

# School Board of Brevard County

2700 Judge Fran Jamieson Way • Viera, FL 32940-6601

Mark W. Mullins, Ed.D., Superintendent



October 6, 2021

Richard Corcoran  
Commissioner of Education  
325 W. Gaines Street  
Tallahassee, FL 32399-0400

Dear Commissioner Corcoran,

On October 5, 2021, the School Board of Brevard County, Florida ("School Board") met to discuss the new FDOH Emergency Rule approved on September 22, 2021, along with the Board's emergency face-covering policy. Given the Florida Department of Health's ("FDOH") new emergency rule, the Board needed to address the face-covering policy as a collective Board to determine if the new rule had changed anyone's perspective. On October 5, 2021, the Board voted three (3) votes to two (2) to continue the face-covering policy requiring face coverings with enumerated exceptions. One point of clarification that needs to be addressed from the outset is that Dr. Mark Mullins, Superintendent of Schools, has made no recommendation to the Board to implement a face-covering policy. Therefore, the decision to implement the policy was made by a majority of the School Board alone.

The Florida Department of Health ("FDOH") and the Commissioner of Education cite Section 1003.22(3), Florida Statutes for the authority to implement the Emergency Rule by FDOH. Section 1003.22(3), Fla. Stat., allows adoption of rules by the FDOH, after consultation with the FDOE, to enforce "this section." 1003.22, Fla. Stat., deals with "School-entry health examinations; immunization against communicable diseases; exemptions; duties of Department of Health." Subsection 3 of 1003.22, Fla. Stat., which is specifically cited, further details children's immunizations and exemptions. 1003.22, Fla. Stat., fails to mention the ability of FDOH to adopt rules to protect the rights of parents as provided by the legislature in the Parent Bill of Rights, Florida Statute Chapter 1014 (created by HB 241 during the 2021 legislative session). As such, reliance upon 1003.22, Fla. Stat., in authorizing the FDOH emergency rule is misplaced. Parents have the direct right to challenge actions that purportedly violate the Parent Bill of Rights by challenging whether a school district's action satisfies the requirements of Section 1014.03, Fla. Stat., which provides:

**"[I]nfringing on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child **without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by less restrictive means.**"**

Just as Judge Cooper determined in *Scott v. DeSantis*, Case No. 2021-CA-001382, there is a process if someone wishes to challenge whether the school districts have complied with the statute.

Misty Belford, Chair  
Board Member, District 1

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Despite the *Scott* case being on appeal before the First District Court of Appeal, a Florida Judge is on record finding that “the Governor nor the executive agencies are permitted to substitute their judgment for the legislature nor can they perform the function of the legislature.” *See Judge Cooper Order at page 14 attached as Exhibit 1.* While Judge Cooper’s Order may be stayed and ultimately may be overturned, unless it is overturned on the legal analysis you still have a Florida Judge that has determined:

“[t]he Parents’ Bill of Rights expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school, even if the policies affect a parents’ rights to make decisions in these areas. However, the statute requires the governmental agency to show that the policy is reasonable and necessary to achieve a compelling state interest, and that the policy is narrowly tailored and not otherwise served by a less restrictive means.

There is no prohibition in the Parents’ Bill of Rights against schools adopting mandatory face mask policies without a parental opt-out so long as the policy is reasonable and otherwise complies with the provisions of the law.”

Judge Cooper continues the decision by finding:

“The Defendants do not have authority under this law to enforce a before the fact of policy adoption blanket mandate against a mandatory face mask policy by a local school board.”

*Exhibit 1 at 18.*

The School Board has closely monitored the progress in the District regarding the District's Covid related numbers moving down. Friday, October 1, 2021, was the first time since the summer that Brevard Public School’s Covid numbers were lower than the Covid numbers for Brevard County, despite the school district making up only 11% of the County population. Yet, as provided in our September 8, 2021 response, the District's numbers were 31% of the County's cases. This resulted in the face-covering requirements because the rates were unsustainable and would have led to school closures. School closures run contrary to the legislature's expressed desire to keep schools open at all costs if the students and staff can be safe by using recommended mitigation measures of federal or state health agencies. *See Section 252.36, Fla. Statutes.*

Furthermore, the DOE’s Emergency Order 2020-EO-06, determined:

“...extended school closures can impede educational success of students, impact families’ well-being and limit many parents and guardians from returning to work;and...schools provide many services to students that are critical to the well-being of students and families, such as nutrition, socialization, counseling, and extra-curricular activities; and ...school openings must be consistent with safety precautions as defined by the Florida Department of Health, local health officials and supportive of Floridians, young and adult, with underlying conditions that make them medically vulnerable.”

*See DOE Emergency Order 2020-EO-06 attached hereto as Exhibit 2.* Moreover, on April 14, 2021, the Commissioner of Education sent a Memorandum to School District Superintendents advising that “[r]ight now, our schools are safer than the communities at large.” *See Memorandum to School Superintendents from Richard Corcoran attached as Exhibit 3.* This is not true of Brevard when the School Board enacted our face-covering policy. We have detailed this through the table below that we have expanded upon since the September 8, 2021 response letter. Brevard’s public schools have outpaced our community at large in Covid related cases since school started back. That is until October 1, 2021, when Brevard’s public schools finally

dipped below the community’s numbers for the first time since school started. This fact prompted a majority of the School Board to implement the face-covering policy and was the driving force in continuing the policy to date.

The School Board continues to believe that it complies with Florida Statutes in maintaining its face-covering policy. Specifically, Section 1014.03, Fla. Stat., cited and quoted above, authorizes infringing on the rights enumerated in the Parent Bill of Rights if the compelling state interest requirements are met. The School Board’s initial response to the Commissioner of Education detailed the School Board's basis in implementing the face-covering requirement. That response was provided in the probable cause findings against the School Board, and the essential arguments have not changed, though the data has moved closer to the measurable point the School Board is utilizing (spread per 100,000 people).

First, the School Board maintains that its actions are reasonable and necessary to achieve a compelling state interest. The protection of students and staff's health, safety, and welfare in the School Board’s facilities is of utmost importance and has long been held to be a compelling state interest. Universal masking when social distancing cannot be achieved is the only mitigation measure available to slow (not prevent) the spread outside of vaccines. As vaccines are not available to all students, vaccines are an incomplete mitigation measure at best. Even if face-coverings are only minimally effective, they are still a reasonable measure to protect those students who cannot be vaccinated especially when our numbers have far outpaced the counties' numbers at large. Based upon our local FDOH personnel and other local health experts, we expect to see a reflection of our community in our schools. However, as the chart provides, there was no reflection as we shattered the community trends. As masks are the only available universal mitigation strategy for all of our students, it is as narrowly tailored as is possible and is the least intrusive measure. The Board further reviews this every thirty (30) days, essentially every other Board meeting.

<b>COVID-19 Case Positivity Rate Per 100,000 Individuals</b>		
<b>Timeframe</b>	<b>Brevard County</b>	<b>Brevard Public Schools</b>
<b>Week Before School Started – July 30-August 5</b>	627.6	221
<b>First Week of School – August 6- 12</b>	710.7	789
<b>Second Week of School – August 13-19</b>	744	1,275
<b>Third Week of School – August 20-26</b>	735.9	1,980
<b>Fourth Week of School – August 27-September 2</b>	602.3	1,365
<b>Fifth Week of School – September 3- 9</b>	420.8	764
<b>Sixth Week of School – September 10-16</b>	351.1	445
<b>Seventh Week of School – September 17-23</b>	199	213
<b>Eighth Week of School – September 24-30</b>	126.3	96

The School Board has also authorized the Superintendent to immediately move to a parent opt-out upon the County hitting the “moderate” spread rate per the Centers for Disease Control (“CDC”), 50 cases per 100,000 individuals. Further discussion of the Board encompassed that should the definition change, from 50 to 100, for example, the measure would also change. Nonetheless, all of the measures available indicate Brevard County and Brevard public schools are still at a “high” transmission rate as defined by the CDC.

However, the School Board still believes the requirements for establishing a compelling state interest as specified in 1014.03, Fla. Stat., are satisfied. The School Board further believes that removing the quarantining of asymptomatic students who the school knows have been in contact with Covid positive cases

leaves only one mitigation measure available for all students, face-coverings. Asymptomatic individuals who are Covid positive can shed the Covid virus just like a symptomatic individual. As the new quarantine rules have only recently gone into effect, and our numbers indicate that the vast majority of parents are sending asymptomatic students to school, the School Board has no way to measure what impact this could have on our schools' cases. Face-coverings, even if only ten (10), fifteen (15), or twenty (20) percent effective, will still slow the spread of the virus and provide some mitigation protection for students and staff in the school environment. Outside of the availability of vaccines, that is the only reasonable protection measure left to schools when schools are no longer allowed to move students who are or are likely to develop Covid from a contact to a case situation.

Finally, the School Board wishes to address the pursued remedy from the Commissioner of Education. Individual board members do not have any independent authority to override an official action taken by the majority of the Board. As such, the request to penalize all board members by taking their salary is unreasonable and entirely unsupported. The enactment of the face-covering policy was by a majority vote of the School Board. The initial implementation of the School Board's emergency policy was by a 3 to 2 vote, and each vote on the issue since has been a 3 to 2 vote with consistent member votes on either side of the contested issue. Therefore, taking action and **personally** penalizing board members who have not supported the face-covering policy is not justified or supported by probable cause.

### Conclusion

In light of the updated localized data presented above (as well as presented in our September 8, 2021 response), we hope you agree that the School Board initiated the face-covering policy based upon an alarming pace of cases and quarantines signaled an unsustainable school crisis. Further, the School Board has continued to track the data and determine the issue every 30 days, which requires a review every other Board meeting. These facts demonstrate good faith compliance<sup>1</sup> with the Parent Bill of Rights, and as such, the School Board requests the State Board of Education and FDOE withhold any enforcement action or further investigation.

Sincerely,



Misty Belford, Chair  
School Board Brevard County



Paul Gibbs, General Counsel  
School Board Brevard County

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<sup>1</sup> Notwithstanding the positions presented herein, the School Board hereby reserves its right to present any additional or alternative arguments or defenses at any subsequent legal proceedings.

# **EXHIBIT 1**

Filing # 133961523 E-Filed 09/02/2021 03:49:20 PM

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA  
CIVIL DIVISION

ALLISON SCOTT, individually and on behalf of W.S., a minor; LESLEY ABRAVANEL and MAGNUS ANDERSSON, individually and on behalf of S.A. and A.A, minors; KRISTEN THOMPSON, individually and on behalf of P.T., a minor; AMY NELL, individually and on behalf of O.S., a minor; DAMARIS ALLEN, individually and on behalf E.A., a minor; PATIENCE BURKE, individually and on behalf of C.B., a minor; and PEYTON DONALD and TRACY DONALD, individually and on behalf of A.D., M.D., J.D., and L.D., minors,

Case No.: 2021-CA-001382

Plaintiffs,

v.

GOVERNOR RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and FLORIDA BOARD OF EDUCATION,

Defendants.

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**FINAL JUDGMENT**

This case came before this Court for a non-jury trial from August 23 -26, 2021. A verbal ruling was announced on August 27, 2021.

"Under the American System of laws and government every one is required to so use and enjoy his own rights as not to injure others in their rights or to violate any law in force for the preservation of the general welfare." State ex rel. Hosack v. Yocum, 186 So. 448,451(Fla. 1939)(citing from Dutton Phosphate Co. v. Priest, 65 So. 282, 284-85 (Fla. 1914)(emphasis supplied). "The wisdom and necessity, as well as the policy, of a statute are authoritatively determined by the Legislature. Courts may inquire only into the power of the Legislature to lawfully enact a particular statute." Id.

These two quotes from the Florida Supreme Court over 100 years ago describe the balancing of ones own rights with the rights of others, and that, when considering separation of powers, courts may properly consider whether a law (and as a logical extension of this quote an executive action) was lawfully enacted or exercised. A governor's executive order and an agency's actions must be based on authority granted to them by the Constitution or the Legislature. Executive power exercised without authority is illegal, null and void, and unenforceable.

### **Incorporation of Verbal Order**

This Court's findings and conclusions of law are listed verbatim in the attached transcript of the Court's verbal ruling on August 27, 2021, as Exhibit "A", which is incorporated by reference in this Final Judgment.<sup>1</sup>

### **Issues and Background**

The issues in this case are formed by the pleadings, the evidence presented, the statements and contentions of the parties in the pleadings and at trial.

Before this Court, is a dispute between the Governor, the Florida Commissioner of Education, the Florida Department of Education, and the Florida Board of Education (the Defendants) and parents and students in the Florida public school system (the Plaintiffs).<sup>2</sup> The dispute is whether state law permits local school districts in Florida to adopt and enforce a face mask mandate for students, teachers, and staff. This dispute arises out of the

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<sup>1</sup>As indicated at the hearing on August 27, 2021, this Court's verbal order would be close to a final order that could be used by the parties preparing the order as a guideline. This Court has received a proposed Final Judgment from the Plaintiffs and comments by the Defendants. After reviewing these, this Court will write its own order and will take into account any portions of the proposal/comments that are applicable. The verbal order was lengthy. Because of the pressing need to reduce the verbal ruling to a written order, this Court will do its best to include all the rulings. However, the complete transcript attached hereto is a more complete recitation of the ruling.

<sup>2</sup>The trial transcript will list the Plaintiffs dismissed by the Court who failed to put on any evidence to support their standing. As to the Plaintiffs not dismissed during the trial, this Court found that they had standing and reaffirms that finding here.



opening of public schools for the new school year and the increasing COVID crisis in Florida. This has resulted from the less than complete vaccination of the population in Florida and the dominance of a COVID virus variant referred to as the Delta variant. The Delta variant has a higher viral load and is more contagious than the form of COVID present in Florida in 2020. Also, the Delta variant presents a higher risk of infection to children than did the previous form of COVID. The combination of lack of vaccination, decreasing social distancing, and the Delta variant has resulted in dramatically increased COVID infections in Florida over the past several months. Although vaccinated persons have significant protection against the Delta variant, they can still become infected with it. As a result, the CDC (Centers for Disease Control), the American Academy of Pediatrics, and the wide majority of the medical and scientific community in this country recommend universal indoor masking for all school students, staff, teachers, and visitors to K-12 schools regardless of vaccination status and social distancing.

On April 14, 2021, Commissioner Corcoran sent a memorandum (Defendants' Exhibit 45) to School Superintendents requesting that they not implement a mandated mask policy. He said, "we ask that districts, which currently are implementing a mandated face covering policy, revise their

policy to be voluntary for the 2021-2022 school year.” Based on this memorandum, this Court concludes that the issue of voluntary versus mandated face mask policies was being considered at least as early as April of 2021. At that time, the Delta variant of COVID had not hit in Florida with full force. It seems that the policy mentioned in the April 14, 2021, memorandum was focusing on the former less infectious form of COVID.

In late June 2021, the Governor declared there was no longer a state of emergency in Florida. He did this by allowing the time-limited declaration of state of emergency order to lapse without renewal. Consequently, his emergency powers under Chapter 252, Florida Statutes expired at that time.

On July 27, 2021, the Governor held a Round Table Meeting on face mask policy in schools. The video of that meeting was introduced into evidence and published at the trial. It was noted at the August 27, 2021, verbal ruling according to this Court’s notes and memory, that the participants at this meeting were the Governor, two charter school representatives, a high school student, and some doctors. One of the doctors present was Jayanta Bhattacharya, M.D., Ph.D., who also testified at trial. No Round Table participant proposed a face mask mandate with no parental opt-out. All participants present proposed or suggested a parental opt-out policy. No one

advocated for any CDC recommended policy or guideline. In its verbal ruling, this Court provided additional detail of statements and positions taken at the Round Table meeting.

On July 30, 2021, the Governor issued Executive Order 21-175, which continued the formulation of a policy and the enforcement of that policy by the Defendants that local school districts in Florida could not adopt a face mask mandate unless it allowed a parental opt-out.<sup>3</sup> The Parents' Bill of Rights was the keystone of this policy and its enforcement.

The Executive Order went on to direct certain actions (which were premised on enforcing the Parents' Bill of Rights) which would result in a blanket banning - in advance of all school board mask mandates with no parental opt-out. The apparent way to accomplish this was to institute a policy that would likely result in a violation of the Parents' Bill of Rights.<sup>4</sup>

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<sup>3</sup>This is reflected in the Defendants' Seventh Affirmative Defense which said, "the Parents' Bill of Rights precludes school boards from implementing categorical mask mandates that do not allow parents to opt their children out of the requirement."

<sup>4</sup>The Defendants contended that "[t]he Executive Order requires that any rules adopted by either agency be in accordance with the Parents' Bill of Rights and tasks the Commissioner of Education with ensuring school districts adhere to Florida law." Defendants' Motion to Dismiss, p. 8. In their Motion to Dismiss, p.14, the Defendants contended that "the State Board can \*\*\* enforce the Rule and the Parents' Bill of Rights through its discretionary application of its statutory enforcement powers under Section 1008.32, Florida Statutes." Finally, the Defendants contended in their Motion to Dismiss, p. 31, that under the Bill of Rights "parents - not school - boards have the discretion to choose whether their children will wear masks in school."

The Executive Order specifically directed the Florida Department of Health and the Florida Department of Education to work together to immediately adopt rules and take any additional agency action necessary to ensure safety protocols for controlling the spread of COVID. This direction was interpreted by the agencies as a direction to pass a rule to put into effect Executive Order 21-175, which they did. The Florida Department of Health, after consultation with the Florida Department of Education, passed an emergency rule (64DER21-12) which said that "[t]his emergency rule conforms to Executive Order Number 21-175", and incorporated the Executive Order by reference. The Department of Health rule directs "that any COVID-19 mitigation actions taken by school districts comply with the Parents' Bill of Rights, and 'protect parents' right to make decisions regarding masking of their children in relation to Covid-19." The record in this case demonstrates that the Executive Order had two functions : (1) prohibit mask mandates by public schools that do not have a parent opt-out, and (2) enforce this policy by using the Parents' Bill of Rights.

Among its general protocols for controlling COVID spread, the emergency rule states that "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.”<sup>5</sup> This accurately reflects the Defendants’ position and actions, and is the direct result of the Executive Order.

In addition, the Defendants have acted to threaten and impose sanctions on school districts if they do not comply with the Defendants’ directions.<sup>6</sup> “The Executive Order tasks agencies to draft rules and the State Board to enforce the laws and rules.” (Defendants’ Motion to Dismiss, p. 31).

Thus, the Governor, the Commissioner, the Florida Department of Education, and the Florida Board of Education (by seeking to threaten enforcement of the Executive Order) have directed that school boards may not under any circumstances enact a face mask mandate unless it includes an opt-out provision for the parents pursuant, they say, to the Parents’ Bill of Rights.<sup>7</sup> The Executive Order was issued for the purpose of using the Parents’ Bill of Rights to block all no parent opt-out face mask mandates, and

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<sup>5</sup>The Defendants’ Motion to Dismiss, at p. 33, said, “[n]either the Executive Order nor the Rule require that unvaccinated or non-masked students attend school. Rather, they seek to ensure that school boards are complying with the Parents’ Bill of Rights - leaving the decision of masking of children to the children’s parents.”

<sup>6</sup>The Defendants confirmed by stating at p. 31 of their Motion to Dismiss, “school boards still have the option - albeit with consequences - to categorically mandate masking without exception.”

<sup>7</sup>The Department of Health issued its rule after consulting with the Department of Education. The rule confirms this consultation and the Defendant accept this by stating in their Motion to Dismiss, at p.9, “[i]n accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated the Rule.”

to put into effect the policies raised in the April 14, 2021, memorandum and the July 27, 2021, Round Table meeting.

The Plaintiffs contend, for various reasons set forth in the pleadings, the evidence, the attorneys' presentations in the motion to dismiss hearing, and at trial, that the Executive Order, which directed and became incorporated into the expressed per se no exceptions anti-mask mandate with no parental-opt out, is unconstitutional, illegal, without authority, and unenforceable. The enforcement action of the Defendants (per the August 20, 2021, press release from the Department of Education) noted both the executive order and the Department of Health rule it directed. It said each order (Executive Order and Department of Health rule) requires school districts to document compliance with the Parents' Bill of Rights and the Department of Health rule. Even after the Department of Health rule was adopted, the Department of Education and the State Board of Education are using the Executive Order and the Parents' Bill of Rights to enforce the no mask mandate without a parent opt-out policy.

The parties have called on this Court for a resolution to their dispute.

#### **Count I - Safe Schools**

This Court does not grant relief pursuant to Count I because the proof does not rise to the level required by the decision in DeSantis v. FEA, 306

So.3d 1202 (Fla. 1<sup>st</sup> DCA 2020), and other cases discussing the burden of proof for claims in such cases. There is at least some dispute in the medical community on the issue of masking, therefore, the decision in DeSantis v. FEA mandates a finding by this Court that the burden of proof has not been met for relief.<sup>8</sup>

## **Count II - Home Rule**

### **School Board Control And The Constitution**

There has been discussion for many years in many cases regarding the sometimes competing roles of the local school board and the State of Florida in operating public schools.

For example, Article IX, Section 4(b) of the Florida Constitution says in pertinent part: "The school board shall operate, control and supervise all free public schools within the school district."

Yet the Florida Supreme Court in Citizens for Strong Schools v. Florida State Board of Education, 262 So.3d 127, 137 (Fla. 2019) quoted from an earlier decision in Coalition v. Chiles, 680 So.2d 400, 408 (Fla. 1996), "[w]e

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<sup>8</sup>In this case, the evidence clearly demonstrated that the recommendation of the CDC for universal masking of students, teachers, and staff represents the overwhelming consensus of scientists, medical doctors, and medical organizations. However, the Plaintiffs failed to disprove that there is at least some dispute within the medical community on the issue of masking.

hold that the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools." In Coalition and Citizens, the Court dealt with a claim that the Legislature had failed to sufficiently fund the public schools. In general, funding decisions by the Legislature have been granted substantial deference by the appellate courts of Florida. However, the issue here is not whether the State has adequately funded the school system.

Last year the First District Court of Appeal said: "whatever the outcome of Appellees' lawsuit, the choice of how to deliver education to students remains with Florida's school boards". DeSantis v. FEA, 306 So.3d 1202, 1214 (Fla. 1<sup>st</sup> DCA 2020). Although the State retains responsibility for establishing a system of public education through laws, standards, and rules to assure efficient operation of a system of public education, the state constitution states that each county constitutes a school district. Responsibility for the actual operation and administration of all schools within the districts are delegated by law to the school boards of the respective districts. In this regard, all public schools conducted within the district are under the direction and control of the district school board. 46 Fla. Jur. 2d Schools, Universities, and Colleges §19. Although subject to the Parents' Bill



of Rights, the setting of local policies for health and safety of students substantially remains a local function. Florida is a large state including small rural counties to large densely populated counties. What is appropriate in one county may not be appropriate in another county. Thus, a one-size-fits-all policy for student health and safety as dictated by Tallahassee seems to run contrary to Article IX, Section 4(b) of the Florida Constitution. However, the passing of the Parents' Bill of Rights and other case law in Florida does not make it sufficiently clear that the issue presented in this case is not clearly, strictly, and solely a local issue with no right of the State to intervene. There exist cases which seem to validate State imposed laws regulating teachers and imposing certain obligations on local school boards regarding charter schools.

Therefore, I cannot find that the law of Florida clearly sets forth the issues in this case as solely local. Thus, this Court finds and **DENIES** relief to the Plaintiffs on Count II of the Complaint.

### **Counts III and IV**

This Court grants relief with respect to Counts III and IV for the reasons announced at the August 27, 2021, hearing and this Final Judgment.

### **Separation of Powers**

The Defendants argue that the Plaintiffs seek relief that would violate the doctrine of separation of powers. This doctrine is set forth at Article II, Section 3 of the Florida Constitution. It provides that the powers of government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided. As it relates to the powers of the judiciary, the separation of powers concept stands for the proposition that the judicial branch must not interfere with the authorized discretionary functions of the legislative or executive branches of government absent violation of constitutional or statutory rights. 10 Fla. Jur. 2d Constitutional Law §158; and Florida Department of Children and Families v. J.B., 154 So.3d 479, 481 (Fla. 3d DCA 2015)(finding that "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights"); see also Forney v. Crews, 112 So.3d 741, 743 (Fla. 1<sup>st</sup> DCA 2013) (finding that the court cannot dictate the operation of the state prison system "so long as no statute or constitutional requirement is violated."). The courts will not substitute their judgment with reference to matters properly within the domain of the legislative and executive branches of government.

Likewise, neither the Governor nor the executive agencies are permitted to substitute their judgment for the legislature nor can they perform the function of the legislature. By the assertion of separation of powers as an affirmative defense in this case, the Defendants must show that the actions challenged (here, the Executive Order, the blanket prohibition of mask mandates that do not include a parental opt-out, and related enforcement actions) are within the powers of the Defendants as provided by the Constitution or by the Legislature.

Here, the Defendants argue that they are entitled to deference provided by the separation of powers doctrine because they were exercising their authority to act. This is something they must prove. If their actions are not authorized by the Constitution or the Legislature, then they have no authority to take that action, they are not protected by the separation of powers doctrine, and their actions are invalid as being taken without authority. In DeSantis v. FEA, 306 So.3d 1202 (Fla. 1<sup>st</sup> DCA 2020), the First District Court of Appeal held that the Governor was acting in accordance with his emergency powers pursuant to Fla. Stat. §252.36(1)(b) because he declared a state of emergency to address the COVID pandemic. Thus, the

Governor had authority under the declared state of emergency to “issue executive orders to address a pandemic in accordance with the Act.”

In this case, however, the state of emergency lapsed in June 2021, before Executive Order 21-175 was issued. Thus, the Governor did not have emergency powers pursuant to Chapter 252, Florida Statutes. Because the Governor had no emergency powers, he and the other Defendants must look to some other authorization in statute or the Constitution to provide them authority to enforce a blanket ban of mask mandates without a parental opt-out. The Defendants have not shown any convincing authority in the Constitution or any statute. However, they cite the Parents' Bill of Rights as their authority. If Defendants do not show that they had authority to issue the Executive Order, take the actions it called for, and all the things that it led to, the Defendants do not have a separation of powers defense. Thus, the Executive Order and the actions taken as a result are without authority and are null and void.

### **Political Question**

The political question affirmative defense is a form of separation of powers, therefore, the above analysis applies here. As the First District noted in DeSantis, 306 So.3d at 1214, “the nonjusticiability of a political

question is primarily a function of the separation of powers." The political question doctrine must be cautiously invoked, and the mere fact that a case touches on the political process does not necessarily create a political question beyond the Court's jurisdiction. 10 Fla. Jur. 2d Constitutional Law §157. If the Defendants' Executive Order and related actions are ultra vires (i.e., without authority in law) they are without legal basis and therefore null and void. Thus, the defenses of separation of powers or political question are not available. As will be further discussed in this Final Judgment and noted herein, I find that the Defendants have not proven sufficient authority for the Executive Order, their anti-mask mandate policy, and the enforcement actions for them to be entitled to the defenses of Separation of Powers and Political Question.

### **Parents' Bill of Rights And Additional Rulings**

As the case has proceeded, the Parents' Bill of Rights and its use to effect the Defendants' anti-mask mandate has become a focal point.

The Parents' Bill of Rights (Fla. Stat. §§ 1014.01-06) (2021) was passed by the Legislature and signed by the Governor. It took effect July 1, 2021. No party has challenged the constitutionality of this statute. This Court has found no appellate opinion that discusses this new law.

The provision of the law that is most relevant to this case is: Fl. St. §1014.03, which says in pertinent part, no "governmental entity ... may... infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means." (emphasis supplied).

It seems that the Defendants are relying only on the first portion of Fla. Stat. §1014.03 that prohibits infringement on parents rights, but ignoring the remaining portion of the section which provides that infringement may occur if the action is reasonable and necessary to achieve a compelling state interest and that the action is narrowly tailored and is not otherwise served by a less restrictive means. In plain English, this law says that the government cannot interfere with parental rights regarding education and health care unless there is a reasonable basis to do so and that the remaining elements of Fla. Stat. §1014.03 are met.

This law does not make invalid various laws in Florida that do affect parents rights to direct health care of children. Examples are Fl. Stat. §1003.22(3) which mandates vaccines for specific diseases prior to school

admittance, and Chapter 39 of the Florida Statutes which sets forth procedures in Child Dependency cases to provide for the care, safety, and protection of children.

The Parents' Bill of Rights expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school, even if the policies affect a parents' rights to make decisions in these areas. However, the statute requires the governmental agency to show that the policy is reasonable and necessary to achieve a compelling state interest, and that the policy is narrowly tailored and not otherwise served by a less restrictive means.

There is no prohibition in the Parents' Bill of Rights against schools adopting mandatory face mask policies without a parental opt-out so long as the policy is reasonable and otherwise complies with the provisions of the law. The Defendants do not have authority under this law to enforce a before the fact of policy adoption blanket mandate against a mandatory face mask policy by a local school board. This statute does not support a state-wide order or action interfering with the constitutionally provided authority of local school districts to provide for the safety and health of the children based on the unique facts on the ground in a particular county. As stated in this Final

Judgment the Parents' Bill of Rights statute does allow a challenge of a policy and a requirement that the school demonstrate the reasonableness requirements of the statute.

The law of Florida does not permit the Defendants to punish school boards, its members, or officials for adopting face mask mandates with no parental opt-outs if the school boards have been denied their due process rights under the Parents' Bill of Rights to show that this policy is reasonable and meets the requirements of the statute. If the Defendants act to deny the school districts their due process rights provided by the statute, as is the case if the Defendants strictly enforce the Executive Order, the Department of Health rule, or any other policy prohibiting mask mandates without a parental opt-out, then they are acting without authority and are refusing to comply with all provisions of the law.

Therefore, the Parents' Bill of Rights permits local school boards to enact policies relating to health care and education, including mask mandates. The school boards are not required to secure permission in advance to adopt a policy. To do otherwise would submit local schools to endless court suits and/or administrative hearings on innumerable local policy decisions. If there is an objection to a school board adopted policy by a



parent or the Department of Education, those objecting must initiate an authorized proceeding at which it may be demonstrated that the policy is reasonable and necessary to achieve a compelling state interest, that it is narrowly tailored, and is not otherwise served by a less restrictive means.

By passing the Parents' Bill of Rights, the Florida Legislature necessarily recognized the importance of parental rights. But it also recognized that parents' rights are not immune to some reasonable limitation depending upon safety and reasonableness and compelling state need regarding health care or condition of the child.

The standard of proof a school board must meet is reasonableness. The school board is not required to establish that its policy is the best or only policy available or that the policy might be disagreed with by others.

A school district which adopts a policy (such as a mask mandate) is acting within the discretion given to it by the Legislature in the Parents' Bill of Rights. So long as the requirements provided for in the Parents' Bill of Rights are met, the doctrine of separation of powers requires that the discretionary power exercised by the school board cannot be interfered with by the judiciary or executive branch of government, and neither the judiciary nor the executive can substitute their judgment for that of the school board.

The purpose of the Executive Order and the actions it set in motion were to prohibit local school boards from adopting face mask mandates that did not include a parental opt-out provision. The Defendants have contended by their actions and positions in this case that the Parents' Bill of Rights authorizes them to enforce a blanket prohibition against mask mandates. The Defendants have additionally used threats of enforcement and have engaged in enforcement actions generated as a result of the Executive Order to enforce this blanket prohibition. The Defendants contend that the Parents' Bill of Rights as referenced in the Executive Order authorized the enforcement actions against school boards that adopted face mask mandates with no parent opt-out provision.

The Defendants' assertion in this regard is incorrect because the Parents' Bill of Rights does not ban school board face mask mandates. The statute expressly permits school boards to adopt policies regarding the healthcare of students (such as a face mask mandate) even if a parent disagrees with the policy. The statute requires only that the policy be reasonable, is necessary to achieve a compelling state interest, and be narrowly tailored and not otherwise served by a less restrictive means. The actions of the Defendants do not pass constitutional muster because they

seek to deprive the school boards in advance and without their right to show reasonableness of such a policy. The statute does not require that the school board secure permission for adopting a policy in advance. It only requires in the instance of a policy challenge, that the school board, has a burden to prove its policy's validity under the guidelines of the statute.

Therefore, an executive order and/or action or agency action which bans under all circumstances a face mask mandate for school children does not meet constitutional muster because such action exceeds the authority given to the Governor and the other Defendants under the Parents' Bill of Rights. Seeking to enforce a policy through the Executive Order and through actions that violate the provisions of the Parents Bill of Rights is arbitrary and capricious because there is no reasonable or rational justification for a violation of this statute. A policy or action which violates the Parents' Bill of Rights cannot be lawfully enforced by the Defendants.

Further, an Executive Order and/or agency action, such as a blanket ban of a face mask policy, denies school boards their right to show reasonableness, which violates the Parents' Bill of Rights, exceeds any authority to issue the order or take the action to the extent it sets in motion or causes a violation of the Parents' Bill of Rights and exceeds the authority of

the Defendants granted to them by the Parents' Bill of Rights. Such action is arbitrary, unreasonable, and violates the separation of powers doctrine because it would exceed the powers granted by the Legislature in the Parents' Bill of Rights as discussed in this Final Judgment.

### **Count V - Department of Health Rule**

The Defendants' Motion for Involuntary Dismissal as to Count V is granted because the Plaintiffs did not sue the Department of Health and it is an indispensable party to that count. The Court cannot take any action that affects the Department of Health because it is not a party to this suit. Therefore, this Court cannot issue an order to the Department of Health ordering it to strike its rule. However, this ruling does not limit the Court from enjoining or otherwise prohibiting the Defendants from engaging in actions that violate the Parents' Bill of Rights.

### **Count VI - Injunctive Relief**

As stated at the August 27<sup>th</sup> hearing, this Court declines to grant an injunction against the Governor. This Court is not granting an injunction against the Governor because the other Defendants are primarily involved in the enforcement actions on a day-to-day basis against local school boards. However, this Court does issue a permanent injunction and enjoins the

remaining Defendants ("Enjoined Defendants") from violating the Parent's Bill of Rights.

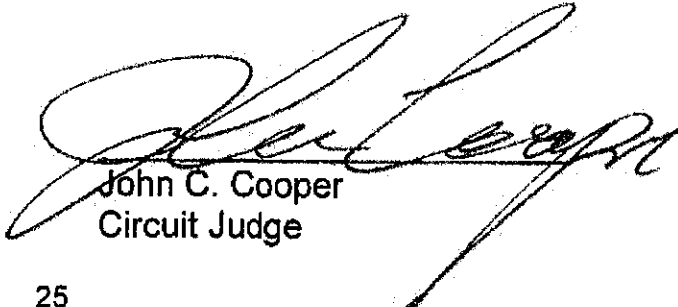
The "Enjoined Defendants" are ordered not to violate the Parents' Bill of Rights by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the school boards their due process rights granted by the statute which permits them to demonstrate the reasonableness of the mandate and the other factors stated in the law. I also enjoin the "Enjoined Defendants" from enforcing or attempting to enforce the Executive Order and the policies it caused to be generated and any resulting policy or action which violates the Parents' Bill of Rights as outlined in this Final Judgment. In granting this injunction I find that the act or conduct to be enjoined (violation of the Parents' Bill of Rights) is a clear legal right, there is no adequate remedy at law, and relief is necessary to prevent an irreparable injury. In this case irreparable injury is demonstrated by the increased risk of Delta variant infection (as demonstrated by CDC guidance and medical evidence in the record) if universal face mask mandates are blocked in violation of the Parents' Bill of Rights. A continuing constitutional violation is in and of itself irreparable harm. Board of County Commissioners v. Home

Builders Association of West Florida, 2021 WL 3177293, at \*3 (Fla. 1<sup>st</sup> DCA July 28, 2021).

This Court notes that it is not enjoining the enforcement of the Parents' Bill of Rights, so long as the complete statute is enforced without omitting portions of it. Defendants can enforce the Parents' Bill of Rights but must do so in accordance with the terms of the law and allow a due process proceeding to permit the local school boards to meet their burden under the statute.

Local school boards can adopt policies dealing with the health and education of school children, and to the extent that those policies may affect parents' rights to control their children's education or health, then, it is incumbent on the school board, if challenged to demonstrate its policy's reasonableness along with the other factors required by the Parents' Bill of Rights.

**Done and Ordered** in Tallahassee, Leon County, Florida this 2<sup>nd</sup> day of September 2021.

  
John C. Cooper  
Circuit Judge

**Copies to:**

**All Counsel of Record**

1           IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
 2           OF THE STATE OF FLORIDA, IN AND FOR LEON COUNTY  
 3                           CIVIL DIVISION  
 4                           Case No.: 2021-CA-001382

5           ROBIN MCCARTHY and JOHN MCCARTHY,  
 6           individually and on behalf of L.M., a minor;  
 7           ALLISON SCOTT, individually and on behalf of  
 8           W.S., a minor; LESLEY ABRAVANEL and  
 9           MAGNUS ANDERSSON, individually and on  
 10          behalf of S.A. and A.A., minors; KRISTEN  
 11          THOMPSON, individually and on behalf of P.T.,  
 12          a minor; AMY NELL, individually and on behalf  
 13          of O.S., a minor; EREN DOOLEY, individually  
 14          and on behalf of G.D., D.D., and F.D., minors;  
 15          DAMARIS ALLEN, individually and on behalf of  
 16          E.A., a minor; PATIENCE BURKE, individually  
 17          and on behalf of C.B., a minor; and PEYTON  
 18          DONALD and TRACY DONALD, individually  
 19          and on behalf of A.D., M.D., J.D., and L.D.,  
 20          minors,

21                           Plaintiffs,

22                           vs.

23          GOVERNOR RON DESANTIS, in his official  
 24          capacity as Governor of the State of Florida;  
 25          RICHARD CORCORAN, in his official capacity  
 as Florida Commissioner of Education; FLORIDA  
 DEPARTMENT OF EDUCATION; and  
 FLORIDA BOARD OF EDUCATION,  
 Defendants.

E X C E R P T

TRIAL BEFORE THE HONORABLE JOHN C. COOPER  
 (Conducted via Videoconference)

DATE:                   August 27, 2021  
 TIME:                   10:22 a.m. to 12:34 p.m.  
 REPORTED BY:          Deborah W. Gonyea, RMR, CRR  
                           Notary Public, State of  
                           Florida at Large  
                           Pages 1 to 86



<p>Page 2</p> <p>1 APPEARANCES:  2 CHARLES R. GALLAGHER III, ESQUIRE  3 ERIKA T. MARIZ, ESQUIRE  4 Gallagher &amp; Associates Law Firm, P.A.  5 5720 Central Avenue  6 St. Petersburg, Florida 33707  7 - and -  8 JOSHUA G. SHERIDAN, ESQUIRE  9 Dusiglio Sheridan Schoeb, P.A.  10 3302 North Tampa Street  11 Tampa, Florida 33603  12 - and -  13 CRAIG A. WHISENHUNT, ESQUIRE  14 Ripley Whisenhunt, PLLC  15 8130 66th Street North, Suite 3  16 Pinellas Park, Florida 33781  17 - and -  18 MARIA G. PITELIS, ESQUIRE  19 Wagstaff &amp; Prieta, P.A.  20 161 14th Street Northwest  21 Largo, Florida 33770  22 - and -  23 ERIN K. BARNETT, ESQUIRE  24 ERIN E. WOOLUMS, ESQUIRE  25 Barnett Woolums, P.A.  6501 1st Avenue South  St. Petersburg, Florida 33707  - and -  TRACEY L. STICCO, ESQUIRE  4202 East Fowler Avenue, SOC 107  Tampa, Florida 33620  - and -  NATALIE L. PASKIEWICZ, ESQUIRE  Paz Mediation  Post Office Box 7233  St. Petersburg, Florida 33734  - and -  CHARLES W. DODSON, ESQUIRE  270 Rosehill Drive North  Tallahassee, Florida 32312  Attorneys for Plaintiffs</p>	<p>Page 4</p> <p>1 (The following is an excerpted portion of the  2 trial proceedings.)  3 PROCEEDINGS  4 THE COURT: Okay. Good morning.  5 Okay. I'm late because I just finished  6 putting in my notes from my last night's writings  7 on this case, and then for some reason I was  8 unable to get on Zoom. But I managed to negotiate  9 that.  10 So give me one more minute and I'll be right  11 back.  12 (Brief recess taken.)  13 THE COURT: All right. This is actually the  14 ruling I just pulled out of the printer. So these  15 are my notes.  16 So, again, good morning everyone. These  17 are -- these are my notes. This is not something  18 that I could send and sign, but this is pretty  19 close to what could be a final written order. And  20 I would expect the parties writing the order to  21 take this as their guideline.  22 It may be that there will need to be  23 grammatical changes or rearranging of various  24 sections to make them flow better in a written  25 order. But I would expect to be able to receive a</p>
<p>Page 3</p> <p>1 APPEARANCES CONTINUED:  2 MICHAEL A. ABEL, ESQUIRE  3 JARED J. BURNS, ESQUIRE  4 Abel Bean Law, P.A.  5 100 North Laura Street  6 Suite 501  7 Jacksonville, Florida 32202  8 Attorneys for Defendants</p> <p>9 INDEX</p> <p>10 Description Page  11 PROCEEDINGS 4  12 REPORTER'S CERTIFICATE 86  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p>Page 5</p> <p>1 proposed order by Monday. And I would give the  2 other side another day after that to make a  3 copy -- I'm sorry -- to make comments. And then I  4 would like to -- I would like to enter the written  5 order Tuesday, if at all possible.  6 Excuse me if I take a little while to get  7 started, but I was up at 2:00 a.m. this morning  8 ruling, working, rereading, making notes, et  9 cetera. So this is where I am.  10 Before I forget, I'm officially finding that  11 the plaintiffs who I left in the case, who we  12 identified at the motion for -- I'm calling it a  13 motion for directed verdict; I know there's a more  14 correct name for it. Motion for order of judgment  15 of dismissal, I think. They have -- I'm finding  16 that they have standing. So I didn't want to  17 forget that before I get into the order.  18 All right. I'm going to read this order and  19 probably from time to time make comments that are  20 not scripted or in my notes. And we'll see how  21 that goes. I will try to be articulate and  22 relatively slow for the purposes of our court  23 reporter.  24 And as in a written order you have various  25 citations and things of that nature, I'm going to</p>



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1 read those. So it may not sound very flowing when  
 2 I read it, but in part it's because I'm  
 3 referencing citations and grammatical marks, et  
 4 cetera. Also, some of the citations into the  
 5 record and to other parts of the case might be  
 6 more appropriately included in footnotes. But I  
 7 wasn't sure that reading a proposed order and then  
 8 identifying footnotes would be all that helpful.  
 9 So, again, that would be left up to the drafters'  
 10 discretion.

11 Even -- who's some great writer, which I'm  
 12 not. Even Ernest Hemingway had an editor. So --  
 13 Maxwell Perkins was his editor, by the way. So I  
 14 have no problem with edits, so long as the essence  
 15 of the order and most of the details are in the  
 16 order.

17 Let me start with you a quote which I think  
 18 we should all think about, including those of us  
 19 who are on the Zoom, those of us who are online,  
 20 on YouTube, those who may read about this case in  
 21 the news media. I find that in any intense public  
 22 debate there are often emotions and concepts which  
 23 show a failure to completely understand the  
 24 complete scenario of what we're dealing with.  
 25 In particular, I find in the last 50, 60

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1 years or so, our country has felt that every  
 2 problem could be served -- could be solved in a  
 3 courtroom. Every problem cannot be solved in a  
 4 courtroom. Some problems are solved at the ballot  
 5 box. Some are solved in the courtroom. Some are  
 6 solved by individual action. But before people  
 7 start deciding how they believe about something or  
 8 how it's going to affect them, let me tell you --  
 9 give you an idea of one of the foundations of our  
 10 law as I think it relates to this situation.

11 So here's the quote: Quote, Under the  
 12 American system of laws and government, everyone  
 13 is required to use and enjoy his own rights as not  
 14 to injure others in their rights or to violate any  
 15 law in force for the preservation of the general  
 16 welfare.

17 That quote comes from a 1914 Florida Supreme  
 18 Court opinion called Dutton, D-u-t-t-o-n,  
 19 Phosphate Company vs. Priest, 65 So. 282, Florida  
 20 1914.

21 It was again restated in a 1939 Florida  
 22 Supreme Court, State ex rel. Hosack, H-o-s-a-c-k,  
 23 v. Yocum, just like the country singer, Y-o-c-u-m,  
 24 136 Fla. 246, Florida 1939.

25 The second quote, coming from the same

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1 decisions, 1914 decision originally and repeated  
 2 in 1939: The wisdom and necessity, as well as the  
 3 policy, of a statute are authoritatively  
 4 determined by the legislature. Courts may inquire  
 5 only into the power of the legislature to lawfully  
 6 enact a particular statute.

7 These two quotes from the Florida Supreme  
 8 Court over 100 years ago describe two things: the  
 9 balancing of one's own rights with the rights of  
 10 others and that, when considering the separation  
 11 of powers, court may properly consider whether a  
 12 law and, as a logical extension of this quote, an  
 13 executive action, was lawfully enacted or  
 14 exercised.

15 A governor's executive order and an agency's  
 16 actions must be based on authority granted to them  
 17 by the constitution or the legislature. Executive  
 18 power is exercised -- if executive power -- fifth  
 19 edit; I still missed words. If executive power is  
 20 exercised without authority, the executive action  
 21 is illegal, null and void, and unenforceable.

22 So let me go back and comment this concept of  
 23 personal rights. We all have personal rights. We  
 24 all enjoy our personal rights. We all zealously  
 25 protect our personal rights.

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1 We have a personal right, if we so choose --  
 2 not my choice, but many do -- to drink alcoholic  
 3 beverages in their home if they're over 21 years  
 4 of age. We can drink until we're intoxicated.  
 5 But we can't get in a -- it's our right to drink  
 6 alcoholic beverages if we're over 21, but we  
 7 cannot get in our car and start driving around  
 8 while we've had alcoholic beverages that impair  
 9 our ability to drive. And the reason is not  
 10 because of whether the driver's going to hurt him  
 11 or herself or not. The reason is the driver  
 12 exercising his or her rights to drink is now  
 13 putting at risk other people.

14 So that driver's right to drive intoxicated  
 15 is limited by the government in various criminal  
 16 laws that prohibit driving while under the  
 17 influence of alcohol.

18 We all have a right to speak our mind, First  
 19 Amendment rights. You've all heard this quote.  
 20 We don't have a right to tell lies about people.  
 21 If we do, then we'll have to respond to that in  
 22 some sort of court action. We don't have the  
 23 right to harass and intimidate people verbally  
 24 because that violates the law. That limits our  
 25 rights. And we don't have a right, to the extent



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1 there are crowded theaters anymore -- this in a  
 2 few years may be an anecdote that younger people  
 3 won't even understand what I'm saying. We don't  
 4 have a right to go into a crowded theater and yell  
 5 "fire" because we've decided it's our right to do  
 6 that. We don't have that right because exercising  
 7 the right in that way is harmful or potentially  
 8 harmful to other people.  
 9 Our law and our history as a country going  
 10 back 200-plus years is full of examples of rights  
 11 that are remedied by the good of others that would  
 12 be adversely affected by those rights.  
 13 So when we talk about absolute and  
 14 fundamental rights, there's always a footnote that  
 15 is something like, well, let's see if exercising  
 16 these rights harms other people. If it does, then  
 17 we have to have a discussion.  
 18 That's what we're having here this week, a  
 19 discussion, in part, as to whether people's rights  
 20 to not want their children to wear a face mask for  
 21 30 or 60 days -- which is what most of these  
 22 policies we've been talking about are for --  
 23 whether those rights outweigh the risk not wearing  
 24 a mask places other children in to catching a  
 25 highly contagious and sometimes deadly disease,

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1 even for children.  
 2 So this is not something that I made up.  
 3 This has been the law of Florida I know since  
 4 1914. It's been the law of Florida for probably a  
 5 hundred years before that. These concepts are  
 6 contained in the fundamental writings that support  
 7 our country. They are contained in the -- all the  
 8 founding documents in the country are these  
 9 concepts, including separation of powers and use  
 10 of rights in such a way as not to harm others.  
 11 So I say that to the lawyers, to the parties,  
 12 and to whoever may be listening to this case. We  
 13 will not solve any issue if we can't sit down and  
 14 work together and take positions recognizing that  
 15 what's going on is not some recent imposition on  
 16 someone or some attack on the country. It's what  
 17 has gone on at least during my lifetime on many  
 18 occasions about many issues. So that's all the  
 19 preaching you'll hear from me.  
 20 So let's go on to the issues before the  
 21 Court. The issues in this case are formed by the  
 22 pleadings, the evidence presented, contentions of  
 23 the parties in the pleadings, and statements and  
 24 contentions made by the parties and witnesses and  
 25 evidence at trial. Those all come together at the

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1 end of a trial and formulate essentially the  
 2 issues for the finder of fact -- which is in this  
 3 case me; in a jury trial, it's the jury -- to try  
 4 to determine.  
 5 This is not an easy task because I constantly  
 6 have to remind myself what my role is. My role is  
 7 to primarily try to figure out what the law says  
 8 and then enforce it. My role is rarely to decide  
 9 what policy should be. However, in our system,  
 10 sometimes when a judge has to enforce a rule or a  
 11 regulation or a statute for the constitution,  
 12 there are policy implications. So they're not as  
 13 separate and as cleanly different as one might  
 14 think.  
 15 Before this Court is a dispute between the  
 16 governor of Florida, the Florida commissioner of  
 17 education, the Florida Department of Education,  
 18 and the Florida Board of Education. And I'll call  
 19 those the defendants. When I say defendants, I'm  
 20 referring to all of those people.  
 21 Also are involved parents and students in the  
 22 Florida public school system, which I'll call the  
 23 plaintiffs.  
 24 The dispute is whether state law permits  
 25 local school districts in Florida to adopt and

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1 enforce a face mask mandate for students and  
 2 staff, staff being teachers and other employees in  
 3 the school system.  
 4 There have been a lot of descriptions for  
 5 this. What I think we're talking about is  
 6 essentially the contention of the plaintiffs that  
 7 the school system should be free to pass a face  
 8 mask mandate -- generally this has been considered  
 9 in this trial a face mask mandate -- with a  
 10 medical opt-out only.  
 11 The governor and the defendants believe the  
 12 correct policy is face mask mandate if you want  
 13 to; but if you pass that, there must be a parental  
 14 opt-out.  
 15 So those of you who are drafting this order,  
 16 that's what I mean. I might not be that specific  
 17 as to each one, but that's where I am.  
 18 One sidenote that's not in my notes, many of  
 19 the witnesses -- there were many very fine -- in  
 20 fact, all the witnesses seemed like fine people  
 21 and serious. Many of the witnesses who are  
 22 parents who testified on behalf of the defendants  
 23 had, you know, serious concerns for their  
 24 children, children with serious medical issues,  
 25 and they were scared about the mask mandate. Most



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1 of what I heard, those children would not be  
2 required to wear a mask in school under any  
3 version of the mandate we've been talking about.  
4 Doctors have a responsibility for patients.  
5 If, in fact, they have a patient with a legitimate  
6 medical reason not to wear a mask, they should  
7 step up and sign the opt-out paper for those  
8 patients. That's the role -- one of the many  
9 roles our medical community has. You can't just  
10 say, no, I don't want to get involved.  
11 Doctors, if you have a patient such as those  
12 I heard described here, you need to do the correct  
13 thing and sign a medical opt-out if that is what  
14 is necessary. Some of these people -- I'm not a  
15 doctor. But they seem to me to be clear medical  
16 opt-out circumstances.  
17 But let me now go back on to my notes.  
18 Picking up, the dispute is whether state law  
19 permits local school districts in Florida to adopt  
20 and enforce a face mask mandate for students and  
21 staff. This dispute arises out of the opening of  
22 public schools for the new year and increasing --  
23 and increasing COVID crisis in Florida.  
24 This is -- by the way, for those of you, I'm  
25 drawing on my legal rulings and my findings from

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1 the facts. I am a factfinder. I am required and  
2 permitted to take the evidence I've heard, draw  
3 inferences from that evidence, and make findings  
4 based upon what I think is the more persuasive and  
5 most credible evidence. So when I give these  
6 statements such as I am, these aren't things I  
7 just dreamed up either. These are things that --  
8 findings I'm making based on the evidence I've  
9 heard, the legal discussions based upon the law as  
10 I interpret it.  
11 So the increasing COVID crisis in Florida has  
12 resulted from less than complete vaccination of  
13 the population of Florida and the dominance of a  
14 COVID virus variant referred to as the Delta  
15 variant.  
16 The Delta variant has a much higher viral  
17 load and is more contagious than the form of COVID  
18 present in Florida from 2020 until about May or so  
19 of this year. COVID variant became increasingly  
20 dominant in Florida starting around May or so, and  
21 to the present time it is the dominant -- by far  
22 the dominant virus that's being spread in the  
23 state of Florida.  
24 Also, the Delta variant presents a higher  
25 risk of infection to children than did the

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1 previous form of COVID. This fact places at issue  
2 all medical studies and anecdotal evidence that  
3 says, well, we had no problems last year; we  
4 should have no problems this year. There's a  
5 difference. We had a different, less infectious,  
6 less dangerous form of virus last year than we  
7 have this year.  
8 And as the facts change on the ground, the  
9 need, or failure to need, for various measures  
10 will also change. I'm talking about facts on the  
11 ground now as I understand it from the evidence.  
12 The combination of lack of vaccination,  
13 decreasing social distancing, and the Delta  
14 variant has resulted in dramatically increased  
15 COVID infections in Florida over the past several  
16 months. Although vaccinated persons do have  
17 significant protection against the COVID variant,  
18 they can still become infected by the COVID  
19 variant. They can also transmit that infection to  
20 children and other people.  
21 As a result, the CDC, Centers for Disease  
22 Control, the American Academy of Pediatrics, and  
23 the wide majority of the medical and scientific  
24 community in this country recommend universal  
25 indoor masking for all school students, staff,

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1 teachers, and visitors to K through 12 schools  
2 regardless of vaccination status and social  
3 distancing.  
4 On April 20 -- April 14, 2021, Commissioner  
5 Corcoran, who's the commissioner of the Florida  
6 Department of Education and, in his official  
7 capacity, the defendant -- and for those who  
8 aren't lawyers, when you sue someone from an  
9 agency in official capacity, that's just another  
10 way of suing the agency.  
11 But Commissioner Corcoran on April 14, 2021,  
12 sent a memorandum to all school district  
13 superintendents. The superintendent of a school  
14 district is sort of like the principal of the high  
15 school. They're the in-charge executive officer  
16 of that district. Many are appointed; some are  
17 elected.  
18 In that order or memorandum, Defendants'  
19 Exhibit 45, as I read it, he's requesting that the  
20 school superintendents do not implement a mandated  
21 masking policy. He said, With this return -- I'll  
22 read it -- we ask that districts, which currently  
23 are implementing a mandated face covering policy,  
24 revise their policy to be voluntary for the  
25 '21-'22 school year.



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1 It's clear to this Court that the issue of  
 2 voluntary versus mandated, opt-out versus no  
 3 opt-out, masking policies in Florida school --  
 4 schools was being considered and studied at least  
 5 as early as April of 2021. Remember, at the time  
 6 of that memorandum, COVID virus or variant had not  
 7 really hit the scene hard. So this was a policy  
 8 perhaps dealing primarily with what was viewed as  
 9 the former form of the virus. In any event, the  
 10 policy consideration was ongoing by that time. I  
 11 can't tell you if it started then or not, but it  
 12 was ongoing.

13 In late June 2021, the governor of Florida  
 14 declared that there was no longer a state of  
 15 emergency based on COVID in Florida. You may  
 16 recall we had been in that state of emergency from  
 17 about March or so 2020 until end of June 2021.  
 18 That date was agreed to earlier in this case by  
 19 all parties. The governor did this by allowing  
 20 the time-limited declaration of emergency order to  
 21 lapse without renewal.

22 Under Florida law -- again, I'm speaking off  
 23 memory; I stand to be corrected -- the ability to  
 24 declare a state of emergency usually lasts for 60  
 25 days and then it has to be re-upped in a

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1 supplemental order. If you don't re-up it, it  
 2 will expire, which is -- my understanding that's  
 3 what happened here. Therefore, the governor's  
 4 emergency powers under Florida Statute 252 expired  
 5 at that point, by the end of June.

6 On July 27th, the governor held a roundtable  
 7 meeting on face mask policy. That meeting -- the  
 8 video of that meeting was admitted into evidence.

9 At that meeting -- this is my recollection  
 10 and notes -- no participant in the meeting --  
 11 there were some doctors there. The governor was  
 12 there. There was a charter school -- I think he  
 13 was a principal, but a higher-up charter school  
 14 official from a local charter school. There was  
 15 another mother and also charter school employee  
 16 there. And there was a high school student who  
 17 indicated he and his friends preferred to hang  
 18 around without wearing face masks. There may have  
 19 been others, but that's my member -- memory of who  
 20 was there.

21 No participant at that meeting, this  
 22 factfinding meeting, proposed a mandate -- a  
 23 mandated face mask policy with no parental  
 24 opt-out, such as that being proposed by a  
 25 number -- or being implemented by a number of

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1 school districts in Florida. No one proposed  
 2 that. All proposed a parental opt-out policy. No  
 3 one advocated for any CDC recommended policy.

4 In fact, the governor stated, gave his  
 5 opinion, that his confidence -- hold on a  
 6 second -- that his confidence in some medical  
 7 leadership had been shattered. He said they  
 8 appear to be, quote, delighted to impose  
 9 unspeakable burdens on children. Other than the  
 10 fact that it was said in that conference, no  
 11 evidence has been produced to support that  
 12 statement.

13 Also in the governor's executive order that  
 14 was issued a few days later, the governor  
 15 expressed doubt about the validity of the CDC  
 16 guidance.

17 Remember, the CDC by the overwhelming weight  
 18 of evidence is considered the preeminent medical  
 19 authority in this country about infectious  
 20 diseases. It's the gold standard.

21 The State of Florida has in the past on many  
 22 occasions adopted and incorporated CDC guidelines  
 23 and recommendations into the state statutes. Here  
 24 is an example of just a few. It's not exhaustive.  
 25 Florida Statute 465.189, topic is administration

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1 of vaccines and epinephrine autoinjection; Florida  
 2 Statute 384.23, regarding sexually transmitted  
 3 diseases; Florida Statute 381.0031, regarding  
 4 epidemiological research, report of diseases of  
 5 public health significance to department; Florida  
 6 Statute 1002.23, a statute that's been mentioned  
 7 quite a bit in this case dealing with student and  
 8 parental rights and educational choices. They say  
 9 there, that statute, a recommended immunization  
 10 schedule in accordance with the United States  
 11 Center for Disease Control and recommendations  
 12 is -- is referenced and apparently assumed to be  
 13 worth including in the statute. Florida Statute  
 14 381.005, primary and preventive health services;  
 15 Florida Statute 381.0056, school health services:  
 16 Each school health advisory committee must, at a  
 17 minimum, include members who represent the  
 18 right -- the eight component areas of the  
 19 Coordinated School Health model as defined by the  
 20 Centers for Disease Control; Florida Statute  
 21 381.985, screening program, a requirement that  
 22 there be adoptive rules to follow established  
 23 national guidelines or recommendations such as  
 24 those used by the Council of State and Territorial  
 25 Epidemiologists and the Centers for Disease



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1 Control; Florida Statute 400.141, administration  
 2 and management of nursing home facilities,  
 3 requiring providing for immunizations against flu  
 4 viruses in accordance with the recommendations of  
 5 the Centers for Disease Control; Florida Statute  
 6 112.181, firefighters, paramedics, EMTs, law  
 7 enforcement officers, et cetera, reference to the  
 8 Centers for Disease Control; 381.9315, gynecologic  
 9 and ovarian cancer education and awareness: State  
 10 Surgeon General shall make publicly available, by  
 11 posting on the Internet website of the Department  
 12 of Health, resources and an Internet website link  
 13 to the federal Centers for Disease Control for  
 14 gynecologic cancer information; and, finally --  
 15 but this is not an exhaustive list; this is just  
 16 some of what I found -- Florida Statute 951.27,  
 17 blood tests of inmates, requiring a procedure  
 18 consistent with the guidelines of the Centers for  
 19 Disease Control.  
 20 So not only do the doctors who testified here  
 21 recognize the Centers for Disease Control as the  
 22 legitimate reputable source of information, it  
 23 appears that over many years so has the Florida  
 24 legislature.  
 25 So let's go back. At that July 27th

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1 meeting -- I made some notes -- there was one  
 2 presenter there, I believe his name was Meissner,  
 3 who stated that masks were not worn to protect  
 4 wearers of the mask. This is clearly contrary to  
 5 evidence presented at the trial here. He said  
 6 that harm is done to children with masks.  
 7 A psychiatrist, I think his last name was  
 8 McDonald, said masking is child abuse. He said  
 9 there is no evidence that masking protects against  
 10 COVID.  
 11 There's a lot of evidence that was presented  
 12 here, including CDC studies, including the April  
 13 21st, two thousand -- April -- the May 21st, 2021,  
 14 CDC study that's Exhibit 48. I'll get back to  
 15 that in a minute.  
 16 Dr. McDonald also said not a single child has  
 17 benefited from wearing a mask. All children have  
 18 been hurt. He is appalled, he said. Every  
 19 thoughtful, rational adult knows children  
 20 shouldn't be masked. He said children cannot  
 21 transfer COVID to adults. Again, another fact  
 22 that's disputed by the science. Masks do nothing  
 23 to help medically, and they destroy the country.  
 24 So that's not everything that was said there.  
 25 I thought the governor's remarks were much more

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1 temperate than some of the other participants',  
 2 but that's what was said there.  
 3 One study -- I'm not going through every  
 4 piece of evidence. I'm highlighting some issues.  
 5 One study, Exhibit -- Defendants' Exhibit 48,  
 6 which was a study in -- I think it was a CDC study  
 7 involving Georgia. What was read to a couple of  
 8 the plaintiffs' witnesses and they were asked for  
 9 this comment, I think it was this sentence:  
 10 quote, The 21 percent lower incidence in schools  
 11 that recommend mask use among students was not  
 12 statistically significant compared to the schools  
 13 where mask use was optional. And the witnesses  
 14 recall -- comment on that.  
 15 The clear implication made in that  
 16 cross-examination was, here's a CDC study that  
 17 doesn't even recognize that masks work. What was  
 18 not read was the rest of the study.  
 19 Directly following that sentence -- it's a  
 20 little bit lengthy, but I'm going to read it. It  
 21 says, This finding might be attributed to higher  
 22 effectiveness of masks among adults, who are at a  
 23 higher risk for SARS-CoV-2 infection, but might  
 24 also result from differences in mask-wearing  
 25 behavior among students in schools with optional

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1 requirements. Mask use requirements were limited  
 2 in this sample; 65.1 percent of schools required  
 3 teacher and staff member mask use and  
 4 approximately one-half, 51.5 percent, required  
 5 student mask use. Because universal and correct  
 6 use of masks can reduce COVID -- I'm substituting  
 7 "COVID" for the technical science term "SARS."  
 8 Let me repeat this. Because universal and correct  
 9 use of masks can reduce COVID transmission and is  
 10 a relatively low-cost and easily implemented  
 11 strategy, findings in this report suggest  
 12 universal and correct mask use is an important  
 13 COVID-19 prevention strategy in schools as part of  
 14 the multicomponent approach.  
 15 This is not a plaintiffs' exhibit. This is a  
 16 defendants' exhibit.  
 17 Also, one last thing this report said in its  
 18 summary, they noted that COVID infection was 37  
 19 percent lower in schools that required teachers  
 20 and staff members to use masks.  
 21 So this study, which was presented by the  
 22 defendants to me, wasn't presented to the governor  
 23 at that meeting in which they were stating they  
 24 were trying to decide what to do. But the  
 25 governor was told that use of masks is child abuse



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1 and bringing harm to every child in the country.  
2 I've seen no scientific evidence of that to  
3 support that statement in this case.  
4 So after the meeting, the governor three days  
5 later issued Executive Order 21-175. This order  
6 began the formulation of a policy, and enforcement  
7 by the defendants, that local school districts in  
8 Florida could not adopt a face mask mandate unless  
9 it provided for a parental opt-out.  
10 This is also reflected in the defendants'  
11 seventh affirmative defense filed in this case  
12 which says, quote, The Parents' Bill of Rights  
13 precludes school boards from implementing  
14 categorical mask mandates that do not allow  
15 parents to opt their children out of the  
16 requirement, end quote. We're going to get to the  
17 Parents' Bill of Rights. But this seventh  
18 affirmative defense does a good job of stating  
19 exactly one of the big disputed issues in this  
20 case. I'll get to that later.  
21 Continuing, the executive order, based on the  
22 evidence and inferences from the evidence  
23 presented to me, was a continuation into a policy  
24 disfavoring the no opt-out mask mandates and the  
25 means to accomplish this was going to be through

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1 the Parents' Bill of Rights, which is clearly  
2 evident from the executive order and confirmed by  
3 the affirmative defense.  
4 Under other provisions of the executive  
5 order, it cited to a study which it said found no  
6 correlation with face masks. This study is known  
7 and called in the order the Brown University  
8 study. It was not peer-reviewed and its own --  
9 its own authors have expressed doubts as to its  
10 use. That study's in evidence. All I have to do  
11 is find it. It's Exhibit -- I believe it is  
12 Exhibit 19 and -- yes. Exhibit 19.  
13 Here's a quote from the people that wrote the  
14 study: Quote, We caution that our analysis  
15 focuses only on correlations, and it is  
16 challenging to make causal statements. In the  
17 case of masking in particular, we focus on  
18 mandates and not on actual behavior. Masking is  
19 likely correlated with mask mandates, but it is  
20 also likely that some individuals mask even in the  
21 absence of a mandate and that there is imperfect  
22 compliance even with a mandate. In addition,  
23 while we control for community rates, we do not  
24 control for community mitigation practices, which  
25 would also impact behavior and rates in schools.

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1 This paper adds to our understanding of the  
2 relationship between COVID mitigation and school  
3 safety in the U.S., and they cite about four  
4 different studies. We would emphasize that in  
5 general this literature suggests in-person school  
6 can be operated safely with appropriate  
7 mitigation, which typically includes universal  
8 masking. It would be premature to draw any  
9 alternative conclusions about this question based  
10 on this preliminary data.  
11 This study doesn't say masking is not  
12 effective. In fact, it recommends universal  
13 masking. And it says that it's premature to state  
14 anything otherwise.  
15 Also, they say in the study right above the  
16 section called discussion, It is important to note  
17 that this -- this is the long discussion in the  
18 paper -- does not imply masks are ineffective, as  
19 these results focus only on masking in schools and  
20 do not take community behavior into consideration.  
21 Additionally, as noted above, we focus only on  
22 mask mandates and not actual masking behavior.  
23 So the Brown report said that it had analyzed  
24 COVID data and found no correlation with mask  
25 mandates. If that's true, why did the Brown

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1 report recommend that universal masking was still  
2 the way to go?  
3 Now, I don't say that the governor has time  
4 enough to read a report that's that thick. But  
5 his advisors do. So the statement in the  
6 executive order is just incorrect. That study  
7 does not find no correlation with mask mandates.  
8 What I read to you is a defense exhibit, not  
9 a plaintiffs' exhibit.  
10 So, going back to the executive order, the  
11 order showed lack of support for CDC guidance on  
12 face masks -- I don't think there's any dispute  
13 about that -- and stated that face masks may have  
14 negative health and societal ramifications. Most  
15 importantly, the order noted the applicability of  
16 a new statute called the Parents' Bill of Rights.  
17 The order -- we'll talk about that more in detail.  
18 The order directed certain actions which were  
19 premised on enforcing the Parents' Bill of Rights,  
20 which would result in a blanket banning in advance  
21 of all school board mask mandates if there was no  
22 parental opt-out. The most likely way to  
23 accomplish this was to institute a policy that  
24 would likely result in a violation of the Parents'  
25 Bill of Rights. Parents' Bill of Rights is a law

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## **EXHIBIT 2**

**STATE OF FLORIDA  
DEPARTMENT OF EDUCATION**

IN RE: WAIVING STRICT  
ADHERENCE TO THE FLORIDA  
EDUCATION CODE, AS SPECIFIED  
HEREIN, PURSUANT TO  
EXECUTIVE ORDER NUMBER 20-  
52, MADE NECESSARY BY THE  
COVID-19 PUBLIC HEALTH  
EMERGENCY

DOE ORDER NO. 2020-EO-06

DEPT OF EDUCATION  
TALLAHASSEE FLA

2020 JUL -6 AM 11:54

FILED AGENCY CLERK

**EMERGENCY ORDER**

WHEREAS, the Governor of the State of Florida issued Executive Order No. 20-114, ratifying and reaffirming Executive Order No. 20-52, declaring a state of emergency in response to the COVID-19 Public Health Emergency; and,

WHEREAS, education is critical to the success of the state and to an individual, and extended school closures can impede educational success of students, impact families' well-being and limit many parents and guardians from returning to work; and,

WHEREAS, schools are not just the site of academic learning; schools provide many services to students that are critical to the well-being of students and families, such as nutrition, socialization, counseling, and extra-curricular activities; and,

WHEREAS, there is a need to open schools fully to ensure the quality and continuity of the educational process, the comprehensive well-being of students and families and a return to Florida hitting its full economic stride; and,

WHEREAS, school openings must be consistent with safety precautions as defined by the Florida Department of Health, local health officials and supportive of Floridians, young and adult, with underlying conditions that make them medically vulnerable.

NOW, THEREFORE, I, Richard Corcoran, Commissioner of the Florida Department of Education (Department), pursuant to the authority granted by Executive Order 20-52, issue this order to accomplish the goals of: 1) reopening brick and mortar schools with the full panoply of services for the benefit of Florida students and families; 2) suspending and adjusting as necessary reporting requirements to ensure appropriate monitoring and financial continuity of the educational process; 3) retaining high-quality school choices for Florida students and families with a focus on eliminating achievement gaps, which may have been exacerbated by the crisis; and 4) maintaining services that are legally required for all students, such as low-income, English language learning, and students with disabilities.

The temporary and limited nature of the waiver of statutes and rules is necessary to respond to the pandemic. Much like the statutory provisions authorizing an agency to vary or waive a rule under section 120.542, Florida Statutes, all suspensions or modifications provided for in this order provide an alternate means of achieving the underlying purpose of the statute or rule.

I find that flexibility provided for in this order is necessary in order to respond to and mitigate the impact of the emergency and to promote the health, safety, and welfare of persons connected with Florida's educational system.

**I. Reopening Requirements.**

- a. All schools open. Upon reopening in August, all school boards and charter school governing boards must open brick and mortar schools at least five days per week for all students, subject to advice and orders of the Florida Department of Health, local departments of health, Executive Order 20-149 and subsequent executive orders. Absent these directives, the day-to-day decision to open or close a school must always rest locally with the board or executive most closely

associated with a school, the superintendent or school board in the case of a district-run school, the charter governing board in the case of a public charter school or the private school principal, director or governing board in the case of a nonpublic school. Strict compliance with requirements of section 1001.42(4)(f), Florida Statutes, requiring school districts to establish a uniform and fixed date for the opening and closing of schools is waived to the extent necessary to give effect to this Order. In addition, strict compliance with sections 1003.02 and 1011.60(2), Florida Statutes, requiring school districts to operate public schools for a minimum of 180 days or an hourly equivalent is waived to the extent necessary to give effect to this Order, consistent with an approved reopening plan. Further, strict compliance with the reporting requirements for educational planning and information, as set forth in section 1008.385, Florida Statutes, and Rule 6A-1.0014, Florida Administrative Code, is waived to the extent necessary to give effect to this Order, consistent with an approved reopening plan.

- b. Full panoply of services. Pursuant to the authority granted in section 1001.10(8), Florida Statutes, school districts and charter school governing boards must provide the full array of services that are required by law so that families who wish to educate their children in a brick and mortar school full time have the opportunity to do so; these services include in-person instruction (barring a state or local health directive to the contrary), specialized instruction and services for students with Individualized Education Programs (IEPs) or live synchronous or asynchronous instruction with the same curriculum as in-person

instruction and the ability to interact with a student's teacher and peers as approved by the Commissioner of Education. Required services must be provided to students from low-income families, students of migrant workers, students who are homeless, students with disabilities, students in foster care, students who are English Language Learners, and other vulnerable populations.

- c. Progress monitoring. Robust progress monitoring must be extended to all students in the same district or public charter school with tiered support for students who are not making adequate progress. Students who are receiving instruction through innovative teaching methods must be provided additional support and the opportunity to transition to another teaching method if they fail to make adequate progress. Progress monitoring data must be shared regularly with the Department, as prescribed, to help ensure that resources are rapidly deployed to support students who are failing to make adequate progress.
- d. Students with Disabilities and English Language Learners (ELL). Students with IEPs must be given the services necessary to ensure they experience a free and appropriate education. School districts must immediately begin working with IEP teams to identify students who may have regressed during school closures. School districts must ensure that IEP teams determine needed services, including compensatory services. IEP teams must follow a student-centered approach with a commitment to ensure that the individual needs of each child are met. If English Language Learners' English reading, writing, listening or speaking skills have regressed during school closures, school districts should convene an ELL Committee meeting with appropriate staff and parents to

determine if additional or supplemental English for Speakers of Other Languages (ESOL) services are needed. Although ELL Committee meetings may take place virtually or on-site, school districts should ensure that appropriate identification of English skills has been noted and that schools have the resources to implement additional interventions and strategies.

- e. Charter school flexibility. School districts must extend the same flexibility in instructional methods to every charter school that submits a reopening plan to the sponsoring district addressing the requirements set forth in this Order. Charter schools with an approved reopening plan are authorized to exercise this flexibility provided in this Order.

## **II. Reopening Plans.**

- a. In order to receive the flexibility and continuity provided for in this Order, school districts must submit to the Department a reopening plan that satisfies the requirements of this Order. Similarly, each charter school governing board must submit a reopening plan to the sponsoring district. Either a school district or a charter school governing board may request assistance from the Department to resolve any disputes over a sponsor's approval of a charter school's reopening plan. The Department will seek to resolve such disputes within three business days. The Department may withhold approval of a school district's reopening plan until such time as all the charter school reopening plans in the district have been approved by the district. In reviewing and approving plans the Department will also consider factors, including but not limited to, the percentage of students in the district who are projected to learn through live synchronous or asynchronous instruction, the quality of proposed progress



monitoring data and efforts to close achievement gaps. The format of plan submissions, as well as the timing of review and approvals, will be established by the Commissioner of Education. The submission of reopening plans and subsequent approval of those plans does not constitute a waiver of state statutes regarding instructional days and hours, rather approval demonstrates how the district or school adheres to those statutes and rules. Nothing herein requires a district or charter school to submit a plan if the district or charter school wishes to open in traditional compliance with statutory requirements for instructional days and hours.

**III. Reporting Flexibility and Financial Continuity.**

School districts and charter school governing boards with an approved reopening plan will receive reporting flexibility that is designed to provide financial continuity for the 2020 fall semester.

- a. Full Florida Education Finance Program funding from state revenue based on General Appropriations Act (GAA) full-time equivalent (FTE) student membership forecast for 2020 fall semester. School boards and charter school governing boards will receive the GAA funding based on pre-COVID-19 FTE student membership forecasts. Rule 6A-1.0452, Florida Administrative Code, is waived to the extent that the Department will not reduce the distribution of funds based on the July and October 2020 student surveys.
- b. Full FTE credit for innovative learning environments. Although it is anticipated that most students will return to full-time brick and mortar schools, some parents will continue their child's education through innovative learning

environments, often due to the medical vulnerability of the child or another family member who resides in the same household. As described in this Order, school boards and charter school governing boards with an approved reopening plan are authorized to report approved innovative learning students for full FTE credit. However, students receiving virtual education will continue to receive FTE credit as provided in section 1011.61(1)(c)1.b.(III)-(IV), Florida Statutes.

- c. October survey and instructional hours. The October survey will record students receiving instruction through traditional as well as innovative learning environments. The Department will provide modified instructions for the October survey that will authorize the reporting of instruction through traditional and innovative learning environments. Sections 1011.61(1)(a) and 1003.23(1), Florida Statutes, and Rules 6A-1.0451 and 6A-1.0014, Florida Administrative Code, are waived to provide school districts and charter school governing boards with additional flexibility in recording and reporting student attendance and instructional hours, based on guidance from the Department consistent with this Order.

#### **IV. Private Schools that Accept Scholarship Students**

- a. Nonpublic private schools that accept scholarship students may also be deemed by the Commissioner of Education, based on the requirements in sections I.a. and I.b. of this Order and by providing progress monitoring data at the conclusion of the 2020 fall semester for scholarship students to the Department, to satisfy the requirements for each student to maintain direct student contact with teachers under section 1002.421, Florida Statutes, and

"actual school instruction days" for purposes of satisfying the daily and hourly instructional time as set forth in Rule 6A-1.09512, Florida Administrative Code, for students participating in scholarship programs. Private schools that accept scholarship students and are interested in pursuing this option must submit a reopening plan to the Department for review only in the format established by the Commissioner of Education.

All of the statutory and rule waivers set forth in this Order for school districts and charter schools are contingent upon having an approved reopening plan for the 2020 fall semester.

The effective date of this Order shall correspond with Executive Order No. 20-52, and any extensions thereto. However, the waivers set forth in this Order only extend through the 2020 fall semester unless extended by a subsequent order.

DONE AND ORDERED this 6<sup>th</sup> day of July 2020, in  
Tallahassee, Leon County, Florida.



Richard Corcoran  
Commissioner of Education

I HEREBY CERTIFY that the above EMERGENCY ORDER has been filed with the Agency Clerk of the Department of Education, on this 6<sup>th</sup> day of July 2020.


  
Agency Clerk

## **EXHIBIT 3**



Andy Tuck, *Chair*  
Marva Johnson, *Vice Chair*  
*Members*  
Monesia Brown  
Ben Gibson  
Tom Grady  
Ryan Petty  
Joe York

**MEMORANDUM**

**TO:** School District Superintendents  
**FROM:** Richard Corcoran   
**DATE:** April 14, 2021  
**SUBJECT:** **Planning for the 2021-2022 School Year**

Florida continues to outwork and outperform the nation in the number of students receiving a high-quality education in an in-person educational setting, and our success has been rooted in schools, districts and the state implementing learned best practices and constantly relying on science and evidence.

Throughout the successful reopening of our schools for in-person instruction, we have consistently provided families with the ability to make educational decisions that are in the best interest of their children. Our efforts ensured parents had the ability to choose from multiple learning modality options for the current school year, with the option to transition to new modalities when their child may have required another option to ensure they were achieving adequate progress.

Florida has once again proven that one-size-fits-all policies do not meet the unique needs of individual students or their families. Therefore, we should continue to make surgical – not sweeping – decisions to mitigate large-scale educational disruptions as we are planning for the upcoming 2021-2022 school year.

As you reflect on the current school year and look ahead to 2021-2022, an example of a one-size-fits-all policy are the mandatory face covering policies in some districts and schools. Upon reviewing the policies of those districts with mandatory face covering policies, reviewing all districts relevant health data, and factoring in such data points as the percentage of students learning in-person and the relative population of a county (which is often synonymous with a county's community health resources), **the data shows us that districts' face covering policies do not impact the spread of the virus.**

Face coverings are a personal decision **and certainly families and individuals should maintain their ability to make a decision that is unique to their circumstances.** Broad sweeping mandatory face covering policies **serve no remaining good at this point in our schools.**

Mandatory face covering policies inhibit peer-to-peer learning in our classrooms and they may also unintentionally create a barrier for students and families who would otherwise choose in-person instruction if such a policy were not in place. **Such policies may also impede instruction in certain cases, especially for students with disabilities and English language learners who benefit from viewing a teacher's face and mouth.**

Planning for the 2021-2022 School Year  
April 14, 2021  
Page Two

As we are planning to provide our students with robust summer programs and welcoming students returning to school in the 2021-2022 school year, we expect more students to participate in face-to-face instruction. Right now, our schools are safer than the communities at large. This safety record should only increase next school year with the increased availability of vaccines.

**With this return, we ask that districts, which currently are implementing a mandated face covering policy, revise their policy to be voluntary for the 2021-2022 school year.**

Florida's districts and schools have done an incredible job implementing, learning and improving upon mitigations and protections for our students, educators, school leaders and Florida's entire education family. Without a doubt, our teachers and school leaders are heroes and they have led the nation in reopening Florida's schools, while giving families broad choices for their child's education. Let us continue to support those choices for our families as we ready ourselves for the 2021-2022 school year.