be heard, that likely will assist the Court.

Pursuant to the Illinois Supreme Court Rule 345(a), the proposed Brief (Memoranda) in compliance with legal memoranda requirements of a Respondent under Illinois Supreme Court Rule 307(d) is attached. Applicants respectfully request leave for the filing of said *amicus curiae* Brief in the cause herein on such terms and conditions as this Honorable Court may provide.

BOARD OF EDUCATION HUTSONVILLE CUSD. #1, BOARD OF EDUCATION VANDALIA CUSD. #203 AND BOARD OF EDUCATION OF BROWNSTOWN CUSD. #201,
Applicants

BY: FEATHERSTUN, GAUMER, STOCKS, FLYNN & ECK, LLP, Their Attorneys,

BY: /s/ Jerrold H. Stocks

Jerrold H. Stocks
ARDC No. 06201986
FEATHERSTUN, GAUMER, STOCKS,
FLYNN & ECK, LLP
101 S. State Street, Suite 240
P. O. Box 1760
Decatur, Illinois 62525
Telephone: (217) 429-4453
Fax: (217) 425-8892
E-mail: jstocks@decatur.legal
glw

CERTIFICATE OF SERVICE

I certify that on the 9th day of February, 2022, at or before 4:00 p.m., a copy of the foregoing shall be served electronically through the Court's approved electronic filing service pursuant to IL Supreme Court Rule 11(c) and thus will be served via that system.

/s/ Jerrold H. Stocks

Jerrold H. Stocks
ARDC No. 06201986
FEATHERSTUN, GAUMER, STOCKS,
FLYNN & ECK, LLP
101 S. State Street, Suite 240
P. O. Box 1760
Decatur, Illinois 62525
Telephone: (217) 429-4453
Fax: (217) 425-8892
E-mail: jstocks@decatur.legal
glw

No. 4-22-0090
(consolidated appeal with 4-22-0092, 4-22-0093, 4-22-0094)

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

ROBERT GRAVES and KIM GRAVES, as Parents and Guardian of K.G.; NATHAN C. THOMPSON and BARBARA J. THOMPSON, as Parents and Guardian of G.T., Plaintiffs-Appellees, v. JAY ROBERT PRITZKER, in His Official Capacity as Governor of Illinois; ILLINOIS STATE BOARD OF EDUCATION; DR. CARMEN I. AYALA, in Her Official Capacity as State Superintendent of Education, ILLINOIS DEPARTMENT OF PUBLIC HEALTH; and DR. NGOZI EZIKE, in Her Official Capacity as Director of the Illinois Department of Public Health, Defendants-Appellants and PLAINFIELD COMMUNITY SCHOOL DISTRICT #202; *et al.* Defendants.	)	Sangamon County Case no.: 21CH500003

AMICUS CURIAE MEMORANDUM PURSUANT TO ILLINOIS SUPREME COURT RU LES 307(d) AND 345 – BOARD OF EDUCATION HUTSONVILLE CUSD #1, BOARD OF EDUCATION VANDALIA CUSD #203 AND BOARD OF EDUCATION BROWNSTOWN CUSD #201

Jerrold H. Stocks
ARDC No. 06201986
FEATHERSTUN, GAUMER, STOCKS, FLYNN & ECK, LLP
101 S. State Street, Suite 240
P. O. Box 1760
Decatur, Illinois 62525
Telephone: (217) 429-4453
Fax: (217) 425-8892
E-mail: jstocks@decatur.legal

Now Come *Amicus curiae*, Board of Education Hutsonville CUSD #1, Board of Education Vandalia CUSD #203 and Board of Education Brownstown CUSD #201 [collectively: *Amicus*] and for their *Amicus curiae* Memorandum pursuant to Illinois Supreme Court Rules 307(d)(2) and 345, state:

Two years ago, an infectious disease entered Illinois and, whether infected or not, changed every life, threatened every institution and potentially re-defined the balance between the individual and the state. While this Brief is submitted in a case related to a provisional remedy, the reasons behind the relief strikes the core of the balance between individual and state, institution to state and, specific to *Amicus*, re-defining local control of schools. Well-founded fear and imprudent hysteria have informed aggressively elastic assertions of statutorily enabled power that should not be enshrined as precedent for the future. The Governor and ISBE[1] have exceeded their authority. For this reason, *Amicus* requests that this Honorable Court affirm the relief ordered below for the reasons offered before the Trial Court and as supplemented herein.

Amicus, three local schools that did not enforce Executive Order 18 [EO18] on a mandatory basis, are defending against ISBE's enforcement of EO18 to stop ISBE from downgrading the district to Non-Recognized status. The Defendant local schools are not defending ISBE enforcement because those districts submitted to the coercive force of threatened ISBE action and now stand as the coercive force against parents and students. However, all local districts face(d) legal dilemmas from conflicting duties, hardships, and obligations to the community, students and parents for which they exist to serve. Hardships EO 18 imposes on

[1] Illinois State Board of Education referred to as ISBE

schools favors the TRO. Universal masking mandates do not exist in a vacuum. Compliance with masks leads to non-compliance in other areas, emotional, academic, equity and financial.

The beginning point for conflict is EO 18. Is it mandatory or directory to the local schools? It is not law adopted in compliance with Illinois Constitution Article IV, Section 8, nor can a legislature delegate the legislative power to the Governor. Illinois Constitution, Article II, Section 1. Of course, on the face of the EO 18 is the assertion that the IEMAA, Section 7 [20 ILCS 3305/1 et seq; hereinafter IEMAA] enables the Governor to control schools directly. (the "mandate" is a direction to local schools). This elastic assertion of power by the Governor is erroneous.

IEMAA does not support EO 18 Mask Order on a mandatory basis. A Governor does not have authority to create sanctions for a non- executive Branch employee by way of Executive Order. *Buettel v. Walker*, 59 Ill.2d 146, 53-54 (1974). Moreover, on its face, the direction to local schools under EO 18 does not purport to impose any sanction. Accordingly, EO 18 should be construed as directory, not mandatory. *People v. Delvillar,*235 Ill2d 507,14-15 (2009). Directory construction may be reconciled with the reasoning of the Trial Court below and does not offend any legislative intent from a statute.

A close reading of the IEMAA discloses that the legislature did not intend to empower the Governor to exercise emergency management powers directly over local school districts. Section 6 of the IEMAA delineates the "Emergency Management" powers of the Governor. "Emergency Management" is defined by the IEMAA at Section 4 as "… the efforts of the State and *political subdivisions* to develop, plan, analyze, conduct, provide, *implement, and maintain programs for disaster mitigation, preparedness, response and recovery.*" (emphasis added). Section 6 appears to be specific at this stage, two years in, with respect to COVID mitigation as

compared to Section 7 powers. If the Governor's theory of empowerment is accepted, the power finds its origins in the Governor's reflexive statement of need to act. Facially, that unchecked reflexive assertion of power is repugnant to separation of powers. Even if the Governor can argue that the legislature gave him the power to define his power, then the legislation fails Constitutional attack for violating Illinois Constitution, Article II, Section 1. Thus, to avoid according IEMAA an unconstitutional construction, the Governor's self-serving definition of his own power under the IEMAA must be checked.

Yet, the ineffectiveness of the IEMAA as an enabling authority for EO 18 or direct Gubernatorial mandate to schools is revealed in another definition in the IEMAA. The Governor's powers to order or coordinate Emergency Management, Sections 6(2)(j) or 7(3), reach only state agencies and "Political Subdivisions." Section 4 defines "Political Subdivision" as "any county, city, village, or incorporated town or township if the township is in a county having a population more than 2,000,000."[2] School Districts are not included in the specific definition. Accordingly, an Executive Order purporting to mandate disaster mitigation has no legal authorization to support mandatory duty imposed on local elected school boards to comply.

The next coercive force upon local schools to follow EO 18 is that applied by ISBE under the Emergency Rules. The Trial Court concluded, for many reasons, that the ISBE Emergency Rules were invalid. *Amicus* share that view and, hopefully avoiding redundancy with the

[2] Section 4 was amended as recently as August 20, 2021 and School Districts were not added to the definition of Political Subdivision for purposes of the IEMAA nor was the definition of "Emergency Management" amended. H.B 3523, Act 102-0485.

Plaintiffs' Memorandum[3], contend that ISBE Emergency Rules to enforce EO 18 are not enabled and that specific infectious disease regulation is reposed to local health departments.

An administrative agency only has the authority given to it by the legislature through statutes. *Knox County ex rel. Masterson v. Highlands*, 188 Ill2d 546,553 (1999). An agency's authority must be construed strictly to limit agency authority. *Simmons v Illinois Liquor Control Commission*, 92 Ill.App.3d 387 (1st, 1980). The Emergency Rules revised the Operational Requirements Section of 23 IL Admin. Code, Section 120. The Emergency Rules specify statutory enablement as 105 ILCS 5/2-3.25 for State Board of Education power. Said Section 3.25 states "(a) To determine for all types of schools conducted under this Act, efficient and adequate **standards** for the physical plant, heating, … sanitation, safety, … instruction, …to issue, refuse to issue, or revoke certificates of recognition … pursuant to **standards** established hereunder." (emphasis added). First, ISBE has NOT established a Recognition Standard adopting EO 18 nor, for that matter, has ISBE adopted the Joint Guidance as a Recognition Standard.[4] The enabling legislation, Section 3.25, minimally requires the antecedent adoption of the Recognition Standard. Basic logic seems to explain an absence of a Recognition Standard for ever-evolving "novel emergencies" as a Standard is something fixed. Recognition Standards were not intended by the legislature to be a cudgel by which ISBE enforces temporary emergency compliance. EO 18 is not an adopted ISBE standard. Thus, ISBE cannot coerce schools to mandate masks under Section 3.25 of the School Code.

[3] Amicus have not had the opportunity to review Plaintiffs' Memorandum before this Court based on contemporaneous filing deadlines. However, based on the content of the TRO, other legal arguments or citations support the relief that are not re-stated herein.

[4] ISBE enacts Recognition Standards by specific Resolutions. Here, only negative evidence, absence, proves the point.

The Trial Court determined that ISBE Emergency Rules could not stand in the face of the statutory and administrative authority of IDPH and local county health departments on the limited quarantine and infectious disease issues presented. If ISBE Emergency Rules are permitted to compel the local schools to mandate masks over objection, then the schools interfere with the due process to which an individual student is entitled under the public health laws relied on by the Trial Court. *Amicus* determined that a local school could not interfere with the rights of those parents and students, which is a reason why they are not defendants in this litigation. The TRO states its reasoning validly on this point. In additional support of the contention that local health department regulation preempts ISBE regulation is the holding in *County of Winnebago v. Davis*, 156 Ill.App.3d 535,538 (2d, 1987) where the Court determined that Section 3.25 *related to the physical plant of the school*, generally, and the legislative framework for county public health departments was the specific and governing regulator. Interestingly, in *County of Winnebago v. Davis*, the Attorney General was allowed to file an Amicus Brief in support of the county health department authority and that School Code Section 3.25 related to school physical plant, generally. *Id.* 535, 538. Likewise, Section 3.25 does not enable ISBE to issue Recognition Standards for COVID Mitigation in the persons of its students and staff. COVID is not a physical plant issue and is reposed to the jurisdiction of county health departments, working with the schools as the Trial Court determined.

Even if ISBE had adopted a Recognition Standard adopting EO 18 (and each re-issuance) with penalties for non-compliance to force local schools to execute an end run around student/parent due process rights before the county health department, then local schools still confront the hardship of compliance impossibility. EO 18 impels a myopic view of the local threats to students and the totality of Standards and guidelines the local schools must balance.

ISBE Rules (preexisting and post Emergency Rule amendment) cannot be reconciled with a universal masking requirement. A valid Recognition downgrade cannot tolerate, by mandating universal masking, non-compliance with other School Code standards and provisions.23 Ill Admin Code Section 1.20(e)(4)("without giving rise to other issues of compliance that would lead to probationary status.") ISBE forges ahead according EO 18 equivalency to a validly adopted Recognition Standard- which it is not- while disregarding the other compliance obligations burdening the local schools. The School Code imposes mandates from emotional health to academic performance to financial health. Here, *Amicus* will focus on one example to illustrate impossibility of compliance with said Rule, Section 120(e)(4).

Local schools must adopt methods and procedures to address emotional and mental health. 105 ILCS 5/2-3.166. Unlike a mask mandate, the emotional health mandate is legislation-clearly legislatively enabled. However, ISBE threatens to pull Recognition because a local school will not ignore emotional health in favor of masks. No scorecard is available quantifying which has yielded more public/private injury: casualties in students where COVID contributed versus suicide/depression where COVID mitigation strategies, including masks, contributed. When the data is available, one should not be surprised to see a far greater emotional and academic toll on the students, far outpacing student COVID deaths. The concern here is not argumentative supposition. Rather, ISBE and IDPH both recognize the emotional toll presented.

ISBE issued its Youth Suicide Prevention Toolkit with the following Introduction:

The Illinois State Board of Education (ISBE) envisions Illinois as a state of whole, healthy children nested in whole, healthy systems supporting communities wherein all citizens are socially and economically secure. **In line with this vision, ISBE aims to empower districts and schools to address effectively the total wellness of our students and school communities. Providing support to plan for suicide prevention and intervention is an integral part of this work.**

Suicide is the second leading cause of death for youth between the ages of 15 and 241 and the third leading cause of death for youth between 10 and 14.2 A nationwide survey of students in grades 9-12 in 2015 found that 17.7 percent of students reported seriously considering suicide, 14.6 percent reported creating a plan, and 8.6 percent reported trying to take their life in the year preceding the survey.3
School districts and individual schools can play a significant role in reducing suicide risk and completion by integrating suicide prevention and intervention into their student wellness frameworks and educating their communities.

Illinois State Board of Education, *Illinois Youth Suicide Prevention Toolkit*, p3.

Here, a local school has statutory duty in addressing the problem related emotional health for which ISBE provides guidance. Which gives when the COVID mitigation compliance increase the emotional harm risk?

IDPH acknowledges the increasing incidence of suicide amongst youth. IDPH, *2020 Illinois Suicide Prevention Strategic Plan*, pp 25-28. IDPH confesses a role between COVID-19 mitigation strategies and an increased risk for suicide and emotional injury. IDPH, *2020 Illinois Suicide Prevention Strategic Plan*, pp 32-35. Adults are unsuccessful in interventions…" based on the belief that adults know more than youth and have the right to act on them without their consent." IDPH, *2020 Illinois Suicide Prevention Strategic Plan*, p 26. Here, ISBE and the Governor are claiming the right to act without consent, but, more importantly to this Court, without actual legal enablement. For the local school district facing conflicting commands, a true hardship exists. *Amicus* has balanced those hardships by maximizing the choice and consent of students and staff at a local level.

To address the real risk to students, IDPH states:

Protective factors for youth include supportive relationships with adults, stable familial relationships with good communication, affirming and inclusive social spaces, access to groups and activities in which they can feel successful and connected, opportunities to participate in and contribute to school or community projects, programs that build

problem-solving skills and conflict resolution skills, and access to quality emotional, behavioral, and medical health care.

IDPH, *2020 Illinois Suicide Prevention Strategic Plan*, p. 27

Health care and educational decisions belong to the parent of the child- a fundamental right. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Local school districts are comprised of the elected board members with the duty to discharge the individual citizens right to a free public education. Illinois Constitution, Article X, Section 1; *Bd. of Education v. Redding*, 32 Ill.2d 567,573 (1962); *Allen v. Maurer*, 6 Ill.App.3d 633, 640 (4th, 1972). As the Trial Court concluded, due process at the county level is the legislatively intended locus for limited quarantine or other quarantine issues according to legislative intent. Affirming the Trial Court Order serves all these well- established principles respects families, saves lives from all threats. Nothing forecloses an individual choice to wear a mask…or two. The Governor and ISBE arrogantly presume that parents and local districts cannot or will not protect their children… or, this whole debate has devolved to a politician's desire to save political face.

EO 18 and the ISBE Emergency Rules are discordant with the best interests of the students the local district board members are charged to educate and the communities they are sworn to serve. 105 ILCS 5/10-16.5. However, the relief requested is not merely substituting a parent's or local district's judgment for the Governor's. Rather, the question presented is who has the right to make the judgment in the first instance for these students, the parents, the local schools, or the Governor- free from any venue to challenge his edict? *Amicus* respectfully submits that students should not be subject to these continuing edicts without due process and that local districts cannot be compelled to apply the muscle to coerce the student into submission.

Respectfully Submitted,

Board of Education Hutsonville CUSD #1, Board of Education Vandalia CUSD #203 and Board of Education Brownstown CUSD #201

By: /s/ Jerrold H. Stocks

Jerrold H. Stocks
ARDC No. 06201986
FEATHERSTUN, GAUMER, STOCKS,
FLYNN & ECK, LLP
101 S. State Street, Suite 240
P. O. Box 1760
Decatur, Illinois 62525
Telephone: (217) 429-4453
Fax: (217) 425-8892
E-mail: jstocks@decatur.legal
glw

CERTIFICATE OF SERVICE

I certify that on the 9th day of February, 2022, at or before 4:00 p.m., a copy of the foregoing shall be served electronically through the Court's approved electronic filing service pursuant to IL Supreme Court Rule 11(c) and thus will be served via that system.

/s/ Jerrold H. Stocks

Jerrold H. Stocks
ARDC No. 06201986
FEATHERSTUN, GAUMER, STOCKS,
FLYNN & ECK, LLP
101 S. State Street, Suite 240
P. O. Box 1760
Decatur, Illinois 62525
Telephone: (217) 429-4453
Fax: (217) 425-8892
E-mail: jstocks@decatur.legal
glw