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

MONIQUE BELLEFLEUR, individually and on behalf of D.B. Jr., M.B., and D.B.; KATHRYN HAMMOND; ASHLEY MONROE, and JAMES LIS,

Plaintiffs,

v. Case No.: 2020-CA-001467

RON DESANTIS, in his official capacity as Governor of the State of Florida, et al.,

Defendants.
_____/

AMENDED NOTICE OF APPEAL OF A NON-FINAL ORDER

PLEASE TAKE NOTICE that, pursuant to Florida Rules of Appellate Procedure 9.030(b), 9.130(a)(3)(B), and 9.310(b)(2), Defendants Ron DeSantis, in his official capacity as Governor of the State of Florida; Richard Corcoran, in his official capacity as Commissioner of Education; Andy Tuck, in his official capacity as the chair of the Florida Board of Education; Jacob Oliva, in his official capacity as Chancellor, Division of Public Schools, Florida Department of Education; and the Florida Board of Education (collectively, the "Defendants"), hereby appeal to Florida's First District Court of Appeal this Court's Order, rendered August 24, 2020, granting Plaintiff's Expedited Motion for Temporary Injunction. A copy of the Order is attached as Exhibit A.

This order is appealable as a non-final order granting an injunction under Florida Rule of Appellate Procedure 9.130(a)(3)(B). Further, the filing of this Notice triggers an automatic stay pending review. Fla. R. App. P. 9.310(b)(2); *see also Reform Party of Florida v. Black*, 885 So.2d 303 (Fla. 2004) (automatically operate as a stay pending review, except in criminal cases, when . . . any public officer in an official capacity . . . seeks review . . . .") (quoting Fla. R. App. P. 9.310(b)(2)); *Citizens Property Ins. Corp. v. Admiralty House, Inc.*, 66 So.3d 342, 345 (Fla. 2d

DCA 2011) ("The timely filing of a notice shall automatically operate as a stay pending review . . . when the state, any public officer in an official capacity, board, commission, or other public body seeks review").

Respectfully submitted,

GUNSTER, YOAKLEY & STEWART, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2020, the foregoing was electronically filed using the E-filing Portal System, and a copy was furnished by email on the following Service List:

By: /s/ David M. Wells

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EXHIBIT A

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

FLORIDA EDUCATION ASSOCIATION; STEFANIE BETH MILLER; LADARA ROYAL; MINDY FESTGE; VICTORIA DUBLINO-HENJES; ANDRES HENJES; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., and NAACP FLORIDA STATE CONFERENCE, Plaintiffs, vs. RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; FLORIDA BOARD OF EDUCATION; and, CARLOS GIMENEZ, in his official capacity as Mayor of Miami-Dade County, Defendants.	Case No. 2020 CA 001450
MONIQUE BELLEFLUER, individually and on behalf of D.B. Jr., M.B., and D.B.; KATHRYN HAMMOND; ASHLEY MONROE, and JAMES LIS Plaintiffs, vs. RON DESANTIS, Governor of Florida, in his official capacity as Chief Executive Officer of the State of Florida; ANDY TUCK, in his official capacity as the chair of the State Board of Education; STATE BOARD OF EDUCATION; RICHARD CORCORAN, in his official capacity as Commissioner of the Florida Department of Education; FLORIDA DEPARTMENT OF EDUCATION; JACOB OLIVA, in in his official capacity as Chancellor, Division of Public Schools; Defendants.	Case No. 2020 CA 001467

ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION

The Court conducted a hearing on August 19, 20, and 21, 2020, on Plaintiffs' expedited motions for temporary injunction. All parties were represented by counsel in the hearing. Because of the COVID-19 pandemic, this judge conducted the hearing via remote technology from the Leon County Courthouse, where he alone was physically present in the hearing.

The hearing involved the two consolidated cases reflected in the case caption. Case number 2020 CA 1467 was filed in Orange County on July 19, 2020. Case number 2020 CA 1450 was filed in Miami-Dade County on July 20, 2020. Both cases involved an emergency order entered July 6, 2020 by Defendant Richard Corcoran, Commissioner of the Florida Department of Education. Both cases were transferred to Leon County on August 6, 2020 and assigned to this judge.

This order pertains to Defendants (1) Education Commissioner Corcoran, (2) Ron DeSantis, Governor of Florida, (3) the Florida Department of Education, and (4) the other State Defendants listed in the case caption. Plaintiffs in the two cases are (1) the Florida Education Association ("FEA"), (2) the National Association for the Advancement of Colored People, Inc., (3) NAACP Florida State Conference, (4) several individual teachers, and (5) several individual parents.

In the hearing 14 witnesses testified and numerous others submitted written declarations which were admitted into evidence. Approximately 100 exhibits were also admitted. The Court has considered the evidence, the matters of record, argument of counsel, and the applicable law. Based upon those considerations the motion for temporary injunction is granted as provided in this order.

THESE CASES' PROCEDURAL HISTORY

On March 9, 2020, Governor DeSantis, in Executive Order 20–52, declared a state of emergency in Florida due to the COVID-19 pandemic. His order was based largely on findings of the World Health Organization ("WHO") and the Centers for Disease Control and Prevention ("CDC").

On March 23, 2020, Education Commissioner Corcoran issued Emergency Order 20-EO-1 strongly recommending school closures and suspending strict adherence to the Florida Education Code. About that time, according to Plaintiffs Exhibit 1 (a report of the Florida Department of Health), there were less than 50 reported cases of COVID-19 in Florida. Schools were closed because of the pandemic. At the time of this Court's present order, about 5 months later, there have been approximately 600,000 COVID-19 cases in Florida and more than 10,000 Florida residents have died of that disease. Commissioner Corcoran stated in his March 23 order recommending the continued closure of schools "COVID – 19 poses a severe threat to the entire State of Florida." He was certainly correct.

After March 23 students across Florida switched to a distance learning platform for the remainder of the 2019-2020 academic year. As a result of the pandemic, whether schools would reopen for traditional face-to-face learning in August 2020 remained uncertain until early July.

On July 6 Commissioner Corcoran removed that uncertainty by issuing Emergency Order 2020-EO-6 (the "Order"). That Order is the subject of the cases presently before the Court. The Order states that school districts statewide must submit a reopening plan that satisfies the requirements of the Order to receive "reporting flexibility and financial continuity." Importantly, the Order waives the October 2020 student surveys which determine school funding based on the number of students physically in the classroom at that time. The Department of Education will

approve or reject each reopening plan submitted. Only school districts with approved plans will receive the statutory waivers contained in the Order. In order to receive approval, a school reopening plan must be consistent with the following language in the Order:

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

The cases before the Court seek an injunction preventing Defendants from forcing schools statewide to reopen unsafely without regard for local COVID-19 conditions, and seek a declaration from this Court that forcing such statewide reopening of schools is a violation of Article IX, Section 1(a) of the Florida Constitution. The FEA Plaintiffs also seek an injunction and a declaration that the Order is arbitrary and capricious in violation of Article I, Section 9 of the Florida Constitution.

According to Plaintiffs, the Order unconstitutionally burdens the safety of schools by conditioning funding on a reopening plan that provides a brick and mortar option in August, regardless of the dangers posed to Florida by this pandemic. Moreover, Plaintiffs claim the Order is arbitrary and capricious both on its face and in its application across Florida. In response, Defendants argue the Order is a reasonable exercise of emergency powers by the executive branch that balances their constitutional obligations to Florida's students against risk of harm from the unprecedented pandemic. At this juncture, Plaintiffs seek temporary injunctive relief staying the

requirements of the Order to preserve the status quo while the parties litigate the merits of their claims.

LEGAL STANDARD

To obtain a temporary injunction, the moving party must establish (1) a substantial likelihood of success on the merits; (2) lack of an adequate remedy at law; (3) irreparable harm absent the entry of an injunction; and (4) that injunctive relief will serve the public interest. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1258 (Fla. 2017); Florida Department of Health v. Florigrown, LLC, No. 1D18-4471, 2019 WL 2943329, at *2 (Fla. 1st DCA July 9, 2019). "The purpose of a temporary injunction is to preserve the status quo until a final hearing may be held and the dispute resolved." Bailey v. Christo, 453 So. 2d 1134, 1136–37 (Fla. 1st DCA 1984). "One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred." Id. at 1137. "The granting of a temporary injunction rests in the trial court's sound judicial discretion, guided by established rules and principles of equity jurisprudence in view of the facts of the particular case." Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

"A substantial likelihood of success on the merits requires a showing of only *likely* or probable, rather than *certain* success." Schiavo ex rel. Schindler v. Schiavo, 358 F. Supp. 2d 1161, 1164 (M.D. Fla. 2005) (emphasis in original). Article IX, Section 1(a) of the Florida Constitution provides:

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free

> public schools that allows students to obtain a high-quality education…

Accordingly, our Florida Constitution requires the State to ensure our schools operate safely. Defendants, however, through the Order and its application, have essentially ignored the requirement of school safety by requiring the statewide opening of brick-and-mortar schools to receive already allocated funding.

The Order requires all local school districts throughout Florida to open brick and mortar schools by Monday, August 31, 2020. Defendants point out that more than 60 school districts have already submitted reopening plans calling for brick and mortar reopening in August; no school district has joined in this litigation; and no official representative of any school district testified regarding any coercion to reopen its schools. Defendants interpret that as meaning the local school boards agreed with this Order requiring brick and mortar opening.

But the school boards have no choice. The Order expressly states that upon reopening in August all school districts must open brick and mortar schools at least five days per week. Several reopening plans were admitted as exhibits in this hearing. In each of those plans the Department of Education includes language that states "the district must agree to ALL of the assurances by checking the corresponding boxes." Assurance 1, the first box on the form, which must be agreed to by the local district, states in pertinent part: "upon reopening in August, the district will assure that all brick and mortar schools are open at least five days per week for all students…"

The districts have no meaningful alternative. If an individual school district chooses safety, that is, delaying the start of schools until it individually determines it is safe to do so for its county, it risks losing state funding, even though every student is being taught.

This policy "runs afoul of the Supreme Court's long-standing admonition that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally

protected interests.'" Lebron v. Secretary, Fla. Department of Children and Families, 710 F.3d 1202, 1217 (11th Cir. 2013). "Under the well-settled doctrine of unconstitutional conditions, the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationships to the right." Id. Put another way, "what the state may not do directly it may not do indirectly." Id. Because Defendants cannot constitutionally directly force schools statewide to reopen without regard to safety during a global pandemic, they cannot do it indirectly by threatening loss of funding through the Order.

The case of Hillsborough County is illustrative. The Hillsborough County School Board called a special board meeting on August 6, 2020 with a panel of seven doctors to assess whether it was safe to reopen schools based on the current levels of COVID-19 in the community. Under the language of the Order, schools must open in August "subject to advice and orders of the Florida Department of Health [and] local departments of health[.]" Therefore, in an effort to comply with the Order, the Hillsborough School Board asked each doctor on the panel whether he or she believed it was safe to reopen schools. Five of the seven doctors stated it was not safe at that time One of the doctors stated it was not safe that day but maybe it would be in a few weeks. The seventh doctor, the director of the local health department, declined to give an opinion. Based on the medical information at that meeting, the Hillsborough County School Board voted to delay the start of in-person learning by three weeks, from August 24, 2020 to September 14, 2020. Virtual learning would still begin on August 24, 2020.

The next day, August 7, 2020, the Superintendent and Chair of the Hillsborough County School Board received a letter from Commissioner Corcoran stating their proposal was not consistent with the Order. If they chose not to revise their plan, they would not receive the financial

flexibility otherwise available under the Order. After another proposal, to delay reopening until September 7, was also rejected, Hillsborough County voted to reopen brick and mortar schools August 31, 2020. They had no real choice. Defendants arbitrarily prioritized reopening schools statewide in August over safety and the advice of health experts; and all school districts complied in order to avoid a drastic loss of State funding.

As stated earlier, the Order states the day-to-day decision to open or close a school rests locally with the school boards, subject to the advice of local health officials. Although that language sounds good, it is essentially meaningless. Plaintiffs presented convincing evidence that State health officials were instructed not to provide an opinion on the reopening of schools. Local school boards asked State health officials for their opinions as to whether it was safe to open their schools. They would not give any opinion. Video evidence of school board meetings indicated several school boards' frustration with the lack of help in that regard. Local school boards wanted to know – is it safe to open our schools in our county? Defendants reduced the constitutional guarantee of a safe education to an empty promise, in violation of the Florida Constitution.

With regard to Plaintiffs' claim that the Order is arbitrary and capricious, Plaintiffs have also met their burden. This Court recognizes that is a very high burden. Plaintiffs have "to prove beyond a reasonable doubt that the State's education policies… were not rationally related to the provision 'by law' for a 'uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education." Citizens for Strong Schools, Inc. v. Florida State Board of Education, 232 So.3d 1163, 1172 (Fla 1st DCA 2017). That case provides that this standard applies in all cases challenging the State's compliance with its obligations under the Constitution, and that deference in these matters is crucial to avoid intrusion by the courts into legislative and executive authority.

But the Citizens for Strong Schools case is distinguishable from the present case. In the Citizens for Strong Schools case the appellate court dealt only with whether the State had violated its paramount duty to provide a uniform, efficient and high-quality system of free public schools. It concluded there were no judicially manageable standards to make that valuation. Thus, asking the courts to do so involved a violation of the separation of powers doctrine.

The Citizens for Strong Schools appellate case did not involve the paramount duty to provide "safe" schools. The trial judge in that case, in his well-written final judgment, stated "however it cannot be said that every education issue is debatable. The terms in Article IX relating to 'safe' and 'secure' are subject to judicially manageable standards. This Court believes that the terms 'safe' and 'secure' are different from the terms 'efficient' and 'high-quality.' Florida's trial courts deal with issues relating to safety and security all day long. Allegations of unsafe or unsecure schools can be measured differently and more definitively that can terms like 'efficient' and 'high-quality.'" Citizens for Strong Schools, Inc., et al. v. Florida State Board of Education, et al., No. 2009-CA-4534 (Fla. 2d Cir. Ct. 2018). Significantly, the First DCA declined to address "safe" schools in its appellate opinion.

Article I, Section IX of the Florida Constitution provides "no person shall be deprived of life, liberty or property without due process of law…" If a statute or government order is arbitrary and capricious, it violates due process rights guaranteed by the Florida Constitution. See State v. Saiez, 489 So. 2d 1125, 1128 (Fla. 4th DCA 1986). A government act is arbitrary and capricious if it is taken with improper motive, without reason, or is meaningless. See City of Sweetwater v. Solo Const. Corp., 823 So.2d 798 (Fla. 3d DCA 2002). Moreover, an order is unconstitutional if it is vague and susceptible to arbitrary and capricious application. See State v. Jenkins, 454 So. 2d 79, 80 (Fla. 1st DCA 1984).

Here, the evidence established that the Department of Education allowed Miami-Dade County, Broward County, and Palm Beach County to begin the school year with distance learning until September 30 or beyond when virus indicators improve for those districts. These counties were permitted to heed the advice of local health experts. However, when Hillsborough and Monroe County attempted to adopt similar plans Defendants denied their proposals. Department of Education official Jacob Oliva explained that this was because Miami-Dade, Broward, and Palm Beach Counties are in phase 1 of reopening. But there is no mention of "phases" in the Order. Without prescribed standards for approval of plans, the Commissioner has engaged in ad hoc and unconstitutional decision making without considering local safety and the medical opinions of experts, local or otherwise. Indeed, the Department of Health, the agency charged with making health and safety related decisions in the State of Florida, was noticeably absent from the Defendants' decision-making process.

Both parties presented expert testimony regarding the COVID-19 pandemic. The medical literature is clearly still in flux and difficult to parse. Defendants' expert, Dr. Jay Bhattacharya, a professor at the Stanford University Department of Medicine, testified he does not think he will ever again work on such a deadly epidemic in his lifetime.

To what extent children ultimately transmit the virus to adults is still to be determined. The CDC in its report entitled The Importance of Reopening America's Schools this Fall, updated July 23, 2020, provides "international studies that have assessed how readily COVID-19 spreads in schools also reveal low rates of transmission when community transmission is low. Based on current data, the rate of infection among younger school children, and from students to teachers, has been low, especially if proper precautions are followed." Thus, according to the CDC, authorities must consider both community transmission rates and proper precautions.

In addition, when considering children in schools, this covers a wide age range. Kindergartners generally start school at age 5 or 6. Elementary school will typically run until about age 10-12. High school will run until about age 17 – 19. Many of our students are able to vote or sign contracts by the time they graduate.

The Order takes none of that into consideration. It fails to mention consideration of community transmission rates, varying ages of students, or proper precautions. What has been clearly established is there is no easy decision and opening schools will most likely increase COVID-19 cases in Florida. Thus, Plaintiffs have demonstrated a substantial likelihood of success in procuring a judgment declaring the Order is being applied arbitrarily across Florida.

Plaintiffs presented various theories of arbitrary and capricious state action. Defendants' witness testified Commissioner Corcoran entered the Order because school districts and school superintendents were asking for guidance regarding how State funding and the October survey would work if parents and students chose, in large numbers, to continue distance learning in the fall semester. According to Defendants, the Order was intended to ensure flexibility in funding as school districts determined their reopening plans. However, there is no evidence in the record that in order to provide flexibility in funding or waivers of certain statutes, Defendants must require school districts to provide a brick and mortar option no later than August 31, 2020. Significantly, Commissioner Corcoran suspended the Florida Education Code on March 23, 2020 without reference to dates or conditions. Thus, the stated goal of providing funding guidance to the school districts was an unfounded premise for entering an Order that threatens to withhold funding if school districts do not provide a brick and mortar option in August.

Interestingly, this hearing was done remotely, via Zoom technology. That is because it has been decided it is unsafe to hold in person trials in the Leon County courthouse during this highly

dangerous pandemic. That was a local decision based on local conditions. Because of COVID-19, jurors and witnesses are not allowed to come into our courtrooms, almost all of which are larger than classrooms in our schools. Additionally, Defendants' medical expert is a distinguished research doctor who teaches at Stanford University. Although he testified it is safe enough to reopen our schools, he also admitted Stanford University will not be holding in-person classes in the fall. Classes there will be taught remotely because of the pandemic.

The evidence was clear that teachers want to be back in school. Our teachers are the foundation of our educational system. They chose to teach because they have a passion for teaching our children. They want to be in the classroom interacting with their students. But the evidence was clear that there are teachers falling hard through the cracks because of this Order. The evidence demonstrated that some teachers are being told they must go back into classrooms under extremely unsafe conditions. There is not room in many classrooms for social distancing. There is not room to put desks 4 feet apart, much less 6 feet apart as is recommended. Students entering and leaving classrooms are inherently close together. Despite school rules, some might be wearing masks and some not. Teachers have not been provided adequate personal protection equipment. They are asked to sanitize their classrooms in five minutes between classes.

Some teachers have medical conditions that make them particularly susceptible to COVID-19. Many teachers are also parents. Some of their children have medical conditions that make them particularly susceptible to COVID-19. Some teachers live with other people, such as their spouses, parents or friends, who may be particularly susceptible to COVID-19. Video clips of the Governor and Education Commissioner were entered into evidence with those officials saying teachers who cannot teach face-to-face will be able to teach remotely. But that option is not being provided to