



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

MEMORANDUM

TO: State Board of Education Members

FROM: Richard Corcoran

RE: Brevard County School Board, Student Opt-Out Requirements

DATE: October 4, 2021

Based upon the following memorandum, I find there is probable cause that the Brevard County School Board (BCSB) acted contrary to the law by requiring students to wear a mask or face covering unless certain exceptions apply, such as a medical certification. Specifically, BCSB's policy violated the provisions of Rule 64DER21-12 and continues to violate Rule 64DER21-15, Protocols for Controlling COVID-19 in School Settings.

Background Information

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

On August 6, 2021, in response to the executive order, and after consultation with FDOE, the State's former Surgeon General, Scott Rivkees, as the head of FDOH, adopted an emergency rule establishing protocols for controlling the spread of COVID-19 in schools. Given the statutory duty of FDOH to implement protocols to prevent or limit the impact or spread of disease, the State's Surgeon General must be a licensed physician with

advanced training or extensive experience in public health administration. *See* § 20.43(2), Fla. Stat. The rule provided for general protocols for public schools, protocols specific to symptomatic or COVID-19 positive students, protocols specific to students with exposure to COVID-19 and protocols for students with a prior COVID-19 infection. The portion of the rule addressing masks provided as follows: **Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.** *See* Rule 64DER21-12, Protocols for Controlling COVID-19 in School Settings, Florida Administrative Register, Vol. 47 / No. 153, August 9, 2021 (emphasis supplied).

Citing to the Parents’ Bill of Rights, the notice for FDOH’s emergency rule provided that “it is necessary to immediately promulgate a rule regarding COVID-19 safety protocols that protects parents’ rights and to allow for in-person education for their children.”

On September 22, 2021, under the direction of the State’s new Surgeon General, Dr. Joseph Ladapo, FDOH issued a revised rule to address controlling the spread of COVID-19 in school settings. Rule 64DER21-15 relaxes the requirements for quarantining asymptomatic students who have been exposed to COVID-19, and further clarifies the parental opt-out provision by providing that a “school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian’s **sole discretion.**” *See* Rule 64DER21-15, Florida Administrative Register, Vol. 47 / No. 185, September 23, 2021 (emphasis supplied). *See* Exhibit A.

The purpose of these changes is explained by FDOH in its notice for the new rule:

The Department [of Health] observed a large number of students have been required to quarantine for long periods of time, resulting in the loss of hundreds of thousands of days of in-person learning. In addition, the Department [of Health] observed no meaningful difference in the number of COVID-19 cases in school-aged children in counties where school districts have imposed mask mandates. It is necessary to minimize the amount of time students are removed from in-person learning based solely on direct contact with an individual that is positive for COVID-19, to ensure parents and legal guardians are allowed the flexibility to control the education and health care decisions of their own children, and to protect the fundamental rights of parents guaranteed under Florida law.

Id.

Brevard Public Schools

On August 30, 2021, the Brevard School Board voted to implement an emergency mandatory facemask policy. The district’s policy provides as follows:

- Each Pre-K-12 student, employee, visitor, vendor, or other person is required to wear a face covering at all times while indoors on school district property.

- A child younger than two years old and a person with a medical certification are not required to have a face covering. Medical Certification: A face covering shall not be required for persons who present school district staff with a certification from a licensed health care provider that the person has a medical, physical, or psychological contraindication that prevents the person from being able to safely wear a face covering.
- Other times a face covering is not required: students with supervisor's approval, eating and drinking, strenuous physical activity, receiving health care, exigent circumstances.
- A face covering IS NOT needed if a student or adult is outside.

See Exhibit B. The policy requires all students, visitors and staff to wear a face covering on school district property and provides for medical exemptions and other limited exceptions. This Emergency Policy is in effect for up to 30 days.

On September 3, 2021, I wrote BCSB's superintendent and school board chair to notify them of my concern with their apparent non-compliance with Rule 64DER21-12 and to afford the district the opportunity to demonstrate compliance. *See* Exhibit C.

On September 8, 2021, Brevard Public Schools' superintendent and board chair responded to me in writing, asserting that the district's policy is narrowly tailored, limited in scope, and necessary to achieve the compelling state interest of protecting students. *See* Exhibit D. The letter did not rescind the requirement for medical documentation in order for a student to opt-out of a mask mandate.

On September 23, 2021, due to the adoption of FDOH's new rule, I advised BCSB's superintendent and school board chair of Rule 64DER21-15, and afforded the district another opportunity to demonstrate compliance. *See* Exhibit E.

On September 24, 2021, counsel for BCSB responded by requesting an extension of time in order to allow the school board to discuss the matter at a special board meeting scheduled for October 5. *See* Exhibit F. The letter did not rescind the requirement for medical documentation in order to opt-out of the mask mandate.

In sum, the BCSB's face covering policy requires all students, staff and visitors to wear face coverings on BCSB grounds. Although the policy appears to provide a number of exceptions, the policy precludes voluntary parental opt-out at the parent's or guardian's sole discretion.

The State Board of Education's Enforcement Authority

The State Board of Education's enforcement authority is found in section 1008.32, Florida Statutes. The statute provides that "[t]he State Board of Education shall oversee the performance of district school boards [...] in enforcement of all laws and rules." § 1008.32, Fla. Stat.

In enforcing the law, the statutory process prescribed therein requires that I first report my determination of probable cause to the State Board of Education. If the State Board

then determines that a district school board is unwilling or unable to comply with either law or rule, the State Board is authorized to impose sanctions in order to secure compliance, including the withholding of funds and reporting to the Legislature.

Any argument that the State Board's authority to enforce these safety protocols interferes with any district school board's authority to operate and control schools should be summarily rejected. Indeed, the law in Florida is clear that the State Board's supervisory authority acts as a limitation on the operational authority of districts to operate, control and supervise public schools.

Looking to the Florida Constitution, there is a hierarchy under which a school board has local control, but in which the State Board supervises the system as a whole. This broader supervisory authority may at times infringe on a board's local powers, but such infringement is expressly contemplated and, in fact, encouraged by the very structure set by the Florida Constitution. *See Sch. Bd of Palm Beach Cty. v. Fla. Charter Educ. Found, Inc.*, 213 So. 3d 356, 360 (Fla. 4th DCA 2017) (rejecting school board's argument that the State Board of Education's authority to approve a charter school application on appeal violates article IX, section 4(b)); *see also Sch. Bd of Collier Cty v. Fla. Dep't of Education*, 279 So. 3d 281 (Fla. 1st DCA 2019) (rejecting school board's argument that statute requiring school boards to distribute a portion of capital millage revenue to charter schools violates article IX, section 4(b)).

Accordingly, any argument that the State Board of Education lacks the authority to enforce these school safety protocols should also be rejected. It has long been settled that rules have the force and effect of the law. *State v. Jenkins*, 469 So. 2d 733 (Fla. 1985); *Florida Livestock Board v. W.G. Gladden*, 76 So. 2d 291 (Fla. 1954). Rule 64DER21-15 derives authority from a statute in the educational code—specifically, section 1003.22(3), Florida Statutes—so while FDOH may *also* have enforcement authority, enforcement of school safety protocols falls squarely within the State Board of Education's authority to supervise the state's education system as a whole.

Conclusion

Every school board member and every school superintendent has a duty to comply with the law, whether they agree with it or not. While the district school board may not agree with the safety protocols set forth by the Surgeon General, the Surgeon General is the person who, under the law, sets protocols to control and mitigate COVID-19 in schools. The Office of the Attorney General relied upon these principles to reject any argument a school board could depart from FDOH's emergency rule based upon a disagreement with the protocols found in the rule. *See* AGO 2021-01, September 1, 2021. Disagreement with the protocols found in 64DER21-15 simply does not provide a school district with a basis to violate the rule, be it through medical requirements, attempts to tie mask requirements to fluctuating positivity rates, or through any other means.

All of this in mind, I hereby recommend that the State Board of Education use its enforcement powers to enforce the health protocols found in Emergency Rule 64DER21-15 and protect the right of parents to make both health and educational decisions on behalf of their children.

Should the State Board adopt my recommendation, I request that it consider the sanction of withholding state funds in an amount equal to 1/12 of all school board members' salaries, as well as withholding state funds in an amount equal to any federal grant funds awarded to the BCSB for its noncompliance with Emergency Rule 64DER21-15.

EXHIBIT A

Notice of Emergency Rule

DEPARTMENT OF HEALTH

Division of Disease Control

RULE NO.: RULE TITLE:

64DER21-15 Protocols for Controlling COVID-19 in School Settings

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: Because of an increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, prior to the beginning of the 2021-2022 school year, it is imperative that state health and education authorities continue to provide emergency guidance to school districts concerning the governance of COVID-19 protocols in schools. In August 2021, all public schools in Florida began the 2021-2022 school year with in-person learning available for all students. The Department of Health adopted Emergency Rule 64DER21-12 on August 6, 2021. Since that time the Department has conducted a review of data for cases of COVID-19 positive school-aged children and data for school-aged children who have been in direct contact with a COVID-19 positive person. The Department observed a large number of students have been required to quarantine for long periods of time, resulting in the loss of hundreds of thousands of days of in-person learning. In addition, the Department observed no meaningful difference in the number of COVID-19 cases in school-aged children in counties where school districts have imposed mask mandates. It is necessary to minimize the amount of time students are removed from in-person learning based solely on direct contact with an individual that is positive for COVID-19, to ensure parents and legal guardians are allowed the flexibility to control the education and health care decisions of their own children, and to protect the fundamental rights of parents guaranteed under Florida law.

In order to permit students to continue in-person learning, to minimize the detriment to students and school personnel from the added burden of recurrent removal of students, and to benefit the overall welfare of students in Florida, it is necessary to provide updated emergency guidance to school districts concerning the governance of COVID-19 protocols in schools. This emergency rule conforms to Executive Order Number 21-175, which ordered the Florida Department of Health and the Florida Department of Education to ensure safety protocols for controlling the spread of COVID-19 in schools that (1) do not violate Floridians' constitutional freedoms; (2) do not violate parents' rights under Florida law to make health care decisions for their minor children; and (3) protect children with disabilities or health conditions who would be harmed by certain protocols, such as face masking requirements. The order 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."

Because of the importance of in-person learning to educational, social, emotional and mental health, and welfare, removing healthy students from the classroom for lengthy quarantines should be limited. Under Florida law, parents and legal guardians have a fundamental right to direct the upbringing, education, health care, and mental health of their minor children and have the right to make health care decisions for their minor children. HB 241, Ch. 2021-199, Laws of Fla. Parents and legal guardians are uniquely situated to understand the health care, emotional, and educational needs of their minor children. In furtherance of the Florida Department of Health's authority to adopt rules governing the control of preventable communicable diseases—and because students benefit from in-person learning—it is necessary to immediately promulgate a rule regarding COVID-19 safety protocols that protects parents' rights and to maximize the allowance of in-person education for their children. Unnecessarily removing students from in-person learning poses a threat to the welfare of children, including their social, emotional and educational developmental, and is not necessary absent illness.

REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES: This emergency rule is necessary in light of the unnecessary exclusion of healthy students from in-person learning and the urgent need to provide updated COVID-19 guidance to school districts. Given the evolving nature of this novel disease and the potential for adverse impacts on school children resulting from the unnecessary exclusion of healthy children from in-person learning, there is a need to issue an immediately effective rule while the department promulgates a permanent rule through the non-emergency process.

SUMMARY: Emergency rule 64DER21-15 sets forth the procedures for controlling COVID-19 in school settings. Emergency rule 64DER21-15 repeals and replaces Emergency rule 64DER21-12 that was adopted on August 6, 2021.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Carina Blackmore, Florida Department of Health, 4052 Bald Cypress Way, Tallahassee, Florida 32399-1703, (850)245-4732.

THE FULL TEXT OF THE EMERGENCY RULE IS:

64DER21-15 Protocols for Controlling COVID-19 in School Settings

(1) GENERAL PROTOCOLS AND DEFINITION. The following procedures shall be instituted to govern the control of COVID-19 in public schools:

(a) Schools will encourage routine cleaning of classrooms and high-traffic areas.

(b) Students will be encouraged to practice routine handwashing throughout the day.

(c) Students will stay home if they are sick.

(d) Schools may adopt requirements for students to wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian's sole discretion.

(e) For purposes of this rule, "direct contact" means cumulative exposure for at least 15 minutes, within six feet.

(2) PROTOCOLS FOR SYMPTOMATIC OR COVID-19 POSITIVE STUDENTS. Schools will ensure students experiencing any symptoms consistent with COVID-19 or who have received a positive diagnostic test for COVID-19 shall not attend school, school-sponsored activities, or be on school property until:

(a) The student receives a negative diagnostic COVID-19 test and is asymptomatic; or

(b) Ten days have passed since the onset of symptoms or positive test result, the student has had no fever for 24 hours and the student's other symptoms are improving; or

(c) The student receives written permission to return to school from a medical doctor licensed under chapter 458, an osteopathic physician licensed under chapter 459, or an advanced registered nurse practitioner licensed under chapter 464.

(3) PROTOCOLS FOR STUDENTS WITH EXPOSURE TO COVID-19. Schools shall allow parents or legal guardians the authority to choose how their child receives education after having direct contact with an individual that is positive for COVID-19:

(a) Parents or legal guardians of students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19 may choose one of the following options:

1. Allow the student to attend school, school-sponsored activities, or be on school property, without restrictions or disparate treatment, so long as the student remains asymptomatic; or

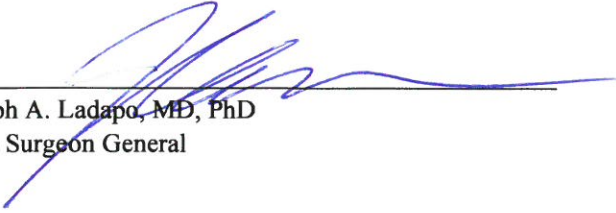
2. Quarantine the student for a period of time not to exceed seven days from the date of last direct contact with an individual that is positive for COVID-19.

(b) If a student becomes symptomatic following direct contact with an individual that has tested positive for COVID-19, or tests positive for COVID-19, the procedures set forth in subsection (2), above shall apply.

Rulemaking Authority 1003.22(3) FS. Law Implemented 1003.22(3) FS. History—New.

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE:


Joseph A. Ladapo, MD, PhD
State Surgeon General

9/22/21
Date

EXHIBIT B

[Return to Headlines](#)

Face Mask Reminder

This is a reminder that the emergency face mask policy passed by the school board last month is still in effect. The policy makes wearing a face mask mandatory while on school board property, including schools and school transportation. Important Information to Remember:

- Each Pre-K-12 student, employee, visitor, vendor, or other person is required to wear a face covering at all times while indoors on school district property.
- A child younger than two years old and a person with a medical certification are not required to have a face covering. Medical Certification: A face covering shall not be required for persons who present school district staff with a certification from a licensed health care provider that the person has a medical, physical, or psychological contraindication that prevents the person from being able to safely wear a face covering.
- Other times a face covering is not required: students with supervisor's approval, eating and drinking, strenuous physical activity, receiving health care, exigent circumstances.
- A face covering IS NOT needed if a student or adult is outside.
- The mask mandate will reduce quarantines of students and staff, based on CDC guidelines.

We have seen a decline in quarantines since the mask mandate was put into place on August 30th. The mask mandate, along with our other COVID-19 mitigation efforts, will allow your school staff to remain focused on the number one priority, educating your child.



Title: Emergency K-12 Face Covering Requirement

Preamble

Judge John C. Cooper, Florida Circuit Court for the Second Circuit of Florida, found that the Centers for Disease Control (“CDC”) is the pre-eminent authority in the United States for infectious diseases and control. Moreover, Section 252.36(1)(c), Fla. Stat., states:

“The Legislature intends that, during an extended public health emergency, such as the COVID-19 pandemic, there should be a presumption that K-12 public schools, to the greatest extent possible, should remain open so long as the health and safety of students and school personnel can be maintained by specific public health mitigation strategies recommended by federal or state health agencies for educational settings.”

The CDC qualifies as a federal health agency as specified in Florida Statute. Moreover, CDC guidelines explicitly recommend all individuals, students as well as staff, wear face coverings while inside whether they have been vaccinated or not, until the spread of COVID-19 is better controlled.

As the Florida Legislature has explicitly authorized the use of mitigation measures recommended by federal health agencies in order to maintain open schools, the School Board of Brevard County, finds that during this time of extreme spread of COVID-19, additional mitigation measures are needed.

Therefore, the School Board of Brevard County, Florida, implements this emergency policy:

Section 1. Required Face Coverings

Subject to the exceptions set forth below, each student (Pre-K-12), employee, visitor, vendor, or other person is required to wear a face covering at all times, while indoors on school district property, including District transportation. All students, employees, visitors, and vendors shall have a face covering with them at all times while on school district property even if they are temporarily allowed to not wear a face covering pursuant to one of the exceptions set forth below. An infant younger than two (2) years old and a person with a medical certification are not required to carry a face covering.

Section 2. Exceptions to Required Face Coverings.

While maintaining social distancing (six (6) feet minimum) as much as feasible, a face covering is not required in the following instances:

Medical Certification - A face covering shall not be required for persons who present school district staff with a certification from a licensed health care provider that the person has a medical, physical, or psychological contraindication that prevents the person from being able to safely wear a face covering.

IEP/504 – A face covering shall not be required for persons who have documented through an IEP or 504 plan that the person has a medical, physical, or psychological contraindication that prevents the person from being able to safely wear a face covering.

Students with Supervisor’s Approval - A face covering shall not be required for a student if the school district staff supervising the student authorizes the student to remove their face covering during that activity provided that the student maintains social distancing (six (6) feet minimum) from other persons when not wearing a face covering.

Eating and Drinking - A face covering shall not be required for any person inside or outside a school district facility while such person is stationary and eating or drinking during a planned mealtime and/or snack time. A face covering also shall not be required while any person is drinking while inside or outside of a school district facility.

Strenuous Physical Activity - A face covering shall not be required for any person inside or outside of any school district facility while such person is engaged in strenuous physical activity.

During Receipt of Health Care - A face covering may be removed when removal of the face covering is necessary for such person to receive health care or to undergo a health care examination from authorized health care personnel.

Exigent Circumstances - A face covering shall not be required if a person is experiencing acute trouble breathing, is unconscious or incapacitated, is personally unable to remove the face covering without assistance or it is deemed by school district staff to be necessary to remove the face covering.

Section 3. Types of Face Coverings.

All students, employees, visitors and vendors are encouraged to wear their own face covering, however, disposable face coverings will be available at all sites. Acceptable face covering include:

Commercially Produced Face Coverings – Commercially produced surgical masks or respirators are acceptable for compliance with this policy, but are not mandated.

Cloth Face Coverings – Commercially produced or home-made cloth face coverings are acceptable for compliance with this policy provided the face covering consists of multiple layers of cloth resulting in the blocking of light when held up to a light, covers both the mouth, and nose and fits snugly against the sides of the person’s face with little to no gaps.

All student face coverings shall comply with dress code language prohibiting messages that are crude; vulgar/profane; violent/death-oriented; gang related; sexually suggestive; and/or promoting alcohol, drugs, or tobacco.

Section 4. Visitor and Vendor Compliance

Authorized visitors and vendors who refuse to wear a face covering will not be permitted on District property.

Section 5. This Emergency Policy becomes effective immediately upon approval and will remain in effect for up to 30 days. A five-day grace period may be extended to those who need to obtain exemption documentation. The School Board will review the Emergency Policy every 30 days and authorizes the Superintendent to end the face covering requirement if levels of community transmission drop to moderate transmission as defined by the CDC to be less than 50 new cases per 100,000 people in the previous seven days.



September 21, 2021 School Board Meeting

Title
Emergency K-12 Face Covering Requirement

Meeting Date(s)
Action - 09/21/2021

Consent Type

Discussion

During an emergency meeting held on August 30, 2021; the Board approved a limited-in-time and limited-in-scope emergency mandate requiring all students, employees, vendors and visitors to wear face masks, while indoors, on any school district property. The Board agreed to re-evaluate COVID-19 levels within the schools to determine if it is safe to move the mandate back to an optional model with a strong encouragement to use a face covering within the 30 day timeframe.

Recommendation

Authority for Action
FS 1001.42

Involves Expenditure of Funds Directly in the Classroom

Source of Funding

Financial Impact

FY	Amount	Budgeted	Fund	Cost Center	Project	Function	Object	Program

Legal Counsel Review
No

Contact
Misty Belford, School Board Chairman, ext. 11412

Attachments

No attachments available



EDUCATION

Brevard County School Board votes to extend mask mandate for 30 days

Bailey Gallion Florida Today

Published 9:40 p.m. ET Sept. 21, 2021 | Updated 10:30 a.m. ET Sept. 22, 2021

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Defying pressure from conservative parents and the Florida Department of Education, the Brevard County School Board voted 3-2 Tuesday night to extend its mask mandate without a parental opt out.

The same board members who voted for the original policy at an Aug. 30 meeting passed the motion again. The original mandate would expire after 30 days and allowed students, staff and visitors to opt out of the policy only if they provided medical documentation that they could not wear masks.

Board Chair Misty Belford, member Jennifer Jenkins and member Cheryl McDougall voted in favor, while board vice chair Matt Susin and member Katye Campbell voted against the mandate.

The new mandate will only require masks when social distancing is not possible, meaning students and staff won't need to wear masks if they are at least six feet apart.

Before the meeting: Two anti-mask protesters arrested before Brevard School Board meeting

'We've lost all sense of perspective': Pediatric illness rises as Brevard vaccinations lag

The meeting attracted 33 people to speak, far fewer than the about 140 who arrived at the Aug. 30 meeting. Still, it wasn't without some drama: two anti-mask protesters, including Janice Crisp, a conservative activist who held a mask burning at the last meeting, and Melbourne man Nicholas Carrington, were removed from outside BPS headquarters in Viera in handcuffs and loaded into Brevard County Sheriff's Office vehicles.

Crisp shouted that she only wanted to speak at the meeting without wearing a mask as she was led away. According to BCSO records, Crisp was arrested on charges of trespassing and interfering with school administrative functions, while Carrington was charged with resisting an officer without violence, trespassing and disorderly intoxication.

Meanwhile, inside at the meeting, Susin moved to extend the mandate for 30 days, but add a parental opt out. He said the COVID-19 cases began dropping before the mask mandate was implemented, the mandate violates Gov. Ron DeSantis' executive order and students do not wear masks well enough to make a mandate effective.

Campbell said masks make it more difficult to educate students because children sometimes struggle to breathe and teachers are harder to hear and understand. She seconded Susin's motion to add a parental opt-out, but said she would rather see no mask requirement at all.

Jenkins, McDougall and Belford pointed to falling COVID-19 cases to justify the mandate's success, but said community transmission in Brevard is still too high to lift the mandate.

Bailey Gallion is the education reporter for FLORIDA TODAY. Contact Gallion at 321-242-3738 or bgallion@floridatoday.com

EXHIBIT C



State Board of Education

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

Richard Corcoran
Commissioner of Education

September 3, 2021

Dr. Mark Mullins
Superintendent
Brevard Public Schools
2700 Judge Fran Jamieson Way
Viera, Florida 32940

Ms. Misty Belford
School Board Chair
Brevard Public Schools
2700 Judge Fran Jamieson Way
Viera, Florida 32940

Dear Superintendent Mullins and Chair Belford:

This letter is sent to express my grave concern regarding your district's response to the recently adopted Emergency Rule 64DER21-12 from the Florida Department of Health. This rule, issued on August 6, 2021, by the Florida Surgeon General, Dr. Scott Rivkees, explicitly requires that any mandated mask policy imposed by a district or school "must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask." The emergency rule does not require parents to submit medical documentation in order to opt out.

Executive Order 21-175 directed the Florida Department of Health and the Florida Department of Education to execute rules to ensure safety protocols for controlling the spread of COVID-19 in schools. The Order directs further that any such action must "at minimum be in accordance with Florida's Parents' Bill of Rights and protect parents' right to make decisions regarding masking of their children in relation to COVID-19." Because the Florida Department of Health, under section 1003.22(3), Florida Statutes, is the agency authorized to adopt rules governing the control of communicable diseases, the Florida Department of Health adopted an emergency rule establishing protocols for controlling COVID-19 in public schools. The rule provides, in part, as follows:

Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.

Rule 64DER21-12(1)(d), Florida Administrative Register, Vol. 47/No. 153, August 9, 2021.

Recent reports in the media indicate that the Brevard County School Board has taken action inconsistent with the emergency rule by limiting or conditioning the parental ability to opt out of a face covering or mask mandate. Your rationale may be based on Judge Cooper's recent order;

Dr. Mark Mullins, Ms. Misty Belford
September 3, 2021
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however, at this point, an automatic stay is in effect. This means the Department of Education may resume enforcement of the Florida Department of Health's emergency rule. In the event the stay is lifted, then enforcement action will be automatically tolled.

Section 1008.32, Florida Statutes, states, "The State Board of Education shall oversee the performance of district school boards and the Florida College System institution board of trustees in enforcement of all laws and rules." Further, section 1008.32(2)(a), Florida Statutes, states that the "Commissioner of Education may investigate allegations of noncompliance with law or state board rule and determine probable cause."

Based on this authority, I am immediately initiating an investigation of non-compliance with the rule adopted by the Florida Department of Health on August 6, 2021. In commencing this investigation, I am demanding that you provide a written response by 10:00 a.m. on Wednesday, September 8, 2021, documenting how your district is complying with Florida Department of Health Emergency Rule 64DER21-12. Should you fail to document full compliance with this rule, in accordance with section 1008.32, Florida Statutes, I intend to recommend to the State Board of Education that the Department withhold funds in an amount equal to the salaries for all the members of the School Board, as well as other sanctions authorized by law, until the district comes into compliance.

Parents have a fundamental right to direct the upbringing, education and care of their minor children. The Department of Education will protect that right.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Corcoran", with a long horizontal flourish extending to the right.

Richard Corcoran
Commissioner

EXHIBIT D

School Board of Brevard County

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

Mark W. Mullins, Ed.D., Superintendent



September 8, 2021

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

Dear Commissioner Corcoran,

We are in receipt of your letter dated September 3, 2021. This letter is coming from the board chair rather than the superintendent because this was a Board action. The Board felt it was necessary to pass a short-term emergency face covering policy to mitigate the rising number of Covid-19 cases in Brevard schools. As such, the School Board called for an emergency meeting on August 30, 2021, where it passed the 30-day emergency policy requiring face coverings on all School Board property.

The following response expands on The School Board of Brevard County, Florida's (School Board) reasoning for its decision. Respectfully, we hope you will appreciate the exigent circumstances leading to our short-term emergency policy and agree that we have, in good faith, made every reasonable effort to remain in compliance with the Florida Constitution, Florida Statutes, and the DOH Emergency Rule 64DER21-12. We believe the emergency policy is compliant with the law.

Brevard County is in a major crisis due to a significant influx of Covid-19 patients. As [reported](#) by the County's Emergency Management Office, our hospitals are so overloaded with Covid-19 patients, local health officials have pled for residents to consider other options before taxing our overburdened ambulance or ER services. Every hospital system in the county is overcapacity. Testing is backlogged. Waiting rooms are full. Pediatric hospitalizations are on the rise. As noted in the report, the Emergency Director publicly encouraged all residents and visitors to "increase their vigilance" and "return to what we know helps slow the spread when it comes to COVID, which is wearing face coverings, good hand hygiene, practicing social distancing when possible and [vaccinations]."

This steep and troubling surge of Covid-19 patients in our community and most notably, in our schools, predicated the Board's August 30 emergency meeting. In the short window of time since school started on August 10, the number of students testing positive for Covid-19—and as a result, the number of students and staff out on quarantines—far exceeded any expectations. Multiple students and staff are hospitalized with Covid-19, some in the ICU on ventilators, which have led to staff deaths. The following data compiled from our BPS Covid-19 [dashboard](#) and Brevard DOH was presented at the August 30 meeting:

Covid-19 Case Positivity Rate Per 100,000 Individuals

	Brevard County	Brevard Public Schools
Week Before School Started	627.6	221
First Week of School	710.7	789
Second Week of School	744	1,275
Third Week of School	735.9	1,980

Misty Belford, Chair
Board Member, District 1

Phone: (321) 633-1000, ext. 11412 • FAX (321) 633-3432



Normally, what we see in our schools is a reflection of the community in terms of transmission rates. However, at this time, our BPS schools are disproportionately leading the way in positive Covid-19 cases. For perspective, there were 4,498 reported new cases in the entire county between August 20 and August 26. Out of those, 1,410 came from our BPS schools. Thus, 31% of the total Brevard County cases in that time span came from within our schools, while our school population makes up just over 11% of the county population. Moreover, in three short weeks into the new school year, our Covid-19 rates already far surpass what we saw at the height of the pandemic in the 2020-2021 school year.

The Board could not ignore these alarm bells. Quarantines as of the August 30 emergency meeting had already reached nearly 16,000 students. On August 23 and 24, in consultation with our local DOH, we had to temporarily close one of our middle schools based on an extremely high number of cases and quarantines. The rapidly escalating trend of positive cases and contact-based quarantines represent an unsustainable trajectory in light of our commitment to honor the State's expectation of keeping schools open. See F.S. 252.36(1)(c); DOH Rule 64DER21-12 ("lengthy quarantines should be limited at all costs"). With the shared interest of open schools in mind, the Board, with great consideration of the costs, reasonably enacted an emergency policy intended to curb the dangerously high numbers of positive cases and quarantines, and to prevent further school closures.

Notably, the policy (enclosed) is narrowly tailored and limited in both time and scope. The emergency policy is only in effect for up to 30 days and allows parents and students ample opportunities to opt out or remove the face covering via one of the seven available exceptions delineated in Section 2 of the policy, which includes the opportunity to provide a medical certification. Moreover, the policy affords a 5-day grace period for families to pursue any documentation needed to participate in the parental opt-out, and any exemptions approved from the prior school year will be honored.

Florida Constitution

Article IX, Section (1)(a) of our Florida Constitution states, "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require."

The Board's ultimate duty under the Florida Constitution to provide for student safety while providing a high-quality education motivated the Board's decision to implement the emergency mandate. Parents entrust their children to our care every day. We treat student safety as a serious and sacred obligation. From the moment parents drop their child off at the car loop or bus stop, they expect us to do everything we possibly can to keep them safe.

This emergency mandate decision was not made lightly nor without consideration of hours upon hours of public comment, parental and community input, and careful evaluation of medical experts, including feedback from our local Department of Health and hospitals.¹ Given the bleak landscape of skyrocketing cases outlined above, the Board feels a moral and legal obligation to deploy any available mitigation measure that has potential to slow the effect of the deadly Covid-19 virus on our staff and students and reduce overall quarantines to maintain continuity of education. Ultimately, in line with our constitutional duties, our goal is to keep students safe while keeping school doors open.

¹ At the August 10, 2021, School Board meeting, the following local health leaders, including representatives of our local DOH, were present to answer questions and provide insight and data concerning the increase of Covid-19 positive cases in Brevard County: Dr. Eric Deppert, Dr. Mary Ulrich, John Davis, Helen Medlin and Maria Stahl.

Florida Statutes

The State Board of Education and Department of Education is asserting we are in violation of the Parents' Bill of Rights ("PBR"). The PBR was created by HB 241 and created Chapter 1014 of the Florida Statutes. 1014.03, Fla. Stat., prohibits government entities from:

"[I]nfring[ing] 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.**" (emphasis added)

The School Board's actions were reasonable and necessary in light of the current worldwide Covid-19 pandemic, the more infectious and virulent strain of Covid-19 known as the Delta variant, and the alarming local influx of cases in the month of August, especially evidenced at the higher-than-average rates demonstrated within the school district, which far outpaced the overall Brevard County rates, as cited above.

Pursuant to the Florida Constitution and Florida Statute 1002.20, Florida's school boards are charged with the health, safety, and welfare of students and staff. The numbers provided should be alarming and more than justify the Board's reasonable concern over the health, safety, and welfare of the students and staff under its care. Moreover, the continued trajectory was unsustainable and would have resulted in more school closures preventing teacher led instruction as there is no allowance for schools to implement the innovative e-learning options that were utilized during the last school year. The School Board takes the obligations of the health, safety, and welfare of its students and staff seriously, and consider this to be a compelling state interest.

The limited-in-time and limited-in-scope emergency mandate implemented by the School Board was as narrowly tailored as possible. Only two measures serve as recommended mitigation strategies. First is vaccination. There is no requirement by the State for students to be vaccinated. Moreover, only those students 12 and over are eligible for vaccination. As such, all students from Pre-K through 6th grade are not eligible for this mitigation strategy. The second mitigation strategy is masking combined with social distancing, which we employed last year with relative success. The School Board requires social distancing as much as possible given we have more students in brick-and-mortar schools with no e-learning option to de-densify the school population. As such, social distancing has limited effectiveness. We combined social distancing with optional face coverings to open the school year. School staff strongly recommended but did not require face coverings when we opened the year. This strategy resulted in the above numbers and the closing of a school. The School Board needed to take swift additional action to slow the spread through the schools and continue educating children. A side benefit of the mandatory face covering policy is that it reduces the number of quarantines resulting from contact to positive cases as everyone is utilizing a face covering, further allowing the education of students in class.

There are no less restrictive means for the School Board to act in order to keep students in school. The mandate was limited to only thirty (30) days so that the Board will soon have an opportunity to re-evaluate Covid-19 levels within the schools to determine if it is safe to move the mandate back to an optional model with a strong encouragement to use a face covering. Both the CDC and Florida DOH acknowledge the ability of face coverings to serve as a mitigation strategy for slowing the spread of Covid-19. Even the DOH's Emergency Rule acknowledges face coverings as a mitigation strategy. The School Board elected to follow the CDC's recommendations for trying to regain some semblance of control over the number of students being removed from the schools.

Furthermore, Section 252.36, Fla. Stat., evidences the Florida Legislature’s intent to authorize implementation of any and all mitigation strategies recommended by federal or state health agencies to keep schools open. Specifically, 252.36, Fla. Stat., provides as follows:

“The Legislature intends that, during an extended public health emergency, such as the COVID-19 pandemic, there should be a presumption that K-12 public schools, to the greatest extent possible, should remain open so long as the health and safety of students and school personnel can be maintained by specific public health mitigation strategies recommended by federal or state health agencies for educational settings.”

This language specifically allows, and directs, that schools will only be closed when mitigation strategies recommended by federal or state health agencies will not allow for keeping students and staff healthy and safe. The plain language of the statute serves as a limitation and authorization for use of federal or state health agency recommendations for mitigating effects of an extended public health emergency such as Covid-19.

Finally, the Board considers its compliance with Section 768.38, Fla. Stat., as relevant to the overall decision to temporarily implement a face covering mandate. Given the vastly higher number of positive Covid-19 cases this school year compared to last, the Board finds reimplementation of its previously central mitigation strategy, mandatory face coverings, to be necessary to preserve its liability protections from Covid-19 related claims. Specifically, the statute provides the School Board must demonstrate “a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued.” F.S. 768.38(3)(c)(2). Further, “If more than one source or set of standards or guidance was authoritative or controlling at the time the cause of action accrued, the defendant’s good faith effort to substantially comply with any one of those sources or sets of standards or guidance confers such immunity from civil liability.” F.S. 768.38(3)(c)(2)(b). Given the highly litigated and untenable status of the DOE’s interpretation of DOH Emergency Rule 64DER21-12, the School Board finds the more protective and conservative path toward compliance with Section 768.38, Fla. Stat., is to follow CDC guidance along with DOH guidance that expressly recognizes masks or facial coverings “as a mitigation measure.” Conversely, for the School Board to not employ a recognized mitigation measure in its arsenal at a time when its Covid-19 rates within its schools are vastly higher than at any point last school year (when mandatory masking was in place), the door may be opened to a claim of gross negligence that could threaten the School Board’s eligibility for immunity pursuant to Section 768.38, Fla. Stat.

Neither the DOE nor the DOH rules can supersede statutes passed by the Florida Legislature. The School Board has demonstrated its compliance with existing Florida Statutes. Specific to the Parents’ Bill of Rights, the School Board has a reasonable basis for implementing its mandate to achieve a compelling state interest. The mandate was implemented for a short time requiring frequent review and evaluation, limiting its duration and scope. There are no less restrictive measures available to achieve the outcome sought by the School Board.

DOH Emergency Rule 64DER21-12

The Commissioner’s letter interprets DOH Emergency Rule 64DER21-12 to require a blanket parental opt-out with no specified grounds for opting-out. Respectfully, the School Board disagrees with that interpretation of the Rule. By its plain language, the Rule states, “Students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.” (1)(d). The Rule does not state that the school must allow an opt-out for any and all—or no—reasons.

The School Board’s emergency mandate does, in fact, allow for a parent or legal guardian to opt-out the student from wearing a face covering or mask on the grounds delineated in the policy. Therefore, the School Board’s position is that the emergency mandate complies with DOH Emergency Rule 64DER21-12.

Conclusion

In light of the localized data presented above, we hope you will agree the alarming pace of positive cases and quarantines within our school district was unsustainable. Considering the threat posed to Brevard County's children by removing over 15,000 of our students from school in a span of less than three weeks, we believe the School Board has demonstrated it has effectively and in good faith complied with all relevant and binding laws, including the DOH Emergency Rule and importantly, the Parents' Bill of Rights.² This swift yet short-term action we believe was necessary to keep our schools open, keep our students safe, and keep our students educated.

We respectfully request due to the exigent circumstances of the record-high positive cases and quarantines experienced in Brevard County Schools as of the August 30 emergency mandate, and in light of the narrowly tailored, limited-in-time and limited-in-scope nature of the temporary mandate, that the DOE withhold any enforcement action or further investigation as the School Board has satisfied the plain language of the Florida Parents' Bill of Rights.

Sincerely,



Misty Belford, Chair
School Board Brevard County



Paul Gibbs, General Counsel
School Board Brevard County

² 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 E



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

September 23, 2021

Dr. Mark Mullins
Superintendent
Brevard County Schools
2700 Judge Fran Jamieson Way
Viera, Florida 32940

Ms. Misty Belford
School Board Chair
Brevard County Schools
2700 Judge Fran Jamieson Way
Viera, Florida 32940

Dear Superintendent Mullins and Chair Belford:

This letter is to advise you of the Department of Health's new emergency rule revising the "Protocols for Controlling COVID-19 in School Settings" and to provide you one more opportunity to come into compliance with the requirements established by the Department of Health.

A copy of the Department of Health's new rule, 64DER21-15, is attached. It revises the requirements for quarantining asymptomatic students who have been exposed to COVID-19 and further clarifies the parental opt-out provision to foreclose the erroneous interpretation that the parental opt-out permits a medical-only opt-out. That provision now provides that ". . . the school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian's **sole discretion.**" See, [Rule 64DER21-15\(1\)\(d\), Florida Administrative Register, Vol. 43 / No. 185](#), September 23, 2021 (emphasis supplied). The purpose of these changes is explained by the Department of Health in its notice for the new rule.

The Department [of Health] observed a large number of students have been required to quarantine for long periods of time, resulting in the loss of hundreds of thousands of days of in-person learning. In addition, the Department [of Health] observed no meaningful difference in the number of COVID-19 cases in school-aged children in counties where school districts have imposed mask mandates. It is necessary to minimize the amount of time students are removed from in-person learning based solely on direct contact with an individual that is positive for COVID-19, to ensure parents and legal guardians are allowed the flexibility to control the education and health care decisions of their own children, and to protect the fundamental rights of parents guaranteed under Florida law.

Dr. Mullins, Ms. Belford
September 23, 2021
Page Two

I am continuing the investigation of your district's mask mandate that I notified you by letter of September 3, 2021. Based upon the authority provided to me under s. 1008.32(2)(a), Florida Statutes, I request that you provide a written response by 5:00 p.m. on September 24, 2021, documenting how your district is complying with that portion of the Department of Health's Emergency Rule 64DER21-15, that continues to give parents or legal guardians the sole discretion to opt a student out from a mask or face covering mandate.

As I have done before, if you fail to document full compliance, I intend to recommend to the State Board of Education that the Department of Education withhold funds in an amount equal to the salaries for all members of the School Board, as well as other sanctions authorized by law, for the period during which the district has been out of compliance.

Thank you for your prompt attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Corcoran", with a long horizontal flourish extending to the right.

Richard Corcoran
Commissioner

EXHIBIT F

School Board of Brevard County

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

Mark W. Mullins, Ed.D., Superintendent



September 24, 2021

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

Dear Commissioner Corcoran,

We are in receipt of your letter dated September 23, 2021, asking for a response to the District's compliance with the new DOH Emergency Rule by 5:00 p.m. on September 24, 2021. Please be advised that the School Board Chair has directed the Superintendent of Schools, Dr. Mark Mullins, to call a Special Board Meeting on October 5, 2021, to discuss the matter starting at 9:00 a.m. Pursuant to your letter, the decision has ramifications on the full Board and thus, the full Board should have the opportunity to discuss the matter at a properly noticed public meeting. As such the School Board is respectfully requesting until 5:00 p.m. on October 6, 2021, to respond to your letter.

Thank you and have a great day and weekend.

Sincerely,

Paul Gibbs
General Counsel

cc: Misty Belford, Chair
Matt Susin, Vice-Chair
Katy Campbell
Jennifer Jenkins
Cheryl McDougall
Mark Mullins, Ed.D., Superintendent

KMA/pg/vpl

Paul Gibbs, General Counsel
School Board Attorney
Phone: (321) 633-1000, ext. 11438

