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MEMORANDUM

TO: State Board of Education Members

FROM: Richard Corcoran

RE: Leon County Schools, Student Opt-Out Requirements

DATE: October 4, 2021

Based upon the following memorandum, I find there is probable cause that Leon County Schools (LCS) 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, LCS' policy violated the provisions of Rule 64DER21-12, Protocols for Controlling COVID-19 in School Settings 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.

Leon County Schools

On August 9, 2021, I, as the Commissioner of Education, wrote the LCS' superintendent and board chair to notify them in writing of my concern with the district's apparent non-compliance with the Department of Health's previous rule, 64DER-21-12. Although Leon County Schools initially amended its mask policy, that decision was short lived.

On Sunday, August 22, 2021, Superintendent Hanna announced via a Facebook Live event that the district was reinstating mask requirements all students, with certain exceptions. The school board met and discussed the policy change on Monday, August 23, 2021. The district's website provides as follows:

Masks Required –

- Temporary use of masks is **required** for **Pre-K - 12th** grade students while indoors throughout the Leon County School District. Ex: In Class, transportation (buses), after school programs, etc. Masks are not required outside.
- For parents who want to opt their **Pre-K - 8th grade student(s)** out of the mask requirement **due to health concerns**, they will need to submit the Prek-8th mask opt-out form that has been **signed by a licensed medical provider**. The medical mask opt-out form is due by **Friday, August 27** to the student's school.
- For parents who want to opt their **9th - 12th grade student(s)** out of the mask requirement due to health concerns or individual freedoms, they will need to submit a parental mask opt-out form. The mask opt-out form is due by **Tuesday, August 17th** to the student's school.

See Exhibit B. The district's policy requires all students from Pre-K through 12th grade to wear a mask or face covering, and provides exceptions for Pre-K-8th grade based only upon medical certification signed by a licensed medical provider. Parents of 9th through 12th grade students may opt their children out of the mask requirement based on health concerns or individual freedoms. *See Exhibit C.*

On August 27, 2021, I wrote the LCS' superintendent and school board chair to notify them of my concern with the district's apparent non-compliance with Rule 64DER21-12 and to afford the district an opportunity to demonstrate compliance. *See Exhibit D.*

On September 1, 2021, LCS' superintendent and board chair responded to me in writing, asserting that the district's policy is narrowly tailored and necessary to achieve the compelling state interest of protecting students. *See Exhibit E.* 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 LCS' superintendent and school board chair of Rule 64DER21-15, and afforded the district another opportunity to demonstrate compliance. *See Exhibit F.*

On September 24, 2021, the LCS superintendent and board chair asked for additional time to respond through October 1, 2021. *See Exhibit G.* The letter did not rescind the requirement for medical documentation in order for a student to opt-out of a mask mandate.

In sum, the LCS' policy requires all students in pre-K through 8th grade to wear masks or face coverings inside district property and on district transportation. 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 LCS 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

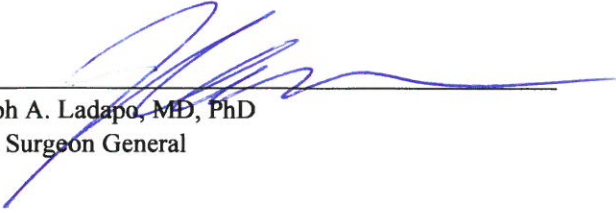
2. Quarantine the student for a period of time not to exceed seven days from the date of last direct contact with an individual that is positive for COVID-19.

(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



For the 2021-2022 school year, we are looking forward to all of our students being back In Class, whether it's in-person, or at Leon County Virtual School.

Plan Highlights: Health & Safety

Masks Required –

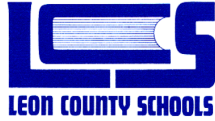
- Temporary use of masks is **required** for **Pre-K - 12th** grade students while indoors throughout the Leon County School District. Ex: In Class, transportation (buses), after school programs, etc. Masks are not required outside.

- For parents who want to opt their **Pre-K - 8th grade student(s)** out of the mask requirement **due to health concerns**, they will need to submit the Prek-8th mask opt-out form that has been **signed by a licensed medical provider**. The medical mask opt-out form is due by **Friday, August 27** to the student's school.
- For parents who want to opt their **9th - 12th grade student(s)** out of the mask requirement due to health concerns or individual freedoms, they will need to submit a parental mask opt-out form. The mask opt-out form is due by **Tuesday, August 17**, to the student's school.
- Masks are a student's personal responsibility.
- Temporary use of masks is required for district employees when six feet of distancing cannot be maintained.
- Temporary use of masks is required for visitors, volunteers, mentors and outside vendors at all schools and district sites during the school day.
- Masks are one of many mitigation methods to help prevent COVID-19 transmission, but are not a substitute for vaccinations.
- Extra masks will be available at all school sites for students, employees, and visitors.
- Parents should initiate a request if they wish for help with compliance of mask wearing for their child.
- Schools and teachers will provide “reasonable assistance” to aid in student mask use.
- The administration should be involved and speak with parents and assist the student with wearing their mask if needed. The health department is available to provide families guidance and assistance on mask use.
- Staff will be encouraged to reduce stigma in classrooms for both masked and unmasked students.

LCS Mask Opt Out Form - Pk-8 ONLY (Medical)

BOARD CHAIR
Georgia "Joy" Bowen

BOARD VICE CHAIR
Darryl Jones



BOARD MEMBERS
Alva Swafford Striplin
Rosanne Wood
DeeDee Rasmussen

SUPERINTENDENT
Rocky Hanna

Dear Parent or Guardian:

COVID-19 is a respiratory illness spread mainly from person-to-person through respiratory droplets which are produced when an infected person coughs, sneezes, or talks. These droplets can land in the mouths and noses of people who are nearby or possibly be inhaled into the lungs. COVID-19 may be spread by people who are not showing symptoms which is why keeping exposed individuals separated from others is important.

Symptoms may appear several days after exposure to the virus. The symptoms associated with COVID-19 are fever, cough, and difficulty breathing. If symptoms develop in your child, seek medical care, and get tested.

Leading health experts believe the best way to prevent illness is by limiting exposure to the virus by

- maintaining physical distance,
- using a mask when around others indoors,
- washing your hands often with soap and water for at least 20 seconds,
- routinely clean and disinfect frequently touched surfaces and
- other mitigating methods.

In order to keep ALL students safe and to prevent the spread of COVID-19 in our schools and classrooms, we are temporarily requiring ALL students, **Pre-K to grade 8**, to wear face masks while indoors. If this temporary requirement is an issue for you and your child because of health concerns, in order to opt-out, a licensed physician or psychologist **signature and medical stamp** is required on this form, OR you must submit a letter indicating approval by a licensed physician or psychologist on their official letterhead. *(Please attach the letter to this form with parent name and signature).*

Medical Opt Out from temporary mask requirement needed at school:

Name of Student _____ Date _____

Parent/Guardian Name _____ Parent/Guardian Name _____
(Printed) (Signature)

Physician/Psychologist Name _____ Physician/Psychologist Name _____
(Printed) (Signature AND Medical Stamp)

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If you are having trouble viewing the document, you may [download the document.](#)

LCS Mask Opt Out Form - 9-12 Only (Parent)

BOARD CHAIR
Georgia "Joy" Bowen

BOARD VICE CHAIR
Darryl Jones



SUPERINTENDENT
Rocky Hanna

BOARD MEMBERS
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- washing your hands often with soap and water for at least 20 seconds,
- routinely clean and disinfect frequently touched surfaces and
- other mitigating methods.

In order to keep ALL students safe and to prevent the spread of COVID-19 in our schools and classrooms, we are temporarily requiring all 9th – 12th grade students to wear face masks while indoors. If this temporary requirement is an issue for you and your child because of health concerns or individual freedoms you may complete the signature portion of this form and return it to your child's school.

In accordance with the Department of Health, Division of Disease Control Rule 64DER21-12, Emergency Rule Adoption Package, students K-12 will be permitted to Opt Out of a requirement to wear a mask.

My child, _____, will Opt Out of wearing a mask.

Parent/Guardian Signature _____ Date _____

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Opt Out Mask Form_Pk-8 - (Medical Endorsement)



This form only applies to PK-8 students ONLY and **requires a medical endorsement.**



Opt Out Mask Form_9-12 (Parent Signature)



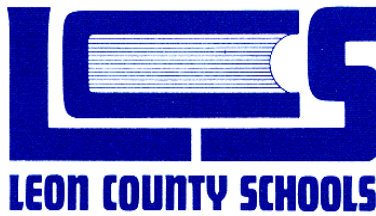
This form is for grades 9-12 ONLY and can be signed by a parent.

Last Modified on September 17, 2021

EXHIBIT C

BOARD CHAIR
Georgia "Joy" Bowen

BOARD VICE CHAIR
Darryl Jones



BOARD MEMBERS
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Symptoms may appear several days after exposure to the virus. The most common symptoms associated with COVID-19 are fever, cough, and difficulty breathing. If symptoms develop in your child, seek medical care, and get tested.

Leading health experts believe the best way to prevent illness is by limiting exposure to the virus by

- maintaining physical distance,
- using a mask when around others indoors,
- washing your hands often with soap and water for at least 20 seconds,
- routinely clean and disinfect frequently touched surfaces and
- other mitigating methods.

In order to keep ALL students safe and to prevent the spread of COVID-19 in our schools and classrooms, we are temporarily requiring ALL students, **Pre-K to grade 8**, to wear face masks while indoors. If this temporary requirement is an issue for you and your child because of health concerns, in order to opt-out, a licensed physician or psychologist **signature and medical stamp** is required on this form, OR you must submit a letter indicating approval by a licensed physician or psychologist on their official letterhead. *(Please attach the letter to this form with parent name and signature).*

Medical Opt Out from temporary mask requirement needed at school:

Name of Student _____ Date _____

Parent/Guardian Name _____
(Printed)

Parent/Guardian Name _____
(Signature)

Physician/Psychologist Name _____
(Printed)

Physician/Psychologist Name _____
(Signature AND Medical Stamp)

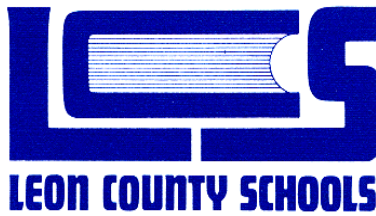
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Leading health experts believe the best way to prevent illness is by limiting exposure to the virus by

- maintaining physical distance,
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- routinely clean and disinfect frequently touched surfaces and
- other mitigating methods.

In order to keep ALL students safe and to prevent the spread of COVID-19 in our schools and classrooms, we are temporarily requiring all **9th – 12th grade students** to wear face masks while indoors. If this temporary requirement is an issue for you and your child because of health concerns or individual freedoms you may complete the signature portion of this form and return it to your child's school.

In accordance with the Department of Health, Division of Disease Control Rule 64DER21-12, Emergency Rule Adoption Package, students K-12 will be permitted to Opt Out of a requirement to wear a mask.

My child, _____, will Opt Out of wearing a mask.

Parent/Guardian Signature _____ Date _____

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EXHIBIT D



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

August 27, 2021

Mr. Rocky Hanna
Superintendent
Leon County Schools
2757 West Pensacola Street
Tallahassee, FL 32304

Ms. Georgia Bowen
School Board Chair
Leon County Schools
2757 West Pensacola Street
Tallahassee, FL 32304

Dear Superintendent Hanna and Chair Bowen:

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 Leon 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 E

BOARD CHAIR
Georgia "Joy" Bowen

BOARD VICE CHAIR
Darryl Jones



BOARD MEMBERS
Alva Swafford Striplin
Rosanne Wood
DeeDee Rasmussen

SUPERINTENDENT
Rocky Hanna

September 1, 2021

Commissioner Corcoran
Florida Department of Education
Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399

Re: Response to August 27, 2021 Letter ("Letter")
Regarding Department of Health Emergency
Rule 64DER21-12 ("DOH Rule")

Dear Commissioner Corcoran:

Although we appreciate your "grave" concern regarding our technical compliance with the DOH Rule, our priority is protecting the health and safety of the over 34,000 students, 2,400 teachers and 4,300 employees in the Leon County Schools from a pandemic that has resulted in 43,979 deaths in Florida. So far this school year (from August 11 through August 31), we have had 532 students report a positive COVID-19 test (as opposed to 815 during the entire 2020-21 school year). Positivity rates in Leon County have been in the double digits since late July, and as of August 31, there were 141 patients with COVID-19 in Tallahassee Memorial Hospital, of which 8 are children (3 of whom are in the ICU). In August alone, we have lost 69 lives in Leon County, including two of our children.

We were very careful and deliberate in adopting our temporary, narrowly-tailored directive regarding masks and did our best to abide by all applicable guidelines, rules and laws, while advancing the district's compelling interest in protecting students, teachers and staff from a communicable, potentially deadly illness. Our decision was primarily based on the recommendations of the Centers of Disease

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Building the Future Together

Control (“CDC”), the American Academy of Pediatrics, and the American Medical Association, along with over 90% of the leading local pediatricians in Leon County. These experts clearly supported the need for the universal wearing of masks in pre-K through 8th grades (where most of the students are not eligible for vaccination), subject only to a written parental opt-out for health concerns (with a signature and medical stamp by a licensed physician or psychologist), and the wearing of masks in 9th through 12th grades subject to a written parental opt-out for health or individual freedom concerns (with no required medical certification). We note that the DOH Rule stresses the importance of in-person learning and says that “removing healthy students from the classroom for lengthy quarantines should be limited *at all costs*.” The purpose of our mask directive is to mitigate the spread of COVID-19 cases in our schools and prevent the unnecessary removal of students as a result of infection or close contact with an infected person, enabling us to continue to keep our schools open.

In your press release on Monday, you stated that “elected officials cannot pick and choose what laws they want to follow.” As noted below, we believe that we are following the DOH Rule based upon its actual language. In order for us to comply with your interpretation of the DOH Rule, we would need to ignore guidelines from the CDC, face federal lawsuits, and act contrary to the Florida Constitution and Florida Statutes. Thus, it is you that would be forcing us to “pick and choose” what laws to follow. Of course, federal law, the Florida Constitution and Florida Statutes all take precedence over a hastily enacted administrative rule.

The DOH Rule

We believe that we are in compliance with the DOH Rule, which, as you wrote in the Letter, says that schools “must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.” Although you are correct that the text of the DOH Rule “does not require parents to submit medical documentation in order to opt-out,” it also does not prohibit school districts from requiring such documentation. The DOH Rule does not dictate the procedures that school districts must follow for the opt-out or the criteria that are to be applied. Each individual school district has to determine the appropriate procedures and criteria for its district based upon local conditions, which is what we have done. This is consistent with Article IX, Section 4 of the Florida Constitution, which vests the responsibility and authority to “operate, control and supervise all free public schools within the school district” with the local school board. We therefore respectfully disagree with your interpretation of the DOH Rule and assertion that we are not in compliance.

Federal Guidelines and Law

In developing our mask directive, we focused on federal CDC guidelines, as updated on August 4, 2021:

Due to the circulating and highly contagious Delta variant, CDC recommends *universal indoor masking by all students* (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.

<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>. This same guidance was given by the American Academy of Pediatrics and the American Medical Association. On August 9, we also received a letter from Dr. Thomas Truman, co-signed by over 90% of the leading local pediatricians in Leon County, calling for masks to be worn by all pre-k through twelfth grade students.

In addition, as you are aware, several lawsuits have been filed throughout Florida by parents of disabled students asserting that school districts would violate the federal Individuals with Disabilities Education Act, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (the “Federal Disabilities Laws”) if they follow your interpretation of the DOH Rule. Although we are not taking any position as to the merits of the claims brought in the lawsuits, following your interpretation of the DOH Rule would potentially expose us to federal liability for violating the Federal Disabilities Laws, as well as require that we ignore CDC guidelines.

The Florida Constitution

Article IX, Section 1(a) of the Florida Constitution requires us to provide a “uniform, efficient, *safe*, secure, and high quality system of free public schools . . .” The requirement that a mask be worn by all students, staff and visitors prevents the spread of the COVID-19 virus as well as ensuring the safety of the mask wearer and also to. This is necessary to provide a “safe” environment for all students.

Florida Statutes

Your interpretation of the DOH Rule is also inconsistent with two Florida Statutes.

In the latest legislative session, section 252.36(1)(c), Florida Statutes, was amended to add the following language:

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*.

As noted above, the federal guidelines issued by the CDC have recommended universal wearing of face masks in schools by students, teachers and visitors, and the Legislature has expressly indicated its intent that we follow those mitigation strategies in order to keep our schools open.

Also in the last legislative session, the Legislature enacted Chapter 1014, Florida Statutes, entitled the Parents' Bill of Rights. The mask opt-out provision in the DOH Order was based upon this statute. However, section 1014.03 expressly *allows* school districts and other local governments to infringe upon parental rights if it can demonstrate "that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means." That is precisely the situation here. The protection of students from COVID-19 by mitigating the spread of the virus is undoubtedly a compelling state interest.

Our directive is also narrowly tailored and cannot be done through less restrictive means. Our decision to implement our mask directive was not something that we took lightly. In fact, notwithstanding our fears regarding the increasing COVID-19 cases and the Delta variant, we began the school year on Wednesday, August 11 allowing parental opt-out for any reason for all grades. Unfortunately, during the first eight days of school, it became clear that the COVID-19 situation was far worse than we feared, with a large number of students reporting that they tested positive and an increasing positivity rate in Leon County. On August 21, a third grade student from one of our elementary schools died from COVID-19. Accordingly, beginning on August 23, we limited the ability for opt-outs in pre-k through 8th grades to health concerns attested to by a licensed physician or psychologist. We believe that our mask directive is a reasonable and necessary means to achieve our compelling interest in mitigating the deadly effects of COVID-19, and we narrowly tailored the directive by making it temporary and allowing opt-outs for pre-k through 8th grades for health concerns, and 9th through 12th grades for health and individual freedom concerns.¹

As I am sure you are aware, Judge John C. Cooper, in *McCarthy v. DeSantis*, Case. No. 21-CA-001382 (Fla. 2nd Cir. Ct.), ruled verbally from the bench on Friday, August 27, that enforcement of the DOH Rule violates section 1014.03. The court advised that it was enjoining enforcement of, and declaring null and void, any rule, policy, or enforcement action stemming from Executive Order 21-175, which would include the DOH Order. Judge Cooper indicated that he would be entering a written order this week.

Accordingly, for us to follow your interpretation of the DOH Rule, we would need to violate both of these newly enacted Florida Statutes.

¹ Moreover, the wearing of a mask is not a parental choice related to the health of a child; rather, it is a choice related to the health of every other student and teacher who may come in contact with the child.

The DOH Rule is Not Valid

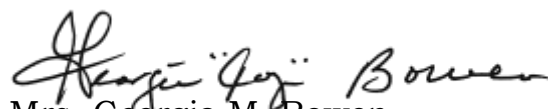
Finally, as you are also aware, petitions have been filed in the Third and Fourth District Courts of Appeal challenging the emergency nature by which the DOH Rule was enacted. The only stated justification for the alleged immediate danger to public health, safety and welfare (namely, the spread of COVID-19) does not support the portion of the DOH Rule relating to mask opt-outs. There was no immediate health or safety danger related to infringement of parental rights. Thus there was no reason that the mask opt-out provision could not have been promulgated through the normal, non-emergency rule-making process, with full public notice, input and transparency. We also understand that other challenges to the rule before the Division of Administrative Hearings are forthcoming, including claims that the mask opt-out portion of the rule is an invalid exercise of delegated legislative authority under section 120.52(8), Florida Statutes.

Conclusion

Based upon the foregoing, it is our belief that we are in compliance with the DOH Rule. We also believe that following your interpretation of the DOH Rule would be contrary to federal CDC guidance, expose us to lawsuits under various Federal disability laws, and violate the Florida Constitution and Florida Statutes. Accordingly, we respectfully request that you refrain from any enforcement actions.²

Sincerely,


Rocky Hanna
Superintendent
Leon County Schools


Mrs. Georgia M. Bowen
School Board Chair
The School Board of Leon
County, Florida

² Any position expressed in this response is without prejudice to or limitation of any legal positions we may adopt in other legal proceedings.

EXHIBIT F



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

September 23, 2021

Mr. Rocky Hanna
Superintendent
Leon County Schools
2757 West Pensacola Street
Tallahassee, FL 32304

Ms. Georgia Bowen
School Board Chair
Leon County Schools
2757 West Pensacola Street
Tallahassee, FL 32304

Dear Superintendent Hanna and Chair Bowen:

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.

Mr. Hanna, Ms. Bowen
September 23, 2021
Page Two

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", with a stylized flourish at the end.

Richard Corcoran
Commissioner

EXHIBIT G

BOARD CHAIR
Georgia "Joy" Bowen

BOARD VICE CHAIR
Darryl Jones



BOARD MEMBERS
Alva Swafford Striplin
Rosanne Wood
DeeDee Rasmussen

SUPERINTENDENT
Rocky Hanna

September 24, 2021

Commissioner Corcoran
Florida Department of Education
Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399

Re: Response to September 23, 2021 Letter ("Letter")
Regarding Department of Health Emergency
Rule 64DER21-15 (the "New DOH Rule")

Dear Commissioner Corcoran:

Thank you for providing us with a copy of the New DOH Rule, which repealed and replaced Rule 64DER21-12 (the "Prior DOH Rule"). As we stated in our letter dated September 1, 2021, we believe that we were at all times in compliance with the Prior DOH Rule because we allowed parents of Pre-K through 8th grade students to opt their children out of the mask or face covering requirement by submitting medical documentation (and allowed parents of high school students to do so for any reason). The addition in the New DOH Rule of the language "at the parent or legal guardian's sole discretion," which was not included in the Prior DOH Rule, shows that we were at all times in compliance with the Prior DOH Rule.

We are in the process of analyzing the portion of the New DOH Rule regarding masks with respect to our current policy implementation in order to determine how to alter our procedures, if needed, so as to

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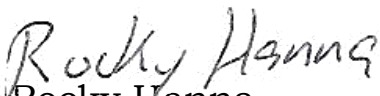
Building the Future Together

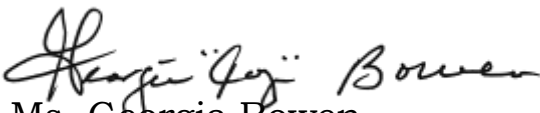
comply with the New DOH Rule, while at the same time protecting the health and safety of our students, teachers and staff. The New DOH Rule does not mandate implementation procedures that school districts must follow, and how to implement the New DOH Rule will involve some level of policy decisions that we need to present to the full School Board, which we will do next week.

We received your letter at 12:55 PM yesterday. Twenty nine hours is not a sufficient amount of time for us to analyze the New DOH Rule, develop policies and present them for consideration to the full School Board. As you know, the School Board is subject to the Government in the Sunshine Law and can only discuss school business at a noticed public meeting at which members of the public will be allowed to provide input.

Accordingly, we respectfully request that you extend the date for us to provide you a written response documenting how our district will comply with the mask portion of the New DOH Rule until 5:00 PM on Friday, October 1, 2021.¹

Sincerely,


Rocky Hanna
Superintendent
Leon County Schools


Ms. Georgia Bowen
School Board Chair
Leon County Schools

¹ Any position expressed in this response is without prejudice to or limitation of any legal positions we may adopt in future correspondence or legal proceedings.