

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:** Sarasota County School District, Student Opt-Out Requirements

**DATE:** October 4, 2021

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Based upon the following memorandum, I find there is probable cause that the Sarasota County School Board (SCSB) 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, SCSB'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.*

#### Sarasota County School Board

On August 18, 2021, SCSB published notice of its intent to hold an emergency meeting concerning its policy regarding face coverings for students and staff. On August 20, 2021, SCSB held the meeting, therein voting to adopt a policy which provides as follows:

For the first 90 days following the date this emergency policy becomes effective, each student, employee, visitor, and vendor must wear a medical grade or COVID-style mask while at school, while on school property, during school sponsored activities, and during School Board-provided

transportation to and from school or school-sponsored activities, at all times while indoors or outdoors in a crowded setting.

*See Exhibit B.* The face covering policy requires all students, staff and visitors to wear face coverings within SCSB schools, administrative facilities and vehicles, and outside in crowded settings, and provides exceptions based only upon medical certification or IEP needs. Although the policy contains an automatic suspension provision which deactivates the mandate if local positivity rates drop below 8%, the policy automatically reinstates if positivity rates rise.

On August 27, 2021, I wrote SCSB'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 1, 2021, counsel for SCSB responded to me in writing, asserting that SCSB's policy is in compliance with law insofar as it is a narrowly tailored response in service of a compelling state interest and, further, that the Department of Health's rule inadequately serves the same provisions insofar as it violates local school districts' constitutional rights to operate, control and supervise schools therein. *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 SCSB'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 SCSB responded to me in writing, therein contending that SCSB's current policy is in compliance with rule, but requesting an extension of time to respond until after the SCSB's next meeting. *See Exhibit F.* The letter did not rescind the requirement for medical documentation in order to opt-out of the mask mandate.

At present, SCSB's mask policy requires all students, staff and visitors to wear face coverings within SCSB schools, administrative facilities and vehicles, and outside in crowded settings, and provides exceptions based only upon medical certification or IEP needs. While the policy contains a suspension provision which deactivates the mandate if local positivity rates drop below a certain threshold, the policy automatically reinstates if positivity rates rise.

#### 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 SCSB 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

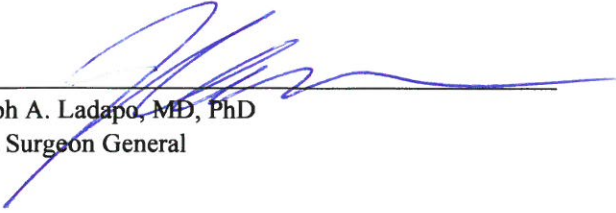
2. Quarantine the student for a period of time not to exceed seven days from the date of last direct contact with an individual that is positive for COVID-19.

(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**

## **EMERGENCY FACE MASK POLICY FOR STUDENTS, EMPLOYEES, VISITORS, AND VENDORS FOR THE 2021-2022 SCHOOL YEAR**

In light of the aggressive transmission of the delta variant to COVID-19, given the current elevated rates of hospitalization and positivity for COVID-19 in Sarasota County, and given the current high rate of positivity for COVID-19 in Sarasota County schools and the corresponding impact on the operation of the school district, the School Board of Sarasota County took testimony at its August 17, 2021 Board workshop on these topics. The School Board of Sarasota County finds credible and authoritative the testimony it heard at said workshop, incorporates it into this emergency policy as its findings of fact, and adopts said testimony in its entirety as its factual basis for this emergency policy.

- I. For the first 90 days following the date this emergency policy becomes effective, each student, employee, visitor, and vendor must wear a medical grade or COVID-style mask while at school, while on school property, during school sponsored activities, and during School Board-provided transportation to and from school or school-sponsored activities, at all times while indoors or outdoors in a crowded setting.
- II. Exceptions: Students, employees, visitors, and vendors may remove masks in order to eat or drink, for medical reasons, and consistent with a student's Individualized Education Plan (IEP).
- III. Accommodations: The School Board must consider accommodations in accordance with state and federal law when interpreting this emergency policy.
- IV. Automatic Suspension and Activation: While this emergency policy is in effect, the requirements regarding wearing a mask shall be automatically suspended any time the positivity rate for COVID-19 within Sarasota County drops below 8% for three (3) consecutive days, as determined by the data maintained by the Florida Department of Health. At any time while this emergency policy is in effect but suspended as described in this section, this requirements contained in this policy shall automatically re-activate and apply any time the positivity rate in Sarasota County for COVID-19 is above 10%. The superintendent or superintendent's designee shall communicate with representatives of the Florida Department of Health on a daily basis about the most recent available daily data regarding the COVID-19 positivity rate in Sarasota County. In the event the suspension or re-activation thresholds described in this section are met, the superintendent or superintendent's designee shall promptly publicly communicate that a suspension or re-activation has occurred. Upon such communication, the mandates of this policy shall apply.
- V. Translucent face shields that restrict the outward free flow of air beyond the individual's nose and mouth area but that do not obscure from the view of others, the individual's eyes may be worn by any student, including as a supplemental

mask to masks mandated by this emergency policy.

- VI. Gaiters, buffs, or bandanas may not be worn as an alternative to face masks.
- VII. All face masks and shields must comply with school dress codes and the Code of Student Conduct, the Employee Handbook, and all School Board collectively-bargained policies, including the School Board's policies against harassment and bullying.
- VIII. Violations of this emergency policy may lead to the imposition of discipline or the revocation of access or other privileges.
- IX. This emergency policy becomes effective immediately upon adoption and will expire 90 days after it becomes effective. Upon becoming effective it shall temporarily constitute a modification to the previously-enacted 2021-2022 Face Mask policy. To the extent the previously enacted 2021-2022 Face Mask policy conflicts with this emergency policy, the previously enacted 2021-2022 Face Mask policy shall be temporarily suspended. Upon expiration of this emergency policy, the previously enacted 2021-2022 Face Mask policy pertaining to students, employees, visitors, and vendors shall again become effective and remain so until its sunsets June 30, 2022, unless extended or amended prior to that date.

**STATUTORY AUTHORITY:**

**FS 1001.41; FS 1001.42; FS 1001.43; FS 120.54(4)**

**LAWS IMPLEMENTED:**

**FS 1001.42(4) & (8); FS 1003.31; FS 1012.23**

**ADOPTED: 08/20/21**

# **EXHIBIT C**



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

August 27, 2021

Dr. Brennan Asplen  
Superintendent  
Sarasota County Schools  
1960 Landings Boulevard  
Sarasota, FL 34231

Ms. Shirley Brown  
School Board Chair  
Sarasota County Schools  
1960 Landings Boulevard  
Sarasota, FL 34231

Dear Superintendent Asplen and Chair Brown:

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 Sarasota 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. 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 5:00 p.m. on Wednesday, September 1, 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**



DANIEL J. DELEO  
BOARD CERTIFIED IN BUSINESS LITIGATION  
941.364.2740  
[ddeleo@shumaker.com](mailto:ddeleo@shumaker.com)

September 1, 2021

***VIA FEDERAL EXPRESS AND EMAIL***

Hon. Richard Corcoran, Esq.  
Commissioner of Education  
Florida Department of Education  
325 W. Gaines St.  
Tallahassee, FL, 32399-0400

Dear Commissioner Corcoran,

My law firm represents the School Board of Sarasota County (“School Board”) – including its Chairperson Shirley Brown (“Board Chair”) - and the Superintendent of the Sarasota County School District, Dr. Brennan Asplen (“Superintendent”). Please treat this letter as the formal response of both the Board Chair and Superintendent to your August 27, 2021 correspondence.

My clients contend that its emergency face mask policy adopted August 20, 2021 (“Emergency Policy<sup>1</sup>”) is both lawful and compliant with the recently enacted HB 241 (2021) - the Parents’ Bill of Rights (“PBoR”).

As you know, one of the statutes enacted by the PBoR - FS 1014.03 - creates a statutory framework for evaluating the interplay between fundamental parental rights and conflicting governmental actions. Specifically, FS 1014.03 prohibits governmental institutions such as school boards 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. (Italicized for emphasis)*

As explained in the paragraphs below, the Emergency Policy satisfies this standard while the recent emergency DOH rule - 64DER21-12 (“Emergency DOH Rule”) - inadequately implements the same statutory provision. Specifically, the Emergency DOH Rule - which requires absolute parental opt out to face mask mandates without satisfaction of any preconditions - is

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<sup>1</sup> This policy passed by a 3-2 vote. Board Members, Karen Rose and Bridget Ziegler, voted against the Emergency Policy.

unlawful because it wholly fails to consider a school board's constitutional and statutory obligations to govern in furtherance of student health, safety, and welfare during a global pandemic. In other words, the Emergency Policy is within the lawful parameters of the PBoR's framework while the Emergency DOH Rule - at least as it is interpreted by DOE - is not. Because the Emergency DOH Rule fails to account for a school board's right to enact procedures that conflict with fundamental parental rights when warranted by compelling interests, it is arbitrary, overbroad in its application, beyond or inconsistent with delegated authority, ultra vires, and, as a result, unlawful.

Further we separately contend that the interplay between Article IX of the Florida Constitution and Florida Statutes 1001.42(8)(a) and 1001.43(7), respectively, provides an alternate legal basis for the School Board's actions.

My clients contend that the immediate and recent threat to student health, safety, and welfare posed by COVID-19 in Florida and Sarasota County is *compelling*. For example, as recently as August 6, 2021, Florida's Surgeon General - in its justification for bypassing the normal rule making process in favor of implementing the DOH Emergency Rule - deemed the "recent increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant" when combined with "the imminent start to the school year" a "specific reason for finding an immediate danger to the public health, safety, and welfare" such that it was "imperative" to "promulgate an emergency rule regarding COVID-19 protocols in public schools to encourage a safe and effective in-person learning environment for Florida's school children during the upcoming school year".

In light of this threat, it was *reasonable* for the School Board to enact the Emergency Policy - especially since, as described above, the DOH Emergency Rule failed to fully account for the PBoR's mandates. Additionally, adopting the Emergency Policy was *necessary* in light of the unique and pronounced health crisis occurring in Sarasota County and its corresponding impact on Sarasota County's healthcare system and public school operations.

For example, at its August 17, 2021 workshop, the School Board heard testimony from witnesses-regarding this crisis and its impact. The testimony<sup>2</sup> included:

- Michael Drennon, the Disease Intervention Services Program Manager at the Florida Department of Health in Sarasota County, who testified that as of August 16, 2021, the COVID-19 positivity rate in Sarasota County was 14.41%, the seven-day average COVID-19 positivity rate in Sarasota County was 14.69%, and the fourteen-day average COVID-19 positivity rate in Sarasota County was 14.03%. These averages were well in excess of the positivity rates at the beginning of the 2020-2021 school year in Sarasota County. Mr. Drennon testified that on August 16, 2021, 62 individuals age 5-18 tested positive for

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<sup>2</sup> A recording of the broadcast of the August 17, 2021 workshop can be viewed in its entirety at <https://www.youtube.com/watch?v=zgoNiIYNvMs>. The portions relevant to this matter occur between 57:40 and 3:10:10 of the recording.

COVID-19 in Sarasota County and that the seven-day average for individuals in this age range who were positive for COVID-19 in Sarasota County was 51.5/day. These figures for school age children were well in excess of the positivity figures at the beginning of the 2020-2021 school year in Sarasota County. Mr. Drennon testified that as of August 16, 2021, 325 individuals were hospitalized in three Sarasota County hospitals combined who were admitted because of COVID-19 and approximately 90% of those hospitalized were unvaccinated. This number of hospitalized individuals was the highest amount that had been recorded since the beginning of the COVID-19 pandemic. Mr. Drennon testified that the incubation period for the COVID-19 delta variant was 2-10 days with an average incubation period of 5 days. Mr. Drennon testified that in the 12-19 age range in Sarasota County as of August 16, 2021, the number of individuals who had been vaccinated with one shot was only 44% and the number of individuals who were fully vaccinated was only 30%.

- Dr. Manuel Gordillo, M.D., an infectious disease specialist, who testified that as of August 17, 2021, 240 individuals were hospitalized at Sarasota Memorial Hospital, with more than 50 such individuals in that hospital's Intensive Care Unit (ICU), the majority of which were on ventilators. Dr. Gordillo indicated that COVID-19 was creating extreme pressure and stress at Sarasota Memorial Hospital, causing hospital staff exhaustion, and described the recent COVID-19 situation in Sarasota County as a "public health crisis". Dr. Gordillo testified that Sarasota Memorial Hospital currently has staffing problems with no current ability to augment staffing and no pool to draw from to currently augment staffing. Dr. Gordillo stated that "now is the worst of the [COVID-19] pandemic in Florida and Sarasota" and that it is a "dire difficult situation" and "the worst it has been in the last 18 months". Dr. Gordillo urged parents to utilize all mitigation measures to prevent the spread of COVID-19, including heeding public health advice, using masks, social distancing, avoiding crowds, and getting vaccinated. Dr. Gordillo testified that the delta variant is more transmissible than previous COVID-19 variants and is "as contagious as the Chicken Pox from a transmissibility standpoint". Dr. Gordillo testified that it is easier for the virus to infect unvaccinated people and masks are a tool to mitigate this transmissible virus. Dr. Gordillo indicated that the COVID-19 numbers "absolutely" justify the School Board in taking emergency action and that "all need to make sacrifices during a crisis to get us out of a hole". Dr. Gordillo testified that an acute crisis currently exists that is unpredictable and that no one knows how long it will last.
- Superintendent, who testified that so far this school year – due largely to no remote school option and more people moving to Sarasota County – there were more children in Sarasota County schools than last year. The Superintendent testified that his number one priority was creating a safe environment for students and staff. The Superintendent testified that the recent spike in COVID-19 has strained school operations. The Superintendent indicated a big concern was quarantining of students and staff due to contacting tracing. The Superintendent testified that 30-40 individuals could be quarantined at a time based on one Covid-19 positive individual and that 30+ employees/day were quarantined this week (August 15 and August 16). The Superintendent testified that staff shortages



caused by the number of employees quarantined was causing difficulty in tasks such as getting students to schools and serving lunches.

- Jody Dumas, the Sarasota County School District's Assistant Superintendent Chief Operations Officer, who testified that vacancies when combined with the absences caused by COVID-19 and other reasons were making it so the school district cannot fulfill services. Mr. Dumas testified that to fulfill operations, the school district is pulling from other areas to meet services needs but that the pool of employees to pull from is only so deep. Mr. Dumas testified that shortages in custodial services, food services, and transportation was creating a situation where it is difficult for the school to meet service levels and that the school district was only a few vacancies away from things such as kids getting to school late due to relying on "double runs" of busses due to staffing shortages.

Based on this testimony and pursuant to the mandate in Florida Statute 1001.42(8) that it provide for proper attention to health, safety, and other matters related to the welfare of students, the School Board called an emergency meeting at its regularly scheduled August 17, 2021 school board meeting in order to consider emergency modification to its existing mask policy. The School Board felt there was insufficient time to adopt necessary policy modifications through the non-emergency process while still protecting the health, safety, and welfare of students.

Following the School Board's announcement that it would be calling an emergency meeting at its August 17, 2021 board meeting but prior to adopting the Emergency Policy, the School Board took reasonable steps to ensure it followed fair procedures, as required by Florida Statute 120.54(4). These included:

- Publishing notice of the August 20, 2021 emergency meeting on the School Board's District Event Calendar on August 18, 2021;
- Ensuring the School Board satisfied the public comment requirements of Florida Statute 286.0114. After its Chairperson announced the intent to conduct the emergency meeting regarding masks, the School Board provided members of the public with more than three hours to be heard via public comment on the matter at the August 17, 2021 board meeting. Then prior to adopting the Emergency Policy at the August 20, 2021 emergency meeting, the School Board permitted an additional three hours of public comment;
- Complying with School Board Policy 2.22. This included affording each member of the public three minutes to speak at the August 20, 2021 emergency meeting, publishing a written emergency meeting agenda prior to the emergency meeting to adopt the Emergency Policy on multiple locations on the School Board's website, and posting the three distinct policy drafts in advance of the emergency meeting to the School Board's website so that public comment could be meaningful;
- Ensuring said written emergency meeting agenda outlined the facts and reasons supporting the School Board's contention that an immediate danger to the public health, safety, or

welfare existed that listed the School Board's rationale for concluding the procedures it was implementing were fair under the circumstances;

- Scheduling the August 20, 2021 emergency meeting more than 67 hours after the School Board called for it so that the public had sufficient time to make arrangements to meaningfully attend and participate in it;
- Scheduling the August 20, 2021 emergency meeting in the same location it holds its regularly scheduled school board meetings; and
- Broadcasting the August 20, 2021 emergency meeting in the same manner it broadcasts its regularly-scheduled board meetings.

At its August 20, 2021 emergency meeting, the School Board adopted the Emergency Policy. By doing so, the School Board expressly determined the testimony from its August 17, 2021 workshop regarding COVID-19 was credible and authoritative, incorporated said testimony into the Emergency Policy as its findings of fact, and adopted the testimony in its entirety as its factual basis for the Emergency Policy. The Emergency Policy took effect immediately, and was implemented for only 90 days, as statutorily required.

A review of the Emergency Policy reveals that it is *narrowly tailored* to address the crisis caused by the COVID-19 pandemic and its impact on the operations of Sarasota County's public schools. First, the Emergency Policy calls for exceptions to its mask mandate for medical reasons and when consistent with a student's IEP. Second, the Emergency Policy permits all accommodations required by state and federal law. Third, importantly, and unlike the mandates adopted by other Florida school boards, the Emergency Policy is automatically suspended when the COVID-19 positivity rate in Sarasota County drops below a proscribed level with automatic re-activation of said suspension if the COVID-19 positivity rate in Sarasota County then rises above a certain proscribed level thereafter.

Lastly, there are *no less restrictive means available* to the School Board than the mask mandates in the Emergency Policy. Given the increase in students in Sarasota County public schools this school year, the fact that limited online schooling options are currently available, considering space constraints in the typical public school classroom designed prior to the COVID-19 pandemic, and given the DOH Emergency Rule's restrictions on isolating or segregating maskless students, attempts to socially distance in lieu of enacting the Emergency Policy would not be effective. Further, because the Florida Legislature adopted FS 381.00316(3) - which prohibits school from requiring documentation of COVID-19 vaccination from students and residents as a precondition to attending school and accessing school property, seeking to mitigate the COVID-19 crisis and its impact on Sarasota County public schools through a push for vaccinations in lieu of passing the Emergency Policy would likewise not be effective.

While my clients may disagree with the Department of Education on the best way to do so in this instance, there is no doubt that they share the same passion to further student educational objectives during the COVID-19 pandemic. Additionally, my clients continue to seek ways to

Hon. Richard Corcoran, Esq.  
Commissioner of Education  
September 1, 2021  
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cooperate and collaborate with DOE in other ways to ensure the best interests of the students of this state and community are served. As such and for the reasons outlined herein, the Board Chair and Superintendent respectfully request that the Department of Education reconsider its position that the Emergency Policy is inconsistent and non-compliant with the DOH Emergency Rule, cease any corresponding investigation, and halt the imposition of any corresponding sanctions.

Alternatively, the Board Chair and Superintendent respectfully request that the Department of Education temporarily abate further proceedings regarding this matter so that the myriad similar legal challenges filed by other, more proactive school districts can determine the outcome of this dispute. This will enable the rule of law to settle this dispute and for both parties to more efficiently devote resources to educational matters instead of the pursuit of duplicative, time consuming, unnecessary, and costly litigation. As such, we urge both the Department of Education and Department of Health to take all necessary actions to advance the litigation of related matters by requesting they be deemed matters of great public importance, where practical, so that the Florida Supreme Court can swiftly and lawfully resolve these disputes.

Respectfully,



Daniel J. DeLeo, Esq.

cc: Hon. Dr. Scott Rivkees, M.D., Florida Surgeon General  
Hon. Jane Goodwin, School Board Member, School Board of Sarasota County  
Hon. Bridget Ziegler, School Board Member, School Board of Sarasota County  
Hon. Karen Rose, School Board Member, School Board of Sarasota County  
Hon. Thomas Edwards, School Board Member, School Board of Sarasota County  
Hon. Dr. Brennan Asplen, Superintendent, School Board of Sarasota County  
Hon. Shirley Brown, School Board Member, Chair, School Board of Sarasota County

# **EXHIBIT E**





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

September 23, 2021

Dr. Brennan Asplen  
Superintendent  
Sarasota County Schools  
1960 Landings Boulevard  
Sarasota, Florida 34231

Ms. Shirley Brown  
School Board Chair  
Sarasota County Schools  
1960 Landings Boulevard  
Sarasota, Florida 34231

Dear Superintendent Asplen and Chair Brown:

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. Asplen, Ms. Brown  
September 23, 2021  
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I am continuing the investigation of your district's mask mandate that I notified you by letter of August 27, 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". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard Corcoran  
Commissioner

# **EXHIBIT F**

DANIEL J. DELEO  
BOARD CERTIFIED IN BUSINESS LITIGATION  
941.364.2740  
[ddeleo@shumaker.com](mailto:ddeleo@shumaker.com)

September 24, 2021

***VIA EMAIL AND FEDERAL EXPRESS***

Hon. Richard Corcoran, Esq.  
Commissioner of Education  
Florida Department of Education  
325 W. Gaines St.  
Tallahassee, FL, 32399-0400

Dear Commissioner Corcoran,

Our law firm represents the School Board of Sarasota County (“School Board”) – including its Chairperson Shirley Brown - and the Superintendent of the Sarasota County School District, Dr. Brennan Asplen (collectively, “Clients”). We have received and reviewed your September 23, 2021 correspondence (“Correspondence”).

Your Correspondence requests that our Clients provide an explanation outlining how the Sarasota County School District is complying with the specific portion of the September 22, 2021 emergency Department of Health rule - 64DER 21-15 (“Emergency DOH Rule) that concerns a parent or legal guardian’s sole discretion to opt out of a face mask mandate. This Emergency DOH Rule replaces the previous emergency DOH rule and was released Wednesday afternoon, September 22, 2021. On Thursday (yesterday), while we were preparing for compliance with the Emergency DOH Rule’s new requirements regarding quarantining, we received your letter which is the subject of this response. We are writing in order to meet your deadline of 5:00pm today.

As you are aware, the Sarasota County School District passed an emergency face mask policy which the Florida Department of Education contends is non-compliant. In order for that policy to be modified or repealed, such action must be taken under certain procedures in conformity with Florida Law. In response to the Emergency DOH Rule, the School Board will schedule a School Board meeting in order to publicly and transparently evaluate the impact of the Emergency DOH Rule, including the need to adjust any of its existing protocols. In view of these circumstances, ***our Clients respectfully request a fourteen (14) day response extension*** so that they can properly report to you how they will proceed moving forward.

Hon. Richard Corcoran, Esq.  
Commissioner of Education  
September 24, 2021  
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Although your Correspondence does not inquire about either the School Board's comprehensive COVID-19 mitigation approach or our Clients' stance regarding the impact of the DOH Emergency Rule overall, please note that our Clients continue to contend that their emergency face mask policy adopted August 20, 2021 is both lawful and compliant with the recently enacted Parents' Bill of Rights for many of the same reasons outlined in their September 1, 2021 correspondence to you. We also are of the opinion that there are significant issues with the emergency DOH rulemaking process at issue. However, in light of the recent rule change, more time is needed to fully and thoughtfully evaluate whether the impact of the revisions contained in the Emergency DOH Rule or the current state of COVID-19 conditions in the Sarasota School District require the School Board to amend its existing policies and protocols including the emergency face mask policy.

Our Clients appreciate its partnership with you and the Department of Education. It is evident that all involved share a passion for doing what is best for the students and families of our community – even if we do not always agree on the precise way to do so. Upon receipt, please advise whether our request for this extension is acceptable. If you have any questions, please feel free to reach out to me directly.

Respectfully,

A handwritten signature in black ink, appearing to read "Dan DeLeo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dan DeLeo, Esq.

cc:

Hon. Dr. Joseph Ladapo, M.D., Florida Surgeon General  
Hon. Shirley Brown, Chairperson and School Board Member, School Board of Sarasota County  
Hon. Jane Goodwin, School Board Member, School Board of Sarasota County  
Hon. Bridget Ziegler, School Board Member, School Board of Sarasota County  
Hon. Karen Rose, School Board Member, School Board of Sarasota County  
Hon. Thomas Edwards, School Board Member, School Board of Sarasota County  
Hon. Dr. Brennan Asplen, Superintendent, Sarasota County School District