



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: School District of Palm Beach County, Student Opt-Out Requirements

DATE: October 4, 2021

Based upon the following memorandum, I find there is probable cause that the School District of Palm Beach County (SDPBC) 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, this 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.

Palm Beach County School District

On August 18, 2021, the School Board of Palm Beach County adopted Policy 5.326, Student Protocols due to COVID-19, which requires that all students must:

[W]ear face coverings at all times. The District will provide up to 5 washable facial coverings per student. Facial coverings should cover your nose and your mouth and comply with the state, local, or federal health department recommendations. All face coverings (whether disposable or reusable) must be made with at least two (2) but preferably three (3) layers of breathable material; fit snugly but comfortably against the side of the face and be secured with ties or ear loops allowing the students to remain hands-free. At this time, based on guidance from health authorities, neck gaiters, open-chin triangle bandanas, and

mesh material, valves or holes of any kind are not acceptable face coverings. Please note facial coverings are in addition to, and not a substitute for, the required social distancing. Exemptions or accommodations (including a plastic shield) to facial coverings must be verified by a treating licensed medical physician as required by the ADA, or Section 504 of the Rehabilitation Act and agreed to by a compliant 504 Team. Nothing within this policy is intended to supersede School Board Policy 5.182 or any individual school's dress code.

The policy further provides that:

Facial coverings will not need to be worn when outside, after seated when eating or drinking as outlined in District protocols that will be posted to the District website and approved by the school principal or designee. Students must continue to maintain social distancing.

See Exhibit B. The district's policy requires all students to wear face coverings at all times, subject to medical exemptions and accommodations due to disability.

On August 27, 2021, I wrote the SDPBC'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, Palm Beach County's 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 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 the SDPBC 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, the SDPBC superintendent responded to me in writing, stating that the face covering policy was still in effect and that he needed an additional two weeks to discuss the matter with the School Board to determine what action, if any, should be taken. *See Exhibit F.* 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 SDPBC's policy requires all students to wear face coverings at all times, subject to certain exceptions, including for reasons related to medical conditions or disability. The policy precludes voluntary parental opt-out at the parent's or guardian's sole discretion.

The State Board of Education's Enforcement Authority

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

In enforcing the law, the statutory process prescribed therein requires that I first report my determination of probable cause to the State Board of Education. If the State Board then determines that a district school board is unwilling or unable to comply with either law or rule, the State Board is authorized to impose sanctions in order to secure compliance, including the withholding of funds and reporting to the Legislature.

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

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

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

Conclusion

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

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

Should the State Board adopt my recommendation, I request that it consider the sanction of withholding state funds in an amount equal to 1/12 of all school board members' salaries, as well as withholding state funds in an amount equal to any federal grant funds awarded to the SDPBC 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

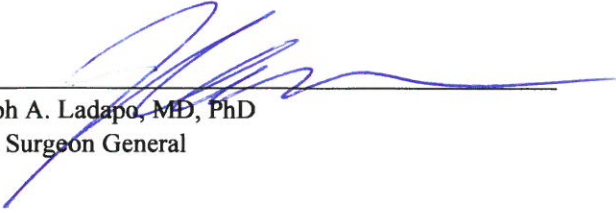
2. Quarantine the student for a period of time not to exceed seven days from the date of last direct contact with an individual that is positive for COVID-19.

(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



Book	School Board Policies
Section	Ch. 5. Pupil Personnel
Title	Student Protocols due to COVID-19
Code	5.326
Status	Active
Adopted	August 19, 2020
Last Revised	August 18, 2021
Last Reviewed	August 18, 2021
Prior Revised Dates	ER 8/19/2020; 11/4/2020; ER 8/18/21

Policy 5.326 Student Protocols due to COVID-19

1. Purpose.

To facilitate the continuous operations of the District and protect the health, safety, and welfare of students by adhering to COVID-19 District safety protocols.

2. Parent/Guardian Notification.

The District recognizes that parents and guardians are essential allies in its efforts to limit the spread of COVID-19 on school property including school buses. The District will disseminate information about this Policy, including student and family responsibilities, to students and families via email, social media, and on its website.

Upon returning to school buildings, school staff will implement a variety of strategies to inform students about their duty to comply with the District's safety protocols. This may include additional markings on hallway floors, posters and other signage, designation of hand sanitizing stations, etc.

3. District Safety Guidelines.

a. All students must:

- i. not come to school if ill including, but not limited to: symptoms of fever, cough, sore throat, diarrhea, headache, body ache, shortness of breath, fatigue, loss of appetite and sense of smell, runny or stuffy nose, sneezing, sore throat and other flu-like symptoms, or if someone in their household has tested positive for COVID-19.
- ii. self-screen at home prior to reporting to school. Parents and guardians are recommended to take their child's temperature prior to reporting to school and the student shall not report to school if they have a temperature of 100.4 or higher. Students shall not report to school while using fever-reducing medications.
- iii. comply with all directives related to health and safety, including, but not limited to: usage and passage through common areas and shared spaces.
- iv. abide by social distancing guidelines, keeping a minimum of 3 feet apart where possible.

- v. follow revised school procedures that may include, but not limited to: staggered arrivals and dismissal times, after school care or before school care, limited classroom changes, limited movement throughout the campus, enhanced sanitization, wearing of facial coverings, changes to school cafeteria procedures, increased handwashing, riding the school bus, any school activity outside the regular school day, and other changes that may be needed for health and safety.
- vi. avoid congregating when moving throughout the campus.
- vii. not share any school supplies, such as pens, pencils, devices, textbooks, etc.
- viii. wear face coverings at all times. The District will provide up to 5 washable facial coverings per student. Facial coverings should cover your nose and your mouth and comply with the state, local, or federal health department recommendations. All face coverings (whether disposable or reusable) must be made with at least two (2) but preferably three (3) layers of breathable material; fit snugly but comfortably against the side of the face and be secured with ties or ear loops allowing the students to remain hands-free. At this time, based on guidance from health authorities, neck gaiters, open-chin triangle bandanas, and mesh material, valves or holes of any kind are not acceptable face coverings. Please note facial coverings are in addition to, and not a substitute for, the required social distancing. Exemptions or accommodations (including a plastic shield) to facial coverings must be verified by a treating licensed medical physician as required by the ADA, or Section 504 of the Rehabilitation Act and agreed to by a compliant 504 Team. Nothing within this policy is intended to supersede School Board Policy 5.182 or any individual school's dress code.
 - 1. Facial coverings will not need to be worn when outside, after seated when eating or drinking as outlined in District protocols that will be posted to the District website and approved by the school principal or designee. Students must continue to maintain social distancing.
- ix. assist with keeping their desks or workstations clean and clutter-free.
- x. abide by separate guidelines for athletics and intramurals as established for COVID-19 by District administration.
- xi. During times of elevated communicable disease community spread, the Superintendent shall issue periodic guidance and directives aligned with the recommendations of public health officials or applicable government guidance and orders. During an outbreak of a communicable disease that can be transmitted by casual contact or in a respiratory or airborne manner, the Superintendent's directives may include mandatory protocols, including but not limited to, physical distancing, facial coverings, and/or other protective measures.

4. Responsibilities of Students and Families:

- a. Student or student's parent/guardian must self-report a positive COVID-19 test, for any member of the household to a school administrator no later than the following school day. The school administrator will alert their supervisor and District administration to make a determination on any necessary cleaning of affected areas.

5. **Protocols for Symptomatic or COVID-19 Positive Students.** Students experiencing any symptoms consistent with COVID-19 or who have received a positive diagnostic test for COVID-19 should 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.

6. **Protocols for Students with Exposure to COVID-19.** Students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19 should not attend school, school-sponsored activities, or be on school property until: (a) The student is asymptomatic and receives a negative diagnostic COVID-19 test after four days from the date of last exposure to the COVID-19 positive individual; or (b) The student is asymptomatic and seven days have passed since the date of last exposure to the COVID-19 positive

individual. (c) If a student becomes symptomatic following exposure to an individual that has tested positive for COVID-19, the student should follow the procedures set forth in subsection (5), above.

7. Protocols for Students with Prior COVID-19 Infection. A student who has received a positive diagnostic test for COVID-19 in the previous 90 days and who is known to have been in direct contact with an individual who has received a positive diagnostic test for COVID-19 is not subject to the protocols set forth in subsection (6), so long as the student remains asymptomatic. If a student with a previous COVID-19 infection becomes symptomatic, the student should follow the procedures set forth in subsection (5), above. This subsection applies equally to students that are fully vaccinated for COVID-19.

- a. Any student who tests positive for COVID-19 must immediately provide administration with a list of everyone with whom they have been in close contact outside of regular classroom contact, including while riding the school bus and extracurricular activities (within 6 feet for more than 15 minutes). Staff will assist younger students with their contact list.
- b. Student's name shall not be revealed when notifying other students' parents or guardians and members of the school's staff of a positive test.
- c. If a student exhibits symptoms of COVID-19, as set forth in paragraph 3 (a) above, during the school day, he/she will be sent to the school clinic. The school nurse will assess the wellness of the student to make the recommendation if the student should be tested for COVID-19. School nurses may not test minor students for COVID 19 without informed written consent from a parent or legal guardian.

8. Responsibilities Of Principals If A Student Tests Positive For Covid-19:

- a. Immediately notify school supervisor to activate COVID 19 Protocols.
- b. Request from the student a list of every student and staff member (outside the classroom or school transportation) with whom they have been in close contact (within 6 feet for more than 15 minutes). The list must be securely maintained.
- c. After the Department of Health has finished the contact tracing investigation, the Department of Health will notify parents, guardians of students or staff identified as exposed to a confirmed case of COVID-19 in the school. The Department of Health will provide the principal with the list of the exposed students and school staff with the returning day to school. The names of exposed students must not be revealed as prohibited by FERPA (as confidential information).

9. Non-Discrimination. Students whose parents or legal guardians have an approved exemption under the ADA or Section 504 exempting them or modifying the face mask requirement shall not be subject to any harassment or discriminatory treatment, including but not limited to:

- a. Relegation to certain physical locations:
- b. Isolation during school activities: or
- c. Exclusion from any school-sponsored events or activities.

10. ESE Students.

For students with an Individualized Educational Plan (IEP), upon the student's return to school, a parent may request an IEP meeting to discuss the impact of compliance with this policy.

11. Duration.

This emergency modification of this policy shall remain in effect for a period of no more than ninety (90) days from the date of the adoption. The Superintendent may suspend/revoke/rescind portions of this policy based on the updates/available information from the CDC, State, or local authorities regarding COVID-19 cases.

RULEMAKING AUTHORITY: Fla. Stat. §§ 120.81 (1); 1001.32 (2); 1001.42 (28).

LAWS IMPLEMENTED: Fla. Stat. §§ 1001.32(3); 1001.43 (1), (6) & (7); 1001.42(2) & (8); Fla. Admin. Code Rule 64DER21-12

HISTORY: ER 8/19/2020; 11/4/2020; ER 8/18/21

EXHIBIT C



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

August 27, 2021

Mr. Mike Burke
Superintendent
School District of Palm Beach County
3300 Forest Hill Boulevard
West Palm Beach, FL 33406

Mr. Frank A. Barbieri, Jr., Esq.
School Board Chair
School District of Palm Beach County
3300 Forest Hill Boulevard
West Palm Beach, FL 33406

Dear Superintendent Burke and Chair Barbieri:

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 Palm Beach 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



**THE SCHOOL DISTRICT OF
PALM BEACH COUNTY, FL**

**MICHAEL J. BURKE
SUPERINTENDENT**

**FRANK A. BARBIERI, JR., ESQ.
BOARD CHAIRMAN**

OFFICE OF THE SUPERINTENDENT
3300 FOREST HILL BOULEVARD, C-316
WEST PALM BEACH, FL 33406-5869

**KAREN M. BRILL
BOARD VICE CHAIR**

PHONE: 561-649-6833 / FAX: 561-649-6837
WWW.PALMBEACHSCHOOLS.ORG

MARCIA ANDREWS
ALEXANDRIA AYALA
BARBARA MCQUINN
DEBRA L. ROBINSON, M.D.
ERICA WHITFIELD

September 1, 2021

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

Dear Commissioner Corcoran:

Pursuant to Fla. Stat. 1008.32(1), on behalf of the School District of Palm Beach County, we respectfully submit the following response to your letter of August 27, 2021.

On August 18, 2021, the School Board adopted its current Policy, 5.326, Student Protocols due to COVID-19.¹ The purpose of the Policy is “[t]o facilitate the continuous operations of the District and protect the health, safety, and welfare of students by adhering to COVID-19 District safety protocols.” Policy 5.326(1). One of the District Safety Guidelines is that “[a]ll students must ... wear face coverings at all times.” Policy 5.326(3)(viii). The Policy provides for an exemption or accommodation where “verified by a treating licensed medical physician as required by (ADA), or Section 504 of the Rehabilitation Act and agreed to by a compliant 504 Team.” Policy 5.326(3)(viii). Further, “[f]acial coverings will not need to be worn when outside, after seated when eating or drinking as outlined in District protocols that will be posted to the District website and approved by the school principal or designee.” Policy 5.326(3)(viii)(1). Finally, “[t]his emergency modification of this policy shall remain in effect for a period of no more than ninety (90) days from the date of the adoption.” Policy 5.326(11). “The Superintendent may suspend/revoke/rescind portions of this policy based on the updates/available information from the CDC, State, or local authorities regarding COVID-19 cases.” Policy 5.326(11).

The School District of Palm Beach County has not acted inconsistently with the DOH Emergency Rule or the authorities which purportedly underpin that Rule. The Rule is based on the directive in the Governor’s Executive Order 21-175, “to ensure safety protocols for controlling the spread of COVID-19 in schools that:

- a. Do not violate Floridians’ constitutional freedoms;
- b. Do not violate parents’ right under Florida law to make health care decisions for their minor children; and
- c. Protect children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements.

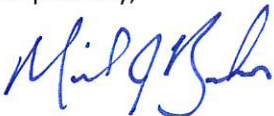
¹ <http://go.boarddocs.com/fl/palmbeach/Board.nsf/goto?open&id=C63KZ55315E8>.

With respect to Floridians' constitutional freedoms, there has been no determination that has concluded a face-covering requirement for students is unconstitutional. Nothing in the Parents' Bill of Rights prohibits a face-covering requirement. The Parents' Bill of Rights also preserves the School Board's power to take action where it 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." § 1014.03, Fla. Stat. The Board's face-covering requirement satisfies these requirements.

It cannot be disputed that providing a safe learning environment for all students is a compelling interest for the School Board and the State of Florida as a whole. A face-covering policy was necessary in response to the dramatically and rapidly worsening state of the spread of COVID-19 as a result of the Delta variant. The Policy was adopted after the experience of operating schools for a week and a half and seeing an explosion of COVID-19 cases. Cases have continued to soar. In the three weeks since school opened on August 10, the District has 3,470 reported cases of COVID-19 involving students and staff on our campuses. In the entirety of the 2020-2021 school year, the District had a total of 3,800 reported cases. The Policy is reasonable and there is not a less restrictive means in light of the lack of available vaccines for the majority of school-age students and the requirement that the Board provide in-person instruction. The Policy is also narrowly tailored, as it is only in effect for 90 days and can be suspended or revoked sooner where available information supports doing so.

Finally, the Board's face-covering requirement provides for an exemption or accommodation where "verified by a treating licensed medical physician as required by the ADA, or Section 504 of the Rehabilitation Act and agreed to by a compliant 504 Team." Policy 5.326(3)(viii). Accordingly, it also protects children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements, as set forth in the Governor's Executive Order.

Respectfully,



Michael J. Burke
Superintendent

C: Frank A. Barbieri, Jr., Esq., Board Chairman
Karen Brill, Vice-Chair
Marcia Andrews
Alexandria Ayala
Barbara McQuinn
Debra L. Robinson, M.D.
Erica Whitfield

EXHIBIT E



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

September 23, 2021

Mr. Mike Burke
Superintendent
Palm Beach County Public Schools
3300 Forest Hill Boulevard
West Palm Beach, FL 33406

Mr. Frank A. Barbieri, Jr., Esq.
School Board Chair
Palm Beach County Public Schools
3300 Forest Hill Boulevard
West Palm Beach, FL 33406

Dear Superintendent Burke and Chair Barbieri:

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. Burke, Mr. Barbieri
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 long horizontal flourish extending to the right.

Richard Corcoran
Commissioner

EXHIBIT F



**THE SCHOOL DISTRICT OF
PALM BEACH COUNTY, FL**

**MICHAEL J. BURKE
SUPERINTENDENT**

**FRANK A. BARBIERI, JR., ESQ.
BOARD CHAIRMAN**

OFFICE OF THE SUPERINTENDENT
3300 FOREST HILL BOULEVARD, C-316
WEST PALM BEACH, FL 33406-5869

**KAREN M. BRILL
BOARD VICE CHAIR**

PHONE: 561-649-6833 / FAX: 561-649-6837
WWW.PALMBEACHSCHOOLS.ORG

MARCIA ANDREWS
ALEXANDRIA AYALA
BARBARA MCQUINN
DEBRA L. ROBINSON, M.D.
ERICA WHITFIELD

September 24, 2021

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

Dear Commissioner Corcoran:

Pursuant to Fla. Stat. § 1008.32(1), on behalf of the School District of Palm Beach County, I respectfully submit the following response to your letter of September 23, 2021.

As I previously explained in response to your August 27, 2021 letter, the School Board adopted its current Policy, 5.326, Student Protocols due to COVID-19.¹ The purpose of the Policy is “[t]o facilitate the continuous operations of the District and protect the health, safety, and welfare of students by adhering to COVID-19 District safety protocols” on August 18, 2021. Policy 5.326(1). One of the District Safety Guidelines is that “[a]ll students must ... wear face coverings at all times.” Policy 5.326(3)(viii). The Policy provides for an exemption or accommodation where “verified by a treating licensed medical physician as required by the ADA, or Section 504 of the Rehabilitation Act and agreed to by a compliant 504 Team.” Policy 5.326(3)(viii). Further, “[f]acial coverings will not need to be worn when outside, after seated when eating or drinking as outlined in District protocols that will be posted to the District website and approved by the school principal or designee.” Policy 5.326(3)(viii)(1). Finally, “[t]his emergency modification of this policy shall remain in effect for a period of no more than ninety (90) days from the date of the adoption.” Policy 5.326(11). “The Superintendent may suspend/revoke/rescind portions of this policy based on the updates/available information from the CDC, State, or local authorities regarding COVID-19 cases.” Policy 5.326(11).

Your September 23rd letter seeks to advise us about the Department of Health’s new emergency rule revising the “Protocols for Controlling COVID-19 in School Settings,” 64DER21-15. On the evening of September 23rd, the District sent a letter to parents and guardians, attached hereto, which informs them that the new protocols under 64DER21-15 for students who are exposed to a positive COVID-19 case, but are not displaying symptoms of the

¹ School Board Policy 5.326, Student Protocols due to COVID-19,
<http://go.boarddocs.com/fl/palmbeach/Board.nsf/goto?open&id=C63KZ55315E8>.

virus themselves, will be effective immediately in our schools. At this time, however, the face covering provisions of Board Policy 5.326 remain in effect.

Like 64DER-21-12 before it, 64DER21-15 purports to rely on the Governor's Executive Order 21-175 and the legal authorities cited therein. I explained in my previous letter to you on August 27, 2021, why the Board's Policy is consistent with the Executive Order and the rights of parents and students under federal and Florida law. Again, the Rule is based on the directive in the Governor's Executive Order 21-175, "to ensure safety protocols for controlling the spread of COVID-19 in schools that:

- A. Do not violate Floridians' constitutional freedoms;
- B. Do not violate parents' right under Florida law to make health care decisions for their minor children; and
- C. Protect children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements.

With respect to Floridians' constitutional freedoms, there has been no judicial determination that a face-covering requirement for students is unconstitutional. Nothing in the Parents' Bill of Rights prohibits a face-covering requirement. The Parents' Bill of Rights also preserves the School Board's power to take action where it 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." § 1014.03, Fla. Stat. The Board's face-covering requirement satisfies these requirements.

It cannot be disputed that providing a safe learning environment for all students is a compelling interest for the School Board and the State of Florida as a whole. A face-covering policy was necessary in response to the dramatically and rapidly worsening state of the spread of COVID-19 as a result of the Delta variant. The Policy was adopted after the experience of operating schools for a week and a half and seeing an explosion of COVID-19 cases. The Policy is reasonable and there is not a less restrictive means of accomplishing the goal for at least three reasons: (1) the lack of available vaccines for the majority of school-age students, (2) the requirement that the Board provide in-person instruction, and, (3) now, the new protocols for students with exposure to COVID-19 set forth in the 64DER21-15 and implemented in our District. The Policy is also narrowly tailored, as it is only in effect for 90 days and can be suspended or revoked sooner where available information supports doing so.

Finally, the Board's face-covering requirement provides for an exemption or accommodation where "verified by a treating licensed medical physician as required by the ADA, or Section 504 of the Rehabilitation Act and agreed to by a compliant 504 Team." Policy 5.326(3)(viii). Accordingly, it also protects children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements, as set forth in the Governor's Executive Order.

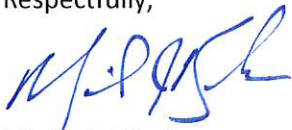
The Board adopted a Policy which signals its commitment to the guidance of major public health authorities, such as the Centers for Disease Control and Prevention (CDC) and the American Academy of Pediatrics, that all students, regardless of vaccination status, should wear masks indoors at school to limit community spread of COVID-19, with limited exceptions based on medical or developmental conditions.² The Board adopted the Policy on August

² Guidance for COVID-19 Prevention in K-12 Schools, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>; COVID-19

18th and principals were advised to direct compliance on their campuses beginning on August 23rd. According to the CDC, the symptoms of COVID-19 can take anywhere from two to 14 days to appear after exposure to the virus.³ The first day of school 14 days after our District began requiring compliance was Wednesday, September 8th. Beginning with September 8th, the daily average of reported COVID-19 cases has dropped dramatically, as can be seen on the District's COVID-19 Dashboard, which has data through September 23rd.⁴ Though the total number of cases and the positivity rate in Palm Beach County have declined somewhat, the CDC still regards Palm Beach County as having a "High" level of community transmission based on its positivity rate and its number of new cases per 100,000 persons.⁵ We believe that our Policy has been effective in reducing the spread of COVID-19 in our schools.

As for 64DER21-15 itself, you assert that it "clarifies the parental opt-out provision to foreclose the erroneous interpretation that the parental opt-out permits a medical-only opt-out." If you are correct, I would view that as a material change to the Rule with respect to face coverings. I am requesting an opportunity to consult with the School Board after they have had a meaningful opportunity to digest the new Rule and consider what action should be taken with respect to the Board's Policy on face coverings. Accordingly, I am requesting an additional two weeks from today to provide the documentation requested in your September 23rd letter. In the meantime, we will continue to monitor local conditions in collaboration with local health professionals.

Respectfully,



Michael J. Burke
Superintendent

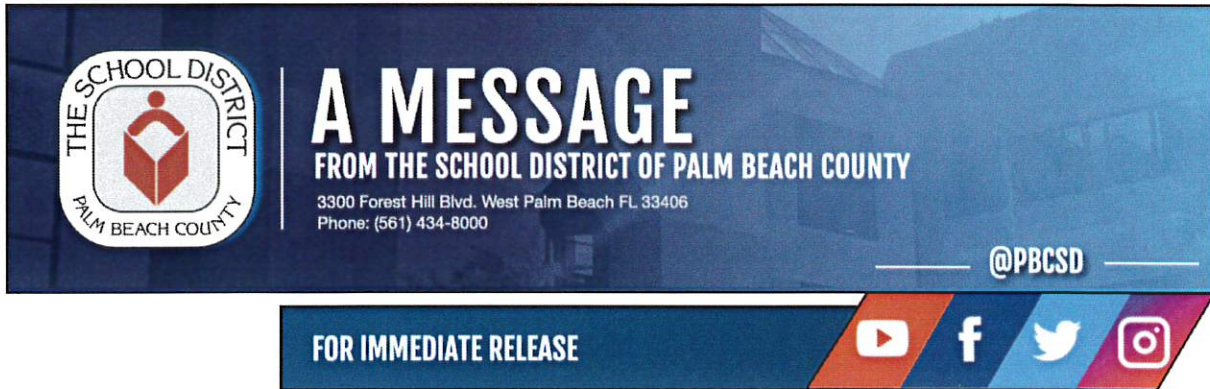
C: Frank A. Barbieri, Jr., Esq., Board Chairman
Karen Brill, Vice-Chair
Marcia Andrews
Alexandria Ayala
Barbara McQuinn
Debra L. Robinson, M.D.
Erica Whitfield

Guidance for Safe Schools, American Academy of Pediatrics, available at <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

³ Symptoms of COVID-19, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

⁴ School District of Palm Beach County, COVID-19 Dashboard, https://www.palmbeachschools.org/students_parents/health_services/coronavirus_disease_2019_covid_19/covid-19_dashboard.

⁵ COVID-19 Integrated County View, Palm Beach County, Florida, Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#county-view|Florida|12099|Risk|community_transmission_level.



September 23, 2021

Hello Parents and Legal Guardians,

While the District's facial covering mandate remains in place, and principals are under direction to uphold Board Policy, there is a COVID related update about which you are being notified.

The District would like to make you aware of a new Emergency Rule, signed by Florida's Surgeon General, that changes the protocol for students who are exposed to a positive COVID-19 case, but are not displaying symptoms of the virus themselves.

Emergency Rule 64DER21-15, Protocols for Controlling COVID-19 in School Settings, mandates that parents/guardians of healthy children identified as being exposed to COVID-19 while on District property, but not showing any symptoms of the virus, now have options regarding whether to keep the student home or continue to have their child attend school and all school activities including athletics.

The Rule defines direct contact as "cumulative exposure for at least 15 minutes, within 6 feet."

The District and the Florida Department of Health will continue to conduct contact tracing, and will notify parents and guardians when a student has direct contact with an individual who is positive for COVID-19.

At that point the parent/guardian will have 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 who is positive for COVID-19.

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

Those procedures include:

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.

Additionally, the Emergency Rule does not require that those who come in contact with a COVID-positive individual be tested for the virus themselves.

This new protocol is effective immediately.

Please contact your child's school with any questions or concerns.

Thank you.