



WILSON | BARROWS | SALYER | JONES

LEGAL OPINION MEMO

(Confidential Attorney-Client Communication)

TO: Trustee C. Wines

FROM: Rob Salyer 

DATE: June 7, 2021

QUESTION: If the Board decides that students are not required to wear masks in school, in violation of the state's mask mandate, would it violate the Nevada Constitution's education funding mandate for the state to attempt to enforce the mask mandate by withdrawing education funding from the District?

ANSWER: Yes

ANALYSIS:

You asked the above question during the *Items From Board Members* portion of the May 25, 2021 meeting. There is tension between numerous legal principles of education law that affect this question:

1. The Nevada Constitution creates the duty on the part of the state to provide an education to the children of Nevada for grades K-12 by creating local districts in which the schools are located and operated. Nevada Constitution, Article 11, Sections 2 & 6.
2. Because the duty to provide an education is a *state* duty, it is the state (and only the state) that has the duty to *fund* the cost of providing the required education. Nevada Constitution, Article 11, Sections 2 & 6. The state duty to fund education is the *primary* duty of the Legislature. In fact, the Legislature is Constitutionally prohibited from making any other appropriation of state public funds for the biennium if it has not fulfilled its duty to fund education. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006) (Legislature ordered back into session by

the Nevada Supreme Court when it adjourned without funding education).

3. Local school districts have no *inherent* right to do anything. They can only be created by an act of the Nevada Legislature as political subdivisions of the state and they have only such powers as the Legislature has given them by statute. *Hard v. Depaoli*, 56 Nev. 19, 41 P.2d 1054 (1935).
4. The Legislature met its funding duty by passing the “Nevada Plan” statutes. NRS 387.121 - .12468; *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016). The Nevada Plan has since been replaced with the Pupil-Centered Funding Plan. SB 543 (2019).
5. In response to the Covid-19 pandemic, the Nevada governor made many emergency declarations in accordance with the powers delegated to him under the Nevada Emergency Management Act. NRS Chapter 414. One such declaration was the “mask mandate” contained in Emergency Directive 024 issued June 25, 2020. It was revised by Emergency Directives 028 issued July 28, 2020, 038 issued February 17, 2021, and 045 issued May 3, 2021. (collectively referred to as the “Mask Mandate”).
6. The Nevada Attorney General ruled that in times of emergency, the governor’s authority under the Emergency Management Act superceded the powers of local political subdivisions. Atty. Gen. Op. 95-03.
7. The Mask Mandate expressly provided the methods of its enforcement throughout the State of Nevada:
 - a. Nevada OSHA shall enforce all violations of the Mask Mandate;
 - b. State licensing boards are directed to enforce all provisions of the Directives against licensees and impose disciplinary measures against licensees. It is unclear whether “state licensing board” includes the Nevada Department of Education; and

- c. An “individual” who does not comply with the Mask Mandate, after receiving notice from law enforcement, may be subject to criminal prosecution and civil penalties under NRS 198.280, NRS 202.450, and other applicable statutes and regulations.

Emergency Directive 024, Sections 8 & 9.

8. In addition to the enforcement provisions provided in the Emergency Directives, the Nevada Emergency Management Act itself provides in NRS 414.070(5) that the governor may remove from office any public officer having administrative responsibilities under the Act for willful failure to obey an order or regulation adopted pursuant to the Act. It is unclear whether local school trustee have “administrative responsibilities under the Act.”

With the background of the above legal principles of law, I arrive at the question of *withholding* Constitutionally mandated state education funds from a school district that they were appropriated for.

I have found no provision in any of the governor’s Emergency Directives – or in the Nevada Emergency Management Act itself – which would authorize the state to withhold a school district’s Constitutionally required funding based upon a willful failure of the district to comply with the governor’s Mask Mandate in the schools within the district.

The power of a state agency to withhold state education funding is available, but usually does not exist in the absence of an express grant of such authority. RAPP, EDUCATION LAW § 3.06(6)(a).

I *have* found several provisions in the law which *expressly* authorize withholding of funding from a public school district for other reasons:

1. First and foremost, the same section of the Nevada Constitution that requires the Legislature to establish a system of local school districts *expressly* provides:

. . . any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the . . . public school fund during the period of such neglect or infraction . . .

Article 11, Section 2.

It is reasonably arguable that by the inclusion of this *express* requirement of withholding that the Constitution precludes withholding of the Constitutionally mandated education funding for any *other* reason.

2. Withholding for failing to repay a loan from the state. NRS 387.528.
3. Withholding by a hospital that provides residential treatment to students. NRS 387.1225.
4. Withholding for exceeding the maximum pupil-teacher ratio in each grade. NRS 387.1234.
5. Withholding for failing to comply with the rules applicable to profoundly gifted pupils. NRS 387.1244.

Therefore, the same argument may be made that by inclusion of these *express* withholding requirements, the Legislature is precluded from withholding education funding for any *other* reason.

Based on the above, I conclude that if the Board decides that students are not required to wear masks in school, in violation of the Mask Mandate, it would violate the Nevada Constitution's education funding mandate for the state to attempt to enforce the Mask Mandate by withdrawing education funding from the District.

CC: President
Superintendent

21060021rms.wpd