



**USD 232 BOARD OF EDUCATION**  
**OFFICIAL MINUTES -- SPECIAL MEETING**

YouTube channel: <https://bitly.com/usd232youtube>

April 26, 2021

The meeting was called to order at 6:00 p.m. by the Vice President, Mrs. Rachele Zade. A quorum of the Board was present. Board members and administrators present were as follows:

**Board Members:** Rick Amos (*participated via Zoom*)  
Bill Fletcher (*participated via Zoom*)  
John Gaignat (*participated via Zoom*)  
Danielle Heikes (*joined the Zoom session at 6:03 p.m.*)  
Stephanie Makalous (*participated via Zoom*)  
Ashley Spaulding (*participated via Zoom*)  
Rachele Zade (*participated via Zoom*)

**Administrators:** Wendy Denham, Board Clerk/Executive Assistant to the Superintendent  
Carrie Handy, Director of Human Resources/Elementary  
Dr. Frank Harwood, Superintendent  
Brian Schwanz, Director of Human Resources/Secondary

Superintendent Harwood said the purpose of this meeting is to allow the Hearing Officers to present findings and make a recommendation to the Board regarding a hearing conducted on April 22, 2021, pursuant to Senate Bill No. 40, contesting the Board's policy requiring the wearing of masks at school. He said action may be taken.

Dr. Harwood then informed the Board that they would be joined tonight by the district's legal counsel, Mike Norris, and said if the board wishes to go into executive session to seek legal advice, it can. He then called on the designated hearing officers, Brian Schwanz and Carrie Handy, to present their report and recommendations.

Hearing Officer Brian Schwanz shared the following information:

**Background**

On Tuesday, April 20, 2021, the district received a request for a hearing under Kansas Senate Bill No. 40 to contest the Board of Education policy requiring masks be worn at school. The policy was adopted by the Board of Education on July 13, 2020 in response to the state of disaster emergency related to the COVID-19 health emergency.

A hearing was called to order at 8:30 a.m. on Thursday, April 22, 2021 at the USD 232 Administrative Office. The hearing was viewable to the public via live stream. Present at the hearing were:

Brian Schwanz & Carrie Handy – Hearing Officers

Emily Carpenter – The individual who requested the hearing, parent of three USD 232 students

Alvie Cater – Representing the Board/District

Wendy Denham – Board Clerk

Casey Rooman-Smith – Technology Support

Ms. Carpenter was asked to present her testimony first, followed by Mr. Cater. Each party was allowed a second opportunity to present information and the hearing officers asked follow-up questions of both parties. The hearing was adjourned at 9:04 a.m.

First, it must be stated that the Board of Education does have the authority to make rules governing the operation of schools under K.S.A. 2019 Supp. 72-1138. Senate Bill No. 40 further reinforces this authority by stating the local school board has sole authority to make rules in response to the declaration of emergency for COVID-19.

#### **Duty to Provide Notice**

Ms. Carpenter claims the Board of Education failed to inform her and the public of certain benefits and risks of face masks. She referenced an Emergency Use Authorization (EUA) issued by the Food and Drug Administration (FDA) on April 24, 2020, as well as a Federal Statute (21 U.S.C. 360bbb-3). The full text of the statute or the EUA was not provided by Ms. Carpenter. In reviewing the full text, it appears the referenced EUA and federal statute are not relevant for a school district.

21 U.S.C. 360bbb-3 is part of a statute that authorizes the Secretary of Health and Human Services to issue EUA's in some circumstances. The April 24, 2020, EUA published by the FDA does address the emergency use of face masks in limiting the spread of COVID-19. The relevant part of the EUA is directed at manufacturers stating that manufacturers of face masks have a duty to inform the public of certain benefits and risks associated with the use of their products. This duty does not extend to a governmental entity, like a school board, that has a requirement to wear barrier face masks. The board policy adopted on July 13, 2020, states, "Barrier face masks will be worn to cover the nose and mouth." A surgical mask that has full FDA approval to be worn for this reason would be acceptable. The FDA recognized the shortage of surgical face masks and its EUA allows the use of non-surgical grade face masks to help prevent the spread of COVID-19.

Based on this information we find that the argument that the barrier face masks cannot be required due to Federal Law is not relevant, without merit, and should be dismissed as the intent of the law is to require manufacturers to adhere to a duty to warn about products. The law does not reference entities such as school boards at all. Additionally, it is unlikely that even if it were relevant that it would be applicable as a reason to contest a board policy under Senate Bill No. 40, which is a state law.

Hearing Officer Carrie Handy shared the following information:

### **Action Being Contested**

In the request for hearing, Ms. Carpenter states that the action that she is contesting occurred on April 1, 2021, and every day after when she or her children are required to wear a mask at school. Mr. Cater provided information during the hearing that the Board took action to adopt the mask requirement on July 13, 2020. He said the mask requirement was discussed at the April 5, 2021, meeting of the Board. However, minutes for this meeting show that the Board did not pass a motion to amend the requirement. In fact, no motion to amend the requirement was given. According to Board policy, an action of the board requires a seconded motion with four votes cast in favor of the motion. Therefore, the board has taken no action regarding the mask requirement since enacting the policy on July 13, 2020. SB 40 gives the parent of an aggrieved student the right to contest an action of the Board of Education pertaining to COVID-19 within thirty (30) days of the action.

Based on the information presented, we do not believe that the continued application of the stated policy is considered a new action of the board. Additionally, SB 40 does not allow Ms. Carpenter to contest a policy on her own behalf, only on the behalf of an aggrieved student. In her petition, Ms. Carpenter objects to being required to wear a face mask at school functions; SB 40 is focused on allegedly aggrieved students, not parents. We further believe that SB 40 is prospective and not retroactive, meaning that the time to contest the Board's action on July 13, 2020, has passed. Therefore, since there has been no action by the Board of Education to be used to file a complaint pursuant to SB 40, the complaint should be dismissed.

### **Policy False and Misleading**

In her testimony, Ms. Carpenter asserted that the wording of the policy requiring masks is false and misleading due to its reference to "state and county orders". She also stated that two communications sent from Mill Creek Middle School and Monticello Trails Middle Schools were false and misleading due to their reference to a "Kansas Executive Order."

Although the complaint regarding the mask requirement should be dismissed due to it being filed beyond the allowed time, the reference to "state and county orders" was accurate on July 13, 2020, and its continued inclusion is not misleading. Mr. Cater stated that pursuant to the policy, the Board of Education did consider the change in state mask requirements at its April 5, 2021, meeting. At that meeting, the board did not take action to amend its policy regarding the requirement to wear a barrier mask over the nose and mouth.

In regard to the notices sent by schools, the district should correct future notices to read that masks are required by board policy instead of referencing state or county orders.

### **Least Restrictive Means**

Citing a "Stanford Study", Ms. Carpenter asserted that due to various health risks associated with wearing a mask that the least restrictive means for the board to take is to make mask wearing optional. Mr. Cater cited information from the Centers for Disease Control and Prevention, the Kansas

Department of Health and Environment and the Johnson County Department of Health and Environment (by way of a signed affidavit from the Director of Epidemiology, Elizabeth Holzschuh) that the use of face masks is narrowly tailored to minimize the spread of COVID-19, a respiratory virus. He further stated that the use of masks is the least restrictive means available to minimize the spread of COVID-19 in schools. Without masks, the district may have to increase social distancing, which would necessitate a shift to the hybrid learning model where only half of the students attend each day. Additionally, he stated that without the proper wearing of masks, many more students would be excluded from school based on a JCDHE recommendation to quarantine due to an exposure of COVID-19. In response to Mr. Cater's reference to the mask requirement being narrowly tailored, Ms. Carpenter disagreed and offered a definition of the term narrowly tailored. She stated that "The definition of 'Narrowly Tailored' means to carefully draft laws and make policies to address a specific objective without affecting other rights or the smooth running of business." Ms. Carpenter did not cite a source for the stated definition. According to Black's Law Dictionary, narrowly tailored is defined as ". . . being only as broad as is reasonably necessary to promote a substantial governmental interest that would be achieved less effectively without the restriction . . ."

Although the complaint regarding the mask requirement should be dismissed due to it being filed beyond the allowed time, we believe the mask requirement is narrowly tailored to reduce the transmission of COVID-19 in schools, and it is the least restrictive means to achieve this goal.

#### **Exclusion Due to Recommended Quarantine**

In response to Mr. Cater's reference to exclusion due to recommendations for quarantine, Ms. Carpenter stated that she believes that this policy is also invalid. This complaint will not be addressed as it was not stated on the original request for hearing. Additionally, according to Ms. Carpenter's testimony, she would lack standing to make the complaint since her children have not been excluded due to a recommendation for quarantine.

Mr. Schwanz read the following:

#### **Conclusion and Recommendation**

To summarize, it is our recommendation that Ms. Carpenter's complaints be dismissed. Her argument that the district's mask requirement is a violation of federal law is without merit. Ms. Carpenter lacks standing to contest the district's mask policy because her complaint regarding the policy requiring masks was not filed in a timely manner (within 30 days of the action). Ms. Carpenter also lacks standing to contest that masks be required for all students in USD 232 since she is not the parent or guardian for all students. Additionally, even if the complaint would have been filed within the required time frame and only applied to Ms. Carpenter's children, as stated previously, K.S.A. 2019 Supp. 72-1138 gives the Board of Education the authority to make such requirement and it has done so properly. Further, it is our opinion that the mask requirement is narrowly tailored to mitigate the spread of COVID-19 and is the least restrictive method of achieving this goal.

Mr. Schwanz and Mrs. Handy concluded their report and asked if board members had any questions. No questions were asked.

Ashley Spaulding thanked the hearing officers for their report and addressing each of Mrs. Carpenter's complaints.

*Mrs. Stephanie Makalous moved to approve the findings and recommendations presented by the hearing officers regarding the hearing held on April 22, 2021, pursuant to Senate Bill No. 40.*

*Mr. John Gagnat seconded.*

*Carried 7/0.*

*President Heikes adjourned the meeting at 6:16 p.m.*

May 3, 2021  
Date Approved

Wendy S. Denham  
Clerk, Board of Education  
Annelle Heikes  
President, Board of Education