

LARIMER COUNTY | HEALTH AND ENVIRONMENT

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Director Tom Gonzales, MPH, REHS
BOARD OF HEALTH

Bernard Birnbaum, MD, President
Brian DelGrosso, Vice President
Jennifer Lee, MS
Janna West Kowalski, MS
Tony J. Van Goor, MD

Mission:

Provide everyone in Larimer County the opportunity for a healthy life.

Vision:

Is a thriving, health-aware community where everyone has access to healthy choices and a healthy environment.

LARIMER COUNTY BOARD OF HEALTH – November 9, 2021

The Larimer County Board of Health (BoH) convened their special meeting at 2:00pm at 200 W. Oak St, Fort Collins CO. 80521 and through the Zoom virtual platform due to the COVID-19 pandemic.

Members Present: Dr. Bernard Birnbaum
Jennifer Lee
Dr. Tony J. Van Goor
Janna West-Kowalski
Brian DelGrosso

Executive Secretary: Tom Gonzales

County Staff: Andrea Clement-Johnson, Phillip Daniel, Chris Manley, Kori Wilford, Laura Walker, Dr. Paul Mayer, Erika Cathey, Frank Haug, David Ayraud

Call to Order - Dr. Bernard Birnbaum, Board President, called the special meeting of the Board of Health to order at 2:00 p.m.

Public Comment - There was no public comment at this meeting

NEW BUSINESS

Hearing on Appeal of Resurrection Christian School from Director's September 9, 2021 Order and September 15, 2021 Amended Order - Dr. Bernard Birnbaum covered the procedures for the meeting. Both parties will be given time to present their case with Resurrection Christian School being first to present. The Board will then deliberate and have a discussion as to the direction that the Board wishes to move forward. Dr. Tony J. Van Goor asked if there would be an opportunity to ask questions of both parties and Dr. Birnbaum confirmed that there would be an opportunity to do so. Brian DelGrosso disclosed that he has a child that attends this school, further that he believed it did not present a conflict for him, but he asked whether anyone else objected to him hearing the case and no one raised an objection.

Brian DelGrosso informally raised the question about studies being done regarding a pill that reduces the effects of COVID. New developments into two new potential medicines are being explored currently that will hopefully reduce the effects of COVID and death rate. Difference in efficacy between the new medications being studied and monoclonal antibodies briefly discussed by Dr. Paul Mayer.



BOARD OF COUNTY COMMISSIONERS

John Kefalas, District I

Kristin Stephens, District II

Jody Shadduck-McNally, District III

The Petitioner appeared at the hearing represented by the Superintendent, Dr. Jerry Eshleman, via video zoom, and RCS counsel Beth Chambers via phone. Resurrection Christian School (RCS) stated it is not questioning if the Larimer County Public Health mitigation strategy is right or wrong, their appeal is for exemption from regulatory definition of a school based on 6 CCR 10.106.2 B1 in which CDPHE expressly exempted "structures or facilities used by a religious organization, exclusively for worship or religious instruction". RCS argued that as a private religious ministry which uses its facilities exclusively for religious worship and instruction, that they fall directly into this exception. When the Respondent (LCDHE) found that RCS was in "outbreak status", RCS confirmed compliance with mitigation strategies except mandated masking to which they are opposed. Subsequently, the order was issued, mandating masks for outbreak areas. RCS contracted with the parents and determined their COVID protocol internally with guidance from their licenced nurse. Parents use God's teachings and believe masking to be a family choice, not a school directive. RCS has a strong reliance on God for their physical health and healing; trusting God for both prevention and recovery is a hallmark of their evangelical faith. CRS 25-1-517 prohibits County / Public Health from imposing any mode of treatment inconsistent with any creed or tenance of any religious denomination that they adhere to if there is compliance of sanitary and quarantine rules. No law or rule regarding masking exists to RCS' knowledge. Administrative Procedure Act is defined under rule CRS 24-4-10215. RCS therefore believes this to be unlawful. Respondent relies on CRS 25-1-506 as the foundation of authority to issue order and supplemental order against RCS but CRS 25-1-506 does not grant that power. CRS 25-1-508(g) instead grants that power to BoH and not Director Gonzales or the Dept of Public Health. RCS rests.

Director Tom Gonzales responded that LCDHE had assigned contact tracers and outbreak teams to monitor all 119 county schools with the desired outcome to maintain in-person learning with the least disruption. In late August, COVID cases at RCS increased so LCDHE provided suppression strategies (including symptom monitoring, seating charts, rosters etc). LCDHE conducted a site visit on Aug, 31st 2021 and noted no mitigation in place, including masks. RCS moved to outbreak status shortly thereafter as RCS had 5 or more epi-linked cases starting in October. Outbreak status is implemented according to the State Health Dept standard. After multiple attempts by LCDHE to remedy the situation, RCS was unresponsive and a notice of Non-Compliance was subsequently issued. Director Gonzales issued an Order on Sept, 9th 2021, based on non-compliance and multiple failed attempts to collaborate with RCS, and the continued increase in cases at the school. PHD has a duty and responsibility to respond to outbreaks of COVID-19 and all other communicable diseases. Thereafter, RCS implemented mitigation strategies and drastic improvements were achieved. Cases declined in upwards of 80 percentiles. Over the next 5 weeks, LCDHE & RCS collaborated well and on October, 12th 2021 the PHO was lifted at the Middle and High schools and on October, 15th 2021, Order was lifted for Grades 3 - 5. Lifting of the PHO was a result of a 14 day period where no epi-linked cases within RCS were recorded. Director Gonzales expressed appreciation for the effort made by RCS to assist in suppressing the 2 outbreaks.

RCS was given an opportunity to respond before the Q & A.

Ms Chambers reiterated that RCS is a private religious school with no government oversight in any of its operations and Public Health is "holding them hostage" under the potential COVID outbreak status at which point, RCS implements many policy and procedural changes and this also impacted their contractual obligations that RCS has with its families. RCS is not a public institution or public accommodation and falls under those entities of religious instruction. RCS strongly believes this should be an internal matter. Government overreach is where their issue lies. They requested the BoH look at RCS' qualification as a religious entity.

Q & A

Dr. Tony J. Van Goor: disclosed that he is a practicing Christian and supports religion being taught in schools but RCS' religious argument is not one that he understood in this context. He asked "what differentiates instruction in reading, writing, math and no-evolutionary science from what is being taught in secular schools?"

Dr. Jerry Eshleman (RCS): responded : RCS is built on 3 core values. They are boldly Christian, academically equipped and globally prepared. It is their responsibility to help develop their students' relationships with God, live out their faith, share their space with others, and live life from a Christian worldview. RCS is different from secular schools - the idea of a proper Christian education is to reveal the glory of God, reveal God's attributes with the "known" so that God is known and reveal man's need to worship God. If they reveal the "known" to make God be known then everything discussed points back to God. RCS gave an example that Fibonacci numbers used in Math reveal God's consistency, purpose and permanence. In History lessons, students are shown the will and hand of God working through men in historical times. In English and language arts, themes of Man vs Man / Man vs God / Man vs himself

are used to demonstrate that God is the word and God is the way. In Science, there is a Creator role that God plays and therefore giving God glory in all of academia. Dr. Jerry Eshleman gave various additional examples. RCS believes that learning is a way to worship God.

Dr. Tony J. Van Goor: appreciated RCS's response but did not see the difference in the mechanics between RCS and secular schools.

Brian DelGrosso: Regarding the argument of RCS of being a religious, private institute having no government oversight - what is the difference between other homeschool / co-op schools environments and RCS?

Beth Chambers (RCS) : From a legal perspective, courts usually support religious and private schools' autonomy. Parents had the fundamental right to choose to be free of government interference in an educational forum. Definition of schools "almost includes" homeschools with "any group of children that are 6 or more). There is limited oversight. (Mr Eshleman agreed with that statement)

Brian DelGrosso: asked if LCDHE had received any complaints from parents or staff of RCS of COVID / non-compliance of mask wearing.

Director Tom Gonzales: confirmed that they had.

Beth Chambers (RCS): agreed and said they have received information that some RCS parents have complained about COVID procedures.

Dr. Jerry Eshleman: said RCS is a private religious forum, and if the parents were not happy with tenets of this body, they could go elsewhere to educate their children. All parents were contracted before the school year began and knew what to expect. Dr Eshleman had experienced misunderstandings in the past 24 months which has prompted ill-informed public complaints. He gave an example of students passing around a box of donuts while being unmasked and subsequently reported.

Brian DelGrosso: One of the arguments raised by RCS was that Director Gonzales did not have the authority to issue this Order and it had to be brought to the BoH as we were no longer under a State of Emergency. He did not agree with that statement but asked for clarification on the accuracy of the interpretation of the statute. It was his understanding that the Director could do this, so he was surprised to see this in the petition.

Frank Haug: The BoH is in a difficult position, being asked to make sense of legal questions and constitutional issues. The bylaws allow RCS to appeal to the BoH as oversight of the Director and the department. Depending on the outcome of these proceedings, RCS have the right to appeal to the District court to decide what is lawful and constitutional. There are additional layers of appeal that are available to RCS after this appeal. However, according to Statute C.R.S. 25-1-509(1)(c) in the event of a public health emergency, the Director has the authority to issue an order. The view of RCS is that it must be an emergency declared by the Governor, the LCDHE's position is that it is not the accurate interpretation.

Brian DelGrosso: Asked if RCS complied with the current mask mandate in place. Director Gonzales responded that they fall under the current 9th amended Public Order. He then asked if RCS has a problem with what was mandated now and if not, what the difference was between this Public Order and the previous one.

Beth Chambers (RCS): Affirmed that RCS did have a problem with the current mandate and it was not included in this petition because it had happened after the process had begun. RCS still argued that the order did not cover their operation as a place of religious worship and instruction.

Dr. Tony J. Van Goor: stated that he received the notice of appeal on Saturday, had studied it and had questions and concerns. There was discordance between the record of what happened at the site visit on August 21st, 2021 in which Public Health investigators found that no mitigation measures were observed at RCS. However in paragraph 9 of the Notice of Appeal, RCS stated that COVID mitigation strategies were already in place.

Dr. Jerry Eshleman (RCS): recalled that he had escorted Erika Cathey around a limited portion of the campus, due to time constraints. It was early morning and class had started so there was "no-one around and there was nothing to see". RCS mitigation would have been better displayed when the bell had rung and students were flooding the hallways. In his view it was disingenuous to claim that nothing was being done. In addition to this, it was during a period of back and forth communication between RCS and the

County. On several occasions, they were given orders late in the day and Dr Eshleman requested extra time to train his staff and put procedures in place. On the day of the site visit, they had not decided on what their mandates were. Nonetheless they had already put in place distance and spacing issues, had cleaning supplies available throughout the campus, installed hand sanitizer dispensers in all classrooms, were using outdoor classroom spaces, followed quarantine protocols, purchased 4 devices (T360) used in a "Red / Hot Room" used when there was a student with COVID which then fogged / cleansed the room, emphasized hand washing, parents and staff were told to watch for COVID symptoms so RCS had in fact complied and even exceeded requirements. In the report, RCS was misrepresented as "having gone rogue and maverick", an entity which did not comply or care about any health measures. According to Dr Eshleman, this was untrue, with "the exception of the mask mandate" and to whom RCS believed it should be pointed to.

Tom Gonzales responded: There are pre-outbreak and outbreak recommendations and requirements, lists compiled as per CDPHE In-Person Learning School kit. This protocol includes seating charts, rosters, universal masking, symptom monitoring. He agreed that RCS was doing certain things but were not meeting the pre-outbreak and outbreak requirements to help prevent an outbreak. Tom stated that LCDHE did not want to issue a mask mandate and was interested in preventing an outbreak in the school to avoid that. The disease investigator was looking specifically for those precautions as per the CDPHE In-Person Learning School Kit.

Dr Tony J. Van Goor: In the Notice of Appeal, paragraph 10 filed by RCS stated that RCS had contracted with parents and students to allow choice regarding masking. He asked if signing this contract with an option for masking was a requirement for school admission?

Dr. Jerry Eshleman: stated that this stipulation was not applied. Most prospective parents toured the campus in June or July, were given a briefing on the various school admission policies and procedures etc at that time. As a private school, students were his paying customers in a way that is non-refundable. When public orders and new rules were implemented by LCDHE, Dr Eshleman had the difficult task of informing his parent body who could fight to revoke their non-refundable contract. As a Christian ministry, school and business, RCS had an obligation to provide an education as it was framed to them when they enrolled. Contracts did not stipulate that masks would be required but were optional.

Dr Tony J. Van Goor: As RCS was acting in *loco parentis*, ensuring parents rights are respected, did RCS poll the parents and what were the results of that poll?

Dr. Jerry Eshleman: RCS asked their parents in late 2020 for their feelings regarding wearing masks. RCS' poll showed 92.83% of parents were not in favor of masking their children. They believed that making masks optional empowered them as parents.

Dr Tony J. Van Goor: Paragraph 9 stated that LCDHE did not hold a hearing regarding the Public Order yet LCDHE did not receive a request for the hearing.

Beth Chambers (RCS): confirmed that RCS had not made a request directly to Board members. She had only had discussions with Frank Haug regarding the Order, supplemental Order and the process for appeal.

Janna West-Kowalski: requested that Director Gonzales explain what other outbreaks might not be taken to the BoH.

Director Tom Gonzales: stated that from time to time, LCDHE had to deal with outbreaks such as TB (tuberculosis) which required quarantining or isolation, measles, annual Influenza, foodborne illness outbreak etc. Recommendations were made, only rarely are Public Orders made as LCDHE preferred to collaborate with the community.

Janna West-Kowalski: asked Frank Haug for information regarding current court proceedings on mask orders in places of worship.

Frank Haug: said the courts throughout the country to the Supreme Court are wrestling with this with varying outcomes. Further, that the role of the BoH was to oversee the Director and the LCDHE and make sure it was operating according to the policies and procedures of the BoH. The question of what is or is not constitutional is better able to be addressed by the court. It was for the judicial system to adjudicate the separation between church and state.

Beth Chambers (RCS): said in her view, the decision regarding the law was something under the purview

of the BoH.

Dr. Tony J. Van Goor: said that other than the media reports, the BoH was not properly or sufficiently advised on the extent of the issue by either RCS or LCDHE. He recognized the need for the BoH to make a constructive and informed decision.

Brian DelGrosso: viewed the school as a private entity similar to a member driven Country Club with no government oversight and asked the Director if any similar action had been taken anywhere else in the county.

Director Tom Gonzales: said the Public Health law was clear that there are no boundaries, excluding private homes. All other private and charter schools were required to comply and they have done so. All requirements had been implemented consistently across the board and it had not been necessary to implement the 9th amended Order at any other school. If there was an outbreak elsewhere, of any communicable diseases, the same protocols guided by Colorado Department of Public Health and Environment were followed. There were different guidelines for other facilities such as Long-term Care Facilities.

Frank Haug: followed this up and said (as provided in briefings) that C.R.S. 25-1-506(b)(3) gave the Health Dept the authority to close schools and public places and prohibit gatherings. There was a statute that lists the authority to take action and lists out the specific authorities granted to the LCDHE.

Dr. Bernard Birnbaum: Suggested closing the Q&A and allowing a brief time for discussion. He suggested three options

- Option 1 - a vote to support Public Health Order
- Option 2 - a vote against supporting the PHO
- Option 3 - this discussion may be moot as this PHO has ended. He believed the correct place to adjudicate this issue would be the judicial system.

Beth Chambers (RCS): asked for procedural clarification, after having had a recent similar experience with the Denver Board of Public Health who issued a written order that could be taken to the District court on appeal. Statute C.R.S. 25-1-515 allows for judicial review of a Board's decision within 90 days of that decision and RCS would need a written report detailing how the BoH handled the issue.

Frank Haug: confirmed that these proceedings were being recorded, there would be written minutes documenting the meeting which could be approved by all attendees on Nov, 18th 2021. The written approval could be used by RCS if they chose to appeal.

Brian DelGrosso: asked what RCS wished to achieve with this hearing, now that the Public Health Order had expired. What outcome was hoped for.

Beth Chambers (RCS): said RCS wanted an order exempting them entirely from Public Health oversight. Their argument goes to the definition of school and to avoid the possibility of repetition. It would only be mooted if the BoH found that RCS is a place of religious worship and instruction and was therefore not under the purview of the public health regulations as they apply to schools.

Jennifer Lee: believed the question of whether RCS is a school or not is a constitutional question and not the role of the BoH. RCS' application for exemption status should be decided by a qualified and experienced body.

Brian DelGrosso: agreed with this statement. His issue with the order was that LCDHE is charged with protecting the health of the public but RCS is a private entity, he does not support mandates and parents have a choice to educate their children elsewhere. He believes the family has the right to choose and that LCDHE should not have made a public order to a private entity.

Dr. Tony J. Van Goor: felt handicapped to make a decision and the constitutional issues were something he is not personally equipped to deal with at this stage. In addition, the notice to appeal was only received a few days prior to this meeting and he had not had enough time to study it and understand it completely. BoH was not involved in the issuance of the PHO, most of what they have heard had been from the media and he would need more time to study and make an informed decision. Additionally paragraph 32 of the petition stated that RCS was seeking more relief than had been mentioned in the hearing, and the BoH would require more time and attention in order to fully consider RCS' concerns. He was unable to make a determination on this matter at this time.

Dr. Bernard Birnbaum: said as a doctor studying COVID and working amongst people suffering with COVID - masking works. He implored the attendees to wear their masks for the sake of his patients and others. Just as a member of a private Country Club would be responsible for its patrons leaving their premises when intoxicated and killing someone else - they would bear responsibility, as potentially would the private club. Secondly, he supported the PHO and believed that the Director did the correct thing. The Public Health Director was not responsible for deciding constitutional matters but rather to evaluate the risk to their community and to take appropriate action. Based on paragraph 32 of the petition, he too did not feel able to rule on this matter. As chairperson, he made a motion not to rule on the merits of this case and stated that the correct place to adjudicate this is within the court system. It would be inappropriate for public citizens to rule on religious exemption or on the separation of church and state.

Action - Dr. Bernard Birnbaum motioned to not rule on the merits of this appeal. He stated that the right place for this to be adjudicated is in the court system. Dr. Birnbaum stated that he didn't think it would be appropriate for a group of public citizens to rule on a religious exemption or on the separation of church and state. Jennifer Lee seconded the motion.

Frank Haug: said the usual procedure on an appeal would be either to grant the motion or to deny it.

Dr. Bernard Birnbaum: restated the motion and said in this case, he would not grant the appeal based on the fact that what we were asked to base the appeal on is not within the purview of the Board.

Action - Dr. Bernard Birnbaum motioned to not grant the appeal based on the fact that the basis for appeal is not in the purview of the Board. Jennifer Lee seconded the motion.

Janna West-Kowalski: expressed she does support the order and the PHO instituted by the Public Health Director as it falls under the role of the Health Department (as per the statute) "to investigate and control the causes of epidemic or communicable diseases in conditions affecting public health." Whether COVID, TB, measles, hepatitis, she supported the Health Dept in doing what needed to be done to control those communicable diseases.

Dr. Tony J. Van Goor: chose to abstain from voting on the motion for the reasons mentioned previously. To make an informed decision, he needed more information.

Brian DeGrosso: also abstained as he did not have the ability to make a decision at that time.

Motion was approved with 3 Ayes and two abstentions

Dr. Bernard Birnbaum: thanked RCS for their time and wished them luck on the next steps.

Action - Dr. Bernard Birnbaum motioned to move to executive session. Jennifer Lee seconded the motion. Dr. Tony J. Van Goor also seconded the motion.

Motion was approved unanimously

The public was asked to leave the meeting.

The Board returned from the executive session at 5:18pm. Dr. Bernard Birnbaum stated that Janna West-Kowlaksi had to leave prior to the meeting adjourning. Dr. Birnbaum stated that he supports the work that the Public Health Director is doing. He stated that he knows that the environment that we are in is politically charged right now in a way that he never imagined and that he is incredibly sad that people choose language of attack such as "fascism" or "tyranny" when they disagree with decisions. He stated that he supports the Public Health Director and that the Board will work with him. Jennifer Lee stated that she seconded what Bernie stated that she appreciates that the Public Health Director is still with the organization.

Action - Dr. Bernard Birnbaum motioned to adjourn the meeting. Dr. Tony J. Van Goor seconded the motion.

Motion was approved unanimously

The meeting adjourned at 5:20 p.m.

