IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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, and FLORIDA BOARD OF EDUCATION,

Appellants/Defendants,

vs.

FLORIDA EDUCATION ASSOCIATION, STEPHANIE 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,

Appellees/Plaintiffs.
_____/

DCA Case No. 1D20-2470
L.T. Case No.: 2020-CA-001450

RESPONSE IN OPPOSITION TO EMERGENCY MOTION TO REINSTATE AUTOMATIC STAY[1]

Appellees/Plaintiffs, 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 (collectively, "Plaintiffs") hereby respond in opposition to the

[1] Inexplicably, Defendants' Appendix contains neither the injunction nor the order vacating the automatic stay. The orders are attached as exhibits to this Response.

Emergency Motion to Reinstate Automatic Stay (the "Motion") filed by Appellants/Defendants 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, and Florida Board of Education (collectively, the "Defendants"). The Motion should be denied.

INTRODUCTION

The trial court vacated the automatic stay of the temporary injunction, expressly finding that vacating the stay was justified by "compelling circumstances" and that the equities were overwhelmingly tilted against maintaining the stay. The trial court did not abuse its discretion in vacating the automatic stay.

This case is not about legislating from the bench—it is about allowing local school districts to determine what is best and safest for their teachers and students in this unprecedented pandemic without fear of losing their funding. The temporary injunction and the order vacating automatic stay were issued after an extensive evidentiary hearing and contain thorough factual findings that are supported by the evidence. In fact, the trial court expressly found:

> [The Department of Education's Emergency Order 2020-EO-06] 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 the schools.

Exh. 2 at 7.

Defendants' Motion asks this Court to re-weigh this and all of the other evidence. Indeed, Defendants' appendix simply collects evidence Defendants presented below—which the trial court rejected. The Temporary Injunction contains nine pages of findings of facts and conclusions of law, and the Order Vacating Automatic Stay is based thereon.[2]

In its Order Vacating Automatic Stay, the trial court stated, in part:

> Defendants' response, in summary, drastically misstates what the temporary injunction order did and did not do. . . . What the order did, for the reasons stated, is require that local school districts be given the authority under their individual circumstances to open or close the local schools, based on local conditions.

[Exh. 1 at 2 (emphasis added).]

The school boards of Florida are the constitutionally created bodies with the responsibility to "operate, control and supervise all free public schools within the school district . . . . " Art. IX, Sec. 4(b), Fla. Const.

[2] The transcript of the proceedings has been ordered on an expedited basis and will be filed below and with this Court immediately upon receipt. Appellees/Plaintiffs' Appendix contains the trial court exhibits also supporting the trial court's conclusions.

The Florida Constitution provides in part:

> 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. . . ."

[Exh. 2 at 5 (quoting Fla. Const. Art. IX, Sec. 1(a) (emphasis added)][3] The trial court found that this constitutional mandate is being violated. *Id.* at 5, 7. The injunction was issued to ensure that local school districts could decide for themselves whether to reopen their brick and mortar locations for in-person instruction in the midst of the COVID-19 pandemic without risk of losing their already-allocated funding. Because the Department of Education's Emergency Order 2020-EO-06 (the "Defendants' Mandate") requires schools to reopen for in-person instruction no later than August 31, the August 24 temporary injunction was necessary to ensure that school districts may implement reopening plans that satisfy the specific needs of their locality—including, if appropriate, resuming school without offering in-person instruction. That option is being offered in Defendants' Mandate to Miami-Dade, Broward, and Palm Beach Counties, but not elsewhere in Florida. [Exh. 2 at 9].

[3] Defendants' Mandate is "law" for these purposes and, as the trial court found, violates the constitutional mandate. [Exh. 2 at 5]

To stay the temporary injunction while this appeal proceeds would nullify these objectives. A stay would leave Defendants' Mandate in full force and effect until after the August 31 reopening deadline passes. This would effectively ensure that every public school across the state reopens brick and mortar without regard for safety, which is the precise outcome the injunction seeks to avoid. Since a stay is antithetical to the injunctive relief awarded, and since the Defendants have wholly failed to demonstrate that the trial court abused its discretion in vacating the stay, this Court should deny the Emergency Motion to Reinstate Automatic Stay.

ARGUMENT

I. Standard of Review.

The Defendants fail to mention the highly deferential review standard that applies. Per Florida Rule of Appellate Procedure 9.310(b)(2), this Court reviews such orders for abuse of discretion. *See City of Sarasota v. AFSCME Council '79*, 563 So. 2d 830, 830 (Fla. 1st DCA 1990). The trial court's discretion is "broad." *Id.* ("Generally, the lower tribunal has broad discretion in the matter of a stay"); *see also Everett v. Everett*, 196 So. 3d 483, 484 (Fla. 1st DCA 2016) (the abuse of discretion standard is "highly deferential" to the trial court's decision).

In applying this highly deferential standard, this Court's review must be "grounded in the traditional appellate principle that must apply throughout the appeal—that is, the order on appeal is presumed correct unless or until the

appellant demonstrates otherwise." *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1077 (Fla. 2d DCA 2005) (emphasis added).

II. The Circumstances Supporting The Stay Order's Vacation Are Compelling And Supported By The Evidence.

Despite maintaining that the circumstances here are not compelling enough to warrant a stay, the Defendants expressly recognize that the COVID-19 pandemic is an "unprecedented public-health crisis" resulting in "unprecedented circumstances" surrounding school reopening. *See* Mt. at 3, 19 (emphasis added). If ever there were a circumstance compelling enough to warrant vacating the automatic stay, surely the state-compelled exposure of Florida's educators and students to an "unprecedented" and highly contagious virus fits the bill.

In an apparent attempt to avoid confronting the "compelling" nature of their mandate that teachers needlessly expose themselves to a deadly and contagious virus based solely on a blanket and arbitrary decision that schools must reopen for in-person instruction or lose their funding, Defendants instead focus on the automatic stay's purpose. *See* Mt. at 11-14 (discussing the separation of powers and judicial deference).[4] This misdirection attempts to distract this Court from the

[4] While Defendants discuss the separation of powers between the judiciary and executive branches, they ignore their own separation of powers violation—*i.e.*, their threats to withhold funding allocated by the Legislature. Separation of powers forbids intrusion into the legislature's spending authority related to the funding of Florida's public schools. *See, e.g.*, *McCall v. Scott*, 199 So. 3d 359, 374 (Fla. 2016).

true issue—do school boards have the authority to make local decisions as to what is best for their teachers and students based on local health statistics and concerns or not? The parties do not dispute the reason the automatic stay was created, nor do they dispute that it initially took effect upon the filing of the notice of appeal—they dispute whether the trial court was justified, under the unique and unprecedented circumstances of this case, in dissolving that stay despite its initial application. *See Mitchell v. State*, 911 So. 2d 1211, 1216 (Fla. 2005) ("Importantly, however, while rule 9.310(b)(2) is effectively automatic in its initial application, a stay entered pursuant to the rule may be dissolved.") (emphasis added). Plaintiffs simply ask this Court to reweigh the evidence, which is impermissible.

Defendants claim "no evidence was offered to support Plaintiffs' central contention that school boards and districts are being 'coerced' into reopening schools for in-person instruction . . . ." Mt. at 8. To the contrary, the Temporary Injunction includes findings regarding Hillsborough County as an illustrative case. [Exh. 2 at 6] In light of medical evidence that the schools could not safely reopen, the School Board voted to delay in-person learning. *Id.* This was rejected by Defendant Corcoran. *Id.* A second proposal was also rejected. *Id.* at 7.

In addition, as the trial court found—despite Defendants' assertions that their Mandate was about safety and subject to the advice of local health offices—

"Plaintiffs presented convincing evidence that State health officials were instructed not to provide an opinion on the reopening of the schools." *Id.* (emphasis added). Thus, the evidence established that safety was not the underlying reason for Defendants' Mandate, and Defendants' protestations to the contrary were not supported by the evidence. The evidence before the trial court included "Video evidence of school board meetings . . . ." *Id.*

Here, the "compelling circumstances" warranting lifting the stay are the same circumstances that caused the trial court to find a likelihood of irreparable harm when it granted the temporary injunction. An injury is irreparable if it cannot "be adequately repaired or redressed in a court of law by an award of money damages." *Sun Elastic Corp. v. O.B. Indus.*, 603 So. 2d 516, 518 n.3 (Fla. 3d DCA 1992). Allowing the automatic stay to remain in place while this appeal is litigated would force hundreds of thousands of school children, teachers, and school staff to return to in-person school without regard to their individual and/or local health and safety considerations. Make no mistake—Plaintiffs want schools to reopen in a brick and mortar environment; but local school boards must have the authority to make those decisions on a local level. As the evidence produced below established, forcing schools to reopen on an in-person basis based purely on economic rather than safety concerns places all Floridians at risk.

Although Defendants recognize that the temporary injunction was issued following "a two-day evidentiary hearing," they claim that the temporary injunction that followed replaced the "careful public-policy judgment of the DOE" with the circuit court's "own judgment." Mt. at 14. This case is not about legislating from the bench—it is about allowing local school boards to determine what is best for their teachers and students in this pandemic without fear of losing their funding. While the circuit court ultimately concluded that the Defendants' Mandate is unconstitutional and arbitrary and capricious, it did so after weighing the conflicting evidence and making numerous factual findings, including the following:

> 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 all teachers. Some teachers are being forced to quit their profession in order to avoid an unsafe teaching environment.

[Exh. 2 at 10-12]

Since these factual findings and the numerous others contained within the trial court's 16-page injunction all were entered following the trial court's weighing of conflicting evidence, they cannot be challenged on appeal. *See Old Equity Life Ins. Co. v. Levenson*, 177 So. 2d 50 (Fla. 3d DCA 1965) (indicating that where trial court's findings of fact are reasonably supported by competent, substantial evidence in the record, as they are here, appellate court cannot re-weigh the evidence or substitute its judgment). Any evidence offered by the Defendants that conflicts with these findings was weighed by the circuit court and properly rejected—it certainly does not provide the Defendants with a basis for disputing the "compelling" nature of the court's findings. *See id.*; *see also City of*

Gainesville v. Watson Const. Co., Inc., 815 So. 2d 785, 785 (Fla. 1st DCA 2002) ("Having reviewed the conflicting evidence in the record before the trial court, we agree with Appellee that the trial court applied the law correctly in finding Appellee entitled to temporary injunctive relief.").

Because the trial court's factual findings firmly demonstrate the "compelling" and "unprecedented" nature of these proceedings, Defendants' contrary contentions must be rejected outright.

III. Plaintiffs And The Public At Large Will Be Irreparably Harmed If The Stay Is Reinstated.

The remaining two components of the stay analysis were expressly considered and ruled upon by the trial court—(1) the likelihood of irreparable harm if the stay is not reinstated; and (2) "the likelihood of success on the merits by the entity seeking to maintain the stay." *Mitchell*, 911 So. 2d at 1219. These two factors constitute the "principle considerations" that must guide this Court's decision. *Id.*

Notwithstanding the fact that this standard is identical to the standard Plaintiffs satisfied when proving entitlement to the injunction in the first place, Defendants baldly proclaim that "the showing necessary to lift the automatic stay pending review is necessarily greater than the showing necessary to obtain a preliminary injunction." Mt. at 10. Appellate case law says precisely the opposite. *See Tampa Sports Auth.*, 914 So. 2d at 1079.

When the order on appeal is a temporary or preliminary injunction, "the first consideration" governing whether to vacate a stay—*i.e.*, the likelihood of irreparable harm—"is substantially identical to the first criterion applied by the circuit court when concluding that [the Plaintiffs were] entitled to a preliminary injunction." *Id.* ("Obviously, if Johnson proved that he will suffer irreparable harm without an injunction against the patdown searches, he will suffer the same irreparable harm if that injunction is not enforced during this appeal.") (emphasis added).

As detailed in Plaintiffs' Emergency Motion to Vacate Automatic Stay filed below:

> If the automatic stay remains in place, . . . the State would be permitted, for the duration of the appeal, to freely expose students and school staff to pandemic-related health issues in a manner that [the trial court] has held to be prohibited by the Constitution. This would constitute per se irreparable injury, which could not possibly be remedied after the fact.

Id. at 5. In other words, since reinstating the automatic stay would effectively require thousands of teachers to report to their brick and mortar locations by August 31 and potentially expose themselves to COVID-19 in the process, the interests protected by the injunction could be rendered moot. *Tampa Sports Auth.*, 914 So. 2d at 1079 ("This [irreparable harm] is compounded by the fact that all or nearly all of the Buccaneers' 2005 home games likely will have been played before the appeal is completed, thus potentially mooting the issue before us as it relates to

Johnston's rights and rendering Johnston's vindication and protection of his constitutional interest wholly illusory."). This Court should deny the Motion. *See id.* ("In short, Johnston will have lost his case simply because the TSA filed an appeal.").

Defendants incorrectly maintain that "Plaintiffs will not be irreparably harmed . . . because the trial court's injunction order does not give them the relief they seek in the first place." In fact, the temporary injunction does effectively ensure that at least some teachers who would otherwise be forced to return to work for in-person instruction will be able to avoid doing so by freeing the school boards to alter their reopening plans without fear of negative funding consequences. [Exh. 2 at 11 ("The evidence demonstrated that some teachers are being told they must go back into classrooms under extremely unsafe conditions.")]. *See also* [Exh. 1 at 2 (recognizing that "Defendants response, in summary, drastically misstates that the temporary injunction order did and did not do. It did not order that Florida's schools statewide be closed. . . . What the order did, for the reasons stated, is require that local school districts be given authority under their individual circumstances to open or close the local schools, based on local conditions.") (emphasis added).] On the other hand, reinstating the stay would force those same teachers to choose between their health and their career. Such harm only can be avoided by refusing to reinstate the automatic stay.

IV. Defendants Have A Low Likelihood Of Success In This Appeal.

The "likelihood of success on the merits" criterion is "related to but somewhat different from the criteria applied by the circuit court when granting the injunction." *Tampa Sports Auth.*, 914 So. 2d at 1079. While the trial court considered Plaintiffs' likelihood of success on the merits of its entire case, this Court is concerned only with the likelihood that the Defendants "will successfully overturn the injunction on appeal." *Id.* "To do so, [the Defendants] must overcome the presumption of correctness by demonstrating that the injunction was not founded on substantial competent evidence, that it resulted from an incorrect application of law, or that the circuit court abused its discretion when entering it." *Id.*

Defendants cannot prove any of these issues in light of the "wide discretion" the trial court enjoyed in ruling on the injunction. *Saidin v. Korecki*, 202 So. 3d 468, 470 (Fla. 1st DCA 2016). Accordingly, just as the irreparable harm factor is less strenuous on appeal than it was in the trial court, so is the "likelihood of success" factor.

In fact, Defendants' "uphill battle" is insurmountable. The trial court's temporary injunction explains in detail why and how Plaintiffs are likely to succeed—and, by extension, why and how Defendants are likely to lose—on the merits of this entire case. [Exh. 2 at 4-12] These conclusions are supported by

pages of factual findings detailing the reasons that: (1) the Defendants' Mandate unconstitutionally deprives Floridians of a "safe" public school system; and (2) the Defendants' Mandate is otherwise arbitrary and capricious. *See id.* The trial court stated, in part:

> 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.

[Exh. 1 at 9 (emphasis added)]

Ironically, in attempting to convince this Court of the merits of their position, Defendants improperly discuss factual matters that the fact-finder rejected or resolved adversely to them after weighing the conflicting evidence. *See, e.g.*, Mot. at 19 ("The evidence on record demonstrates there is no bright-line litmus test for reopening schools under these unprecedented circumstances, regardless of what Plaintiffs or the trial court might believe."). This Court cannot consider such "facts" when this appeal proceeds on its merits, so Defendants' discussion of them here does not serve their cause.

Defendants' challenge to Plaintiffs' standing is entirely improper because the order determining Plaintiffs' standing (*i.e.*, the August 14, 2020 order denying Defendants' motion to dismiss for lack of standing) is not on appeal. This is a non-final appeal of the temporary injunction order under Florida Rule of Appellate Procedure 9.130, so the temporary injunction is the only order that may be reviewed. *Compare Slaughter v. Abrams*, 101 Fla. 1141, 133 So. 111, 112 1931) ("An appeal from the final decree brings up for review all prior orders."), *with Cotton States Mut. Ins. v. D'Alto*, 879 So. 2d 67, 69 (Fla. 1st DCA 2004) ("Jurisdiction to hear an appeal from a nonfinal order is limited to the kinds of orders referred to in rule 9.130 of the Florida Rules of Appellate Procedure.").

In any event, Plaintiffs clearly have standing for the relief they seek. Plaintiffs—which include a teacher's union, several individual teachers, parents,

and others—seek to enjoin Defendants from enforcing Defendants' Mandate in such a way that effectively requires teachers to report to school in the midst of a pandemic without regard for local or individual health and safety considerations. Moreover, if a school reopens, school districts should have authority to quickly close the school if the pandemic statistics for that area detrimentally change—thus, again placing teachers and students at risk of harm. Since Plaintiffs clearly have "a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation," their standing is indisputable. *Wexler v. Lepore*, 878 So. 2d 1276, 1280 (Fla. 4th DCA 2004). The fact that the school districts are not named parties to this case is irrelevant—the injunction binds Defendants in such a way that they are precluded from imposing negative funding consequences on the school districts, which in turn provides Plaintiffs the opportunity for safer teaching options. Nothing more is required to establish standing, and Defendants cite no legal authorities saying otherwise.

CONCLUSION

Because reinstating the automatic stay would defeat the entire purpose of the temporary injunction, and because Defendants fail completely to demonstrate any error in the trial court's decision to vacate the stay, Plaintiffs respectfully request that the Emergency Motion to Reinstate Automatic Stay be denied.

Respectfully submitted,

/s/ Katherine E. Giddings

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 28th day of August 2020 that a true and correct copy of the foregoing has been furnished by E-Mail to all parties below.

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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; and FLORIDA BOARD OF EDUCATION; 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

EXHIBIT 1

ORDER VACATING AUTOMATIC STAY

On August 25, 2020, Plaintiffs filed a Joint Emergency Motion to Vacate Automatic Stay. The Court has considered the motion, Defendants' response in opposition, the evidence produced during the hearing on the motion for temporary injunction, and the applicable law. Based upon those considerations, the Court enters this order vacating the automatic stay.

Defendants' response is primarily a re-argument of its case presented in the hearing. For the reasons stated in the order of August 24, 2020 granting the motion for temporary injunction, there exists a clear evidentiary basis demonstrating compelling circumstances to warrant vacating the automatic stay provided when the State Defendants appealed. The equities are overwhelmingly tilted against maintaining the automatic stay.

Defendants' response, in summary, drastically misstates what the temporary injunction order did and did not do. It did not order that Florida's schools statewide be closed. This Court does not have authority to enter such an order. What the order did, for the reasons stated, is require that local school districts be given authority under their individual circumstances to open or close the local schools, based on local conditions.

Plaintiffs (1) the Florida Education Association, (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 face irreparable injury if the Emergency Order (2020-EO-06) this Court ruled unconstitutional and enjoined parts of, is permitted to remain in effect during the pendency of the State's appeal.

Potential irreparable injury will be suffered by hundreds of thousands of school children, many teachers, and the community at large if the temporary injunction order is stayed. The

evidence before the Court plainly demonstrates that as a result of Defendants' unconstitutional action requiring the statewide reopening of schools during the month of August 2020, without local school boards being permitted the opportunity to determine whether it is safe to do so, places people in harm's way. Teachers are resigning or retiring due to the risk of exposure to COVID-19. Young students are being exposed to the virus while there is uncertainty as to the long-term effects of the virus and whether children can transmit the disease to adults. The record reflects that medical determinations must be made at the local level to determine if and when it is safe to reopen a county's brick and mortar schools.

The Court finds that the harm which would arise if the automatic stay is permitted to remain in place is irreparable and incapable of being remedied through money damages. On the other hand, any injury to Defendants would be negligible if the temporary injunction remains in effect during the pendency of further proceedings.

Plaintiffs' Joint Emergency Motion to Vacate Automatic Stay is GRANTED. The provisions of this Court's temporary injunction order entered on August 24, 2020, shall take full force and effect.

The Court, by separate order, will set an evidentiary hearing on Plaintiffs' bond requirement under Rule 1.610(b).

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 27th day of August, 2020.

Hon. Charles Dodson
Circuit Judge

Copies furnished to all parties via E-Portal and email:

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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

EXHIBIT 2

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

all teachers. Some teachers are being forced to quit their profession in order to avoid an unsafe teaching environment.

Plaintiffs have established a substantial likelihood of success on the merits.

IRREPARABLE HARM AND INADEQUATE REMEDY AT LAW

The Court finds Plaintiffs have established irreparable harm and an inadequate remedy at law. An injury is irreparable, and thus supports the issuance of a temporary injunction, where the potential damages may be calculated only by conjecture and not by an accurate standard. JonJuan Salon, Inc. v. Acosta, 922 So.2d 1081, 1084 (Fla. 4th DCA 2006). Plaintiffs presented evidence that teachers throughout the State are deciding whether to retire, resign, or put themselves and their families in harms' way. One witness testified that because of his pre-existing condition, his doctor advised he will likely die if he contacts COVID-19. If he is forced to return to school, he will be risking his life on a daily basis. The cost of life of teachers and their family members cannot be readily calculated.

Plaintiffs presented evidence that the most widely prevailing standard for determining when the virus is under control and it is safe to reopen schools is a 5% positivity rate in the affected area, in this case the local school district. The evidence showed that the World Health Organization and the Florida Chapter of the American Academy of Pediatrics use this standard in their guidelines and advisory opinions. Defendants did not present an alternative safety standard.

Defendants argue that Plaintiffs cannot meet their burden of establishing irreparable harm because teachers can choose to take sick leave, retire early, file workers compensation claims, or go through the grievance procedures in their collective bargaining agreements. But a teacher must become sick before taking sick leave or filing workers compensation claims. The purpose of an injunction is to prevent injury before damages occur. Furthermore, the grievance process though

the union's collective bargaining agreements only affords a teacher relief when due to a breach of the collective bargaining agreement. Collective bargaining arbitrators do not have jurisdiction or authority to decide constitutional questions like those pending before this Court.

There is simply no adequate remedy at law available to Plaintiffs under these circumstances. They will suffer irreparable harm. Thus, Plaintiffs have met these elements.

PUBLIC INTEREST

Plaintiffs have also shown that a temporary injunction will serve the public interest. An injunction in this case will allow local school boards to make safety determinations for the reopening of schools without financial penalty. This is what the local school boards were elected to do. Every witness testified that any decision to reopen schools should be based on local conditions. Reasoned and data-driven decisions based on local conditions will minimize further community spread of COVID-19, severe illness, and possible death of children, teachers and school staff, their families, and the community at large. Such local decisions unequivocally serve the public interest.

SEVERABILITY OF UNCONSTITUTIONAL PORTIONS

The Plaintiffs ask the Court to sever the unconstitutional portions of the Order.

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Schmitt v State, 590 So. 2d 404, 415 (Fla. 1991). The Court finds that each of these elements is met here. There is no legal basis to treat this Order differently from a statute. The illegal language in the Order can be separated from the valid language "without rendering the enactment

nonsensical or otherwise changing its essential meaning beyond what is necessary to cure the constitutional defect." Id.

Schools should reopen when the local decision-makers determine upon advice of medical experts, that it is safe to do so. Our Constitution requires safe schools. The Court, therefore, severs Section III, the requirement of a reopening plan, and any reference to statutory waivers being conditioned upon said "approved reopening plans" and references to a required start date in August. The legislative purpose, as stated in the Order's WHEREAS clauses, is to open schools consistent with safety precautions and ensure the continuity of funding and the educational process. These goals can be accomplished independently of the provisions that are unconstitutionally void. Schools will still reopen where it is safe, as many have, and continue to reopen slowly as conditions improve across the State. Plaintiffs and Defendants agree this is the ultimate goal: to get students back in school.

The Court finds that the good and bad features of the Order are not so inseparable in substance that the Department of Education would have passed the one without the other. Commissioner Corcoran suspended the Florida Education Code in March in response to a declared state of emergency. He did not condition this suspension or waiver on a date certain or upon any form of virtual learning plan from the districts. Lastly, after severance, the Order "would still meet the requirement of being complete in itself." Searcy, Denney, Scarola, Barnhart & Shipley v. State, 209 So. 3d 1181, 1196 (Fla. 2017). The Order would still accomplish its intended purpose of providing flexibility and continuity in funding while remaining "consistent with safety precautions as defined by the Florida Department of Health, local health officials and supportive of Floridians."

CONCLUSION

The Court finds Plaintiffs have met their burden. The Order is unconstitutional to the extent it arbitrarily disregards safety, denies local school boards decision making with respect to reopening brick and mortar schools, and conditions funding on an approved reopening plan with a start date in August. The Order will, however, pass constitutional muster if its unconstitutional portions are severed. And it would still require local school districts to provide a high-quality education, under the circumstances – the circumstances being this horrible pandemic.

Therefore, the Court strikes the following language:

I. Reopening Requirements.

a. All schools open. ~~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 a 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. Strict compliance with requirements of section 1001.42(4)(f), Florida Statutes, requiring school districts to establish a uniform and fixed date for the opening and closing of schools is waived to the extent necessary to give effect to this Order. In addition, strict compliance with sections 1003.02 and 1011.60(2), Florida Statutes, requiring school districts to operate public schools for a minimum of 180 days or an hourly equivalent is waived to the extent necessary to give effect to this Order~~, consistent with an approved reopening plan~~. Further, strict compliance with the reporting requirements for educational planning and information, as set forth in section 1008.385, Florida Statutes, and Rule 6A-1.0014, Florida Administrative Code, is waived to the extent necessary to give effect to this Order~~, consistent with an approved reopening plan~~.

b. Full panoply of services. Pursuant to the authority granted in section 1001.10(8), Florida Statutes, school ~~districts~~ **boards** and charter school governing boards ~~must~~ **may** provide the full array of services that are required by law so that families who wish to educate their children in a brick and mortar school full time have the opportunity to do so; these services include in-person instruction (barring a state or local health directive to the contrary), specialized instruction and services for students with Individualized Education Programs (IEPs) or live synchronous or asynchronous instruction with the same curriculum as in-person instruction and the ability to interact with a student's teacher and peers ~~as approved~~

~~by the Commissioner of Education~~. Required services must be provided to students from low-income families, students of migrant workers, students who are homeless, students with disabilities, students in foster care, students who are English Language Learners, and other vulnerable populations.

II. Reopening Plans – Strike entire section.

III. Reporting Flexibility and Financial Continuity.
School districts and charter school governing boards ~~with an approved reopening plan~~ will receive reporting flexibility that is designed to provide financial continuity for the 2020 fall semester.

a. [remains as is]

b. **Full FTE credit for innovative learning environments.** ~~Although it is anticipated that most students will return to full-time brick and mortar schools,~~ some parents will continue their child's education through innovative learning environments, often due to the medical vulnerability of the child or another family member who resides in the same household. As described in this Order, school boards and charter school governing boards ~~with an approved reopening plan~~ are authorized to report approved innovative learning students for full FTE credit. However, students receiving virtual education will continue to receive FTE credit as provided in section 1011.61(1)(c)1.b.(III)-(IV), Florida Statutes.

c. [as is]

IV. [as is]

~~All of the statutory and rule waivers set forth in this Order for school districts and charter schools are contingent upon having an approved reopening plan for the 2020 fall semester.~~

The Court retains jurisdiction to enforce the provisions of this Order.

DONE and **ORDERED** in Tallahassee, Leon County, Florida, on this 24th day of August, 2020.

Hon. Charles Dodson
Circuit Judge

Copies furnished to all parties via E-Portal and email: