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MEMORANDUM

TO: State Board of Education Members

FROM: Commissioner Richard Corcoran

RE: Broward County School District, Student Opt-Out Requirements

DATE: August 17, 2021

Based upon the attached memorandum, I find there is probable cause that the School Board of Broward County and the district's superintendent, Vickie Cartwright, acted contrary to the law, specifically, the provisions of 64DER21-12, Protocols for Controlling COVID-19 in School Settings and the Parents' Bill of Rights, found in ss. 1014.02-1014.06, Fla. Stat., by requiring students to wear a face covering or masking, unless certain exceptions apply, such as a medical certification or an IEP team recommendation, as provided in Broward County School Board Policy 2170 in order to opt-out of the district's mask mandate.

Background Information

On July 30, 2021, the Governor issued Executive Order Number 21-175, directing the Florida Department of Health and the Florida Department of Education to immediately execute rules and to take any additional action necessary to ensure safety protocols for controlling the spread of COVID-19 in schools. The executive order requires that these protocols be consistent with the Parents' Bill of Rights and directs that agency action "protect parents' right to make decisions regarding masking of their children in relation to COVID-19." Moreover, the order directs the Commissioner of Education to pursue all legal means available to ensure school districts adhere to Florida law, including but not limited to withholding state funds from noncompliant school boards...."

On August 6, 2021, in response to the executive order, and after consultation with the Florida Department of Education, the Florida Department of Health adopted an emergency rule establishing protocols for controlling the spread of COVID-19 in schools. The rule was adopted by the state's Surgeon General, Scott Rivkees, as the head of the Florida Department of Health. Given the statutory duty of the Florida Department of Health to implement protocols to prevent or limit the impact or spread of disease, the state's Surgeon General must be a licensed physician with advanced training or extensive experience in public health administration. (See Section

20.43(2), Fla. Stat.) The emergency rule provides for general protocols for public schools, protocols specific to symptomatic or COVID-19 positive students, protocols specific to students with exposure to COVID-19 and protocols for students with prior a COVID-19 infection. The general procedures for public schools are as follows:

- (a) Schools should encourage routine cleaning of classrooms and high-traffic areas.
- (b) Student should be encouraged to practice routine handwashing throughout the day.
- (c) Students should stay home if they are sick.
- (d) Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.**

See, 64DER21-12, Protocols for Controlling COVID-19 in School Settings, Florida Administrative Register, Vol. 47, No. 153 (August 9, 2021).

Citing to the Parents' Bill of Rights, the notice for the Department of Health's emergency rule provides that "it is necessary to immediately promulgate a rule regarding COVID-19 safety protocols that protects parents' rights and to allow for in-person education for their children."

Broward County School District

Broward County School District's Face Coverings Policy, 2170-E, provides as follows:

Subject to the exceptions set forth below, each student, employee, visitor, vendor or other person are always required to properly wear a face covering while at or inside a school/facility, or other vehicle owned, leased or operated by The School Board. . .

The policy provides for exceptions to the face covering policy for all persons as well as for students. All persons are exempt based upon medical certification, when outdoors with physical distancing, when necessary for identification or if the person is an infant. There are six exceptions to the mask requirement that are limited to students, such as when school administration or an IEP/504 team authorizes it, during meal times, during strenuous physical activity or during musical or theatrical performances. .

On August 10, 2021, I, as the Commissioner of Education, wrote Broward's superintendent and school board chair to notify the district in writing of my concern with the district's non-compliance with the Department of Health's emergency rule. This letter was sent only after multiple communications with the district, seeking to obtain compliance, were unsuccessful. My letter advised that the "emergency rule does not require parents to submit medical documentation from a physician or a nurse practitioner in order to opt-out [of a mask mandate] and any such requirement is inconsistent with the emergency rule." My letter quotes the emergency rule's requirement that any mandated mask policies imposed by a district or a school "must allow for a

parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.” In order to avoid implementing the State Board of Education’s enforcement authority, I directed that the school district demonstrate compliance by 5:00 p.m. on August 13, 2021

On August 10, 2021, the School Board of Broward County held a special meeting and voted eight to one to follow the Department of Health’s emergency rule, except for 64DER21-12(1)(d), which provides that a school must allow a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask. Instead, the district voted that face coverings would continue to be mandatory based on Broward’s Face Covering Policy 2170-E..

On August 13, 2021, Broward’s superintendent and school board chair responded to me in writing, expressing both disagreement with the Department of Health’s emergency rule and asserting that its policy is in compliance with the Department of Health’s emergency rule because Broward’s policy allows exceptions to the mask mandate.

The State Board of Education’s Enforcement Authority

The State Board of Education’s enforcement authority is found in Section 1008.32, Fla. Stat. The statute provides that “[t]he State Board of Education shall oversee the performance of district school boards...in enforcement of all laws and rules.”

The statutory process requires that I, as the Commissioner of Education, report my determination of probable cause to the State Board of Education. If the State Board of Education determines that a district is unwilling or able to comply with the law or state board rule, it is authorized to impose sanctions in order to secure compliance, including the withholding of funds and reporting to the legislature.

Any argument that the State Board of Education’s authority to enforce these safety protocols interferes with the school board’s authority to operate and control schools, should be rejected. The State Board of Education’s supervisory authority acts as a limitation on the operational authority of districts to operate, control and supervise public schools.

The Florida Constitution therefore creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole. This broader supervisory authority may at times infringe on a school board’s local powers, but such infringement is expressly contemplated – and in fact encouraged by the very nature of supervision by the Florida Constitution.

Sch. Bd of Palm Beach Cty. v. Fla. Charter Educ. Found, Inc., 213 So. 3d 356, 360 (Fla. 4th DCA 2017) (rejecting local school board’s argument that the State Board of Education’s authority to approve a charter school application on appeal violates article IX, section 4(b)); see, also, *Sch. Bd of Collier Cty v. Fla. Dep’t of Education*, 279 So. 3d 281 (Fla. 1st DCA 2019) (rejecting local school board’s argument that statute requiring school boards to distribute a portion of capital millage revenue to charter schools violates article IV, section 4(b) since state

constitution contemplates state educational authorities could infringe on school board's local powers).

Any argument that the State Board of Education lacks the authority to enforce these school safety protocols should also be rejected. It has long been settled that rules have the force and effect of the law. *State v. Jenkins*, 469 So. 2d 733 (Fla. 1985); *Florida Livestock Board v. W.G. Gladden*, 76 So. 2d 291 (Fla. 1954). The emergency rule derives its authority from a statute found in the educational code, specifically Section 1003.22(3), Fla. Stat. While the Florida Department of Health may also have enforcement authority, enforcement of school safety protocols falls squarely within the Florida Department of Education's authority to supervise the system as a whole.

Conclusion

Every school board member and every school superintendent have a duty to comply with the law, whether they agree with it or not. While the district may not agree with the safety protocols set forth by the Surgeon General in the emergency rule, the Surgeon General is the person who, under the law, sets protocols to control COVID-19 in schools.

As a result, I recommend that the State Board of Education use its enforcement powers to enforce the health protocols found in Emergency Rule 64DER21-12 and protect the right of parents to make health and educational decisions for their children.