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

ROBIN MCCARTHY and JOHN MCCARTHY, individually and on behalf of L.M., a minor; ALLISON SCOTT, individually and on behalf of W.S., a minor; LESLEY ABRAVANEL and MAGNUS ANDERSSON, individually and on behalf of S.A. and A.A., minors; KRISTEN THOMPSON, individually and on behalf of P.T., a minor; AMY NELL, individually and on behalf of O.S., a minor; EREN DOOLEY, individually and on behalf of G.D., D.D., and F.D., minors; DAMARIS ALLEN, individually and on behalf of E.A., a minor; PATIENCE BURKE, individually and on behalf of C.B., a minor; and PEYTON DONALD and TRACY DONALD, individually and on behalf of A.D., M.D., J.D., and L.D., minors,

Plaintiffs,

v. CASE NO.: 2021-CA-1382

GOVERNOR 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.
_____/

DEFENDANTS' MOTION TO DISMISS

Florida's Governor and Legislature have determined that it is in the best interests of the State to empower Florida parents with the right to manage the

healthcare of their children. This includes the freedom to choose whether they must be masked in public schools. The Governor and Surgeon General carefully balanced the legitimate state interests of school safety, educational well-being, and parental rights and determined not to impose a categorical mask mandate on students who attend the State's public schools. Plaintiffs fundamentally disagree with this policy decision. Despite their lack of standing, Plaintiffs ask this Court to override the complex balancing of several competing interests—as well as carefully reviewed determinations—that have already been thoroughly assessed by the two branches of government in which this authority exclusively lies. Plaintiffs' request, if granted, would vitiate the fundamental rights of countless Florida parents to make healthcare decisions for their own children. Moreover, the Court cannot grant the relief Plaintiffs seek because it is beyond the purview of the judiciary to make the policy determinations at issue in this case.

Plaintiffs' claims can be distilled to three requests: declare the Governor's Executive Order unconstitutional, declare a Florida Department of Health Rule unconstitutional, and enjoin enforcement of the Executive Order. Plaintiffs do not seek relief that can be granted. *First*, Governor Ron DeSantis, using his constitutional authority and power, issued Executive Order 21-175. In the Order, he directed the Florida Department of Health and the Florida Department of Education to use all legal authorities necessary to implement

safety protocols governing the control of COVID-19 in schools that do not infringe upon parents' rights. The Governor made this policy decision after considering multiple factors including science and law. The Governor as Chief Executive has the authority pursuant to Article IV, Section 1(a) of the Florida Constitution to direct his state agencies to adopt rules implementing Florida laws in accordance with their respective legal authorities. The Order—merely directing agencies to take some future action within their legal means to achieve a policy goal—does not itself impose any state action against plaintiffs, and thus plaintiffs lack standing to challenge it. *Second*, the Department of Health duly enacted Emergency Rule 64DER21-12 pursuant to Florida law. Plaintiffs do not question the constitutionality of Section 1003.22, Florida Statutes, the statute pursuant to which the Department of Health issued the Rule. Instead, they challenge the Defendants' *policy determinations* that reserve to Florida's parents the right to make important healthcare decisions for their children.

In sum, Plaintiffs disagree with how the Governor balanced the various interests expressed in the Executive Order. They also disagree with the determinations of the Surgeon General, the state's chief health official. Plaintiffs only real challenge is to the Rule which was appropriately promulgated pursuant Florida Statutes, and their Complaint is over a political question. Ultimately, Plaintiffs lack standing, and their request that the Court

make policy decisions reserved exclusively to the executive and legislative branches of government is, itself, unconstitutional. Because Plaintiffs fail to raise any colorable claim, Defendants Governor Ron DeSantis, Commissioner Richard Corcoran, the Department of Education, and the State Board of Education, under Florida Rule of Civil Procedure 1.140(b)(1) and (6), collectively move the Court for an order dismissing Plaintiffs' claims with prejudice.[1]

I. SUMMARY OF THE ARGUMENT

Less than a year ago, the First District Court of Appeal held that the terms "safe" and "secure" as used in Article IX, Section 1(a) of the Florida Constitution "lack judicially discoverable or manageable standards" and that "[*a*]*ny* judicial effort to evaluate the State's compliance with those constitutional . . . requirements would violate Florida's strict requirement for the separation of powers." DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202, 1216 (Fla. 1st DCA 2020). Despite this clear edict, Plaintiffs ask the Court to do just that. Plaintiffs' Complaint asks the Court to declare the Executive Order and

[1] On August 13, 2021, the Court held a case management conference and determined that the Court would hear argument concerning threshold substantive matters that may result in dismissal of this action. This Motion is filed in accordance with the Court's ruling at the case management conference. By filing this Motion, Defendants do not waive and expressly reserve the right to file a response to the Complaint in accordance with the Case Management Order. Nothing contained herein is intended to be or should be construed as a waiver of any claims or defenses Defendants may raise in the event a responsive pleading is required.

the Rule unconstitutional as well as to enjoin Defendants from enforcing the Executive Order and Rule. However, Plaintiffs' claims fail for any or all of the following reasons: (1) the claims alleged raise political questions; (2) Plaintiffs lack standing to raise the alleged causes of action; and (3) any judicial interference with the executive's discretionary authority violates the separation of powers doctrine. Accordingly, the Court must dismiss Plaintiffs' claims with prejudice.

For Count I, whether an education policy provides for "safe" and "secure" schools amid a pandemic is a political question and a judicial determination of such would violate the separation of powers doctrine. Fla. Educ. Ass'n, 306 So. 3d at 1216. Moreover, Plaintiffs have not, and cannot, demonstrate an injury in fact that was caused by the Executive Order and Rule and that can be redressed by the Court.

Count II argues that the Executive Order violates Article IX, Section 4 of the Florida Constitution, referred to by Plaintiffs as the "Home Rule," by intruding into the powers of local school districts. But only local school districts, not Plaintiffs, would have standing to argue whether the Executive Order infringes their constitutional authority. No school district has raised such a suit because the law is clear that the Florida Constitution delineates a hierarchical structure between the State Board of Education and the local

school districts, and the Executive Order and Rule appropriately leverage the constitutional supervisory authority granted to the State Board of Education.

Count III—which alleges that the Executive Order undermines schools' safety and is arbitrary and capricious—is subject to dismissal on several grounds. Although a determination of whether executive action is arbitrary and capricious is normally subject to judicial review, here, Plaintiffs' allegations as to why the action is arbitrary and capricious are the same as Count I—that the action does not provide for "safe" schools. This, as stated by the First District Court of Appeal, is a non-justiciable political question and any judicial decision related thereto would violate the separation of powers doctrine. Moreover, as with every other count, Plaintiffs cannot demonstrate standing to bring this claim.

Count IV alleges that the Executive Order exceeds the authority of the Department of Education and therefore violates the Florida Constitution. Count IV is inherently contradictory and must be dismissed for at least two reasons. First, it is difficult to comprehend what Plaintiffs are alleging. Plaintiffs seek "a declaration . . . that the Executive Order exceeds the authority of the Department of Education and the subject matter of public health matters, such as masking in schools, is appropriately within the authority of the Florida Department of Health under section 1003.22." Compl. ¶ 136. The Executive Order was issued by the Governor, and it directed the

Department of Education and the Department of Health to issue rules using all legal means available for the safe reopening of schools. The Department of Health did just that when it promulgated the Rule in accordance with its rulemaking authority under Section 1003.22, Florida Statutes. Plaintiffs do not challenge the authority of the Department of Health to make such rules—they allege it has such authority. Compl. ¶ 136.

Second, Plaintiffs lack standing. Plaintiffs fear being around unvaccinated, non-masked people. But the Executive Order did not cause this alleged injury and the requested relief will not redress that grievance because the Governor, not the Department of Education, issued the Executive Order and the Department of Health, which Plaintiffs concede has authority, issued the Rule. Plaintiffs' request that the Court mandate the Governor to direct and control executive agencies in a particular manner violates the separation of powers doctrine.

Plaintiffs' allegations in Count V, that the Department of Health Rule violates the Florida Constitution by failing to provide for "safe" and "secure" schools amid a pandemic, like Count I, is a political question, the judicial resolution of which would result in the violation of the separation of powers. Further, like every other count, Plaintiffs lack standing.

Lastly, Count VI, seeking injunctive relief, should be dismissed based upon the political question doctrine, separation of powers, and Plaintiffs' lack of standing.

In short, every one of Plaintiffs' claims must be dismissed as a matter of law. All counts fail to demonstrate an actual injury caused by Defendants' actions that can be redressed by the Court. And Counts I, III, IV, V, and VI assert a political question and ask the Court to violate the Florida Constitution's mandated separation of powers.

II. BACKGROUND

A. The Executive Order, the Rule, Executive Power, and the Education Article

On July 30, 2021, the Governor issued the Executive Order, which directs the Department of Health and the Department of Education to execute rules that "ensure safety protocols for controlling the spread of COVID-19 in schools . . . ." Exec. Order 21-175 (July 30, 2021), https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-175.pdf. The Executive Order requires that any rules adopted by either agency be in accordance with the Parents' Bill of Rights and tasks the Commissioner of Education with ensuring school districts adhere to Florida law. Exec. Order 21-175. The Executive Order references a Brown University study that analyzed data for schools in Florida and found no statistically significant correlation between mask mandates and

lower spread of COVID-19. See Exec. Order 21-175. The Executive Order also references the Parents' Bill of Rights, which precludes the government from illegally interfering with a parent's decision regarding his or her child's health care. The Parents' Bill of Rights was signed into law on June 29, 2021 and is codified in Sections 1014.01–.06, Florida Statutes. See Ch. 2021-199, Laws of Fla., http://laws.flrules.org/2021/199.

In accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated the Rule. See Fla. Admin. Code R. 64DER21-12 (Protocols for Controlling COVID-19 in School Settings), https://www.flrules.org/gateway/ruleNo.asp?id=64DER21-12; Vol. 47, No. 153, Fla. Admin. Reg. (August 9, 2021). The Rule identifies the specific reasons for finding an immediate danger to the public health, safety, or welfare and the reason for concluding that the procedure is fair under the circumstances. Plaintiffs did not challenge these findings. See generally § 120.54(4), Fla. Stat. (describing requirements for emergency rulemaking). The Rule also outlines the protocols for controlling COVID-19 in school settings, which include routine cleaning, encouragement of routine hand washing, and a series of protocols for when students are symptomatic, test positive, or are exposed to COVID-19. In furtherance of the Executive Order and Parents' Bill of Rights, the Rule allows students to wear masks, but also

gives parents the choice to opt the student out of wearing a mask. The Rule became effective August 6, 2021.

The Florida Constitution vests the "supreme executive power" in the Governor, who must "take care that the laws [are] faithfully executed." Art. IV, § 1(a), Fla. Const. Additionally, the Governor must "transact all necessary business with the officers of government." Id. The functions of the executive branch are allocated into departments that, except in certain circumstances, are under the direct supervision of the Governor. Art. IV, § 6, Fla. Const. Those departments under the supervision of the Governor—i.e., those that serve at the pleasure of the Governor—are subject to his direction and supervision. §§ 20.03(4), (13), Fla. Stat.

The Department of Health, which promulgated the Rule, is under the constitutional authority of the Governor pursuant to Florida law. See § 20.02(3), Fla. Stat. ("The administration of any executive branch department or entity placed under the direct supervision of an officer or board appointed by and serving at the pleasure of the Governor shall remain at all times under the constitutional executive authority of the Governor . . . ."); § 20.43(2), Fla. Stat. (creating the Department of Health, headed by the State Surgeon General, who is appointed by and serves at the pleasure of the Governor). The Department of Health has its own unique responsibilities, which include adopting rules, after consultation with the Department of Education,

governing the control of communicable diseases in public schools. § 1003.22, Fla. Stat.

The State Board of Education, a constitutional entity, "ha[s] such supervision of the system of free public education as is provided by law." Art. IX, § 2, Fla. Const. The State Board is the head of the Department of Education under Florida law. § 20.15(1), Fla. Stat. The State Board, which consists of seven members appointed by the Governor and confirmed by the Senate, appoints the commissioner of education. Art. IX, § 2, Fla. Const. Commissioner Corcoran is the executive director of the Department of Education. See § 20.15(2), Fla. Stat.

Section four of Article IX of the Florida Constitution—the education article—creates and empowers local school districts to "operate, control and supervise all free public schools within the school district." Art. IX, § 4, Fla. Const. However, local school districts do not have plenary authority to establish local education policy. To the contrary, the text and structure of the Florida Constitution demonstrates that the state Legislature has both primacy and preemptive authority over the state's public education system. The very first section of the education article sets the stage for the Legislature's broad prerogative to establish statewide public education policies by requiring that "[a]dequate provision *shall be made by law* for a uniform, efficient, safe, secure, and high quality system of free public schools . . . ." Art. IX, § 1(a), Fla. Const.

(emphasis added); see Fla. Educ. Ass'n, 306 So. 3d at 1215–16 (noting the Florida Supreme Court's prior holding in Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996), that "the use of the phrase 'by law' in the [first section of the education article] shows that the text of the Florida Constitution commits education policy to the legislative and executive branches"). This necessarily includes the legislative prerogative to enact laws granting state agencies, like the Department of Health and the Department of Education, with the authority and obligation to ensure safe and secure public schools in areas like public health. See Art. IX, § 1(a), Fla. Const.; Fla. Educ. Ass'n, 306 So. 3d at 1219 (quoting Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017) ("Absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in [educational policy choices and their implementation].")).

The very next section of the education article further cements the Legislature's primacy in the public-education sphere, elucidating that "[t]he state board of education *shall . . . have such supervision* of the system of free public education *as is provided by law*." Art. IX, § 2, Fla. Const. (emphasis added); see also The American Heritage Dictionary 1804 (3d ed. 1996) (defining the word "supervise" as "[t]o have the charge and direction of; superintend"); Merriam-Webster's Collegiate Dictionary 1184 (10th ed. 1996) (defining the

word "supervise" as "superintend, oversee"). As the First District Court of Appeal has explained:

> The Florida Constitution "creates a hierarchy under which a school board has local control, but the State Board supervises the system as a whole." . . . The State's "broader supervisory authority may at times infringe on a school board's local powers, but such infringement is expressly contemplated – and in fact encouraged by the very nature of supervision – by the Florida Constitution."

Sch. Bd. of Collier Cnty. v. Fla. Dep't of Educ., 279 So. 3d 281, 286–87 (Fla. 1st DCA 2019) (quoting Sch. Bd. of Palm Beach Cnty. v. Fla. Charter Educ. Found. Inc., 213 So. 3d 356, 360 (Fla. 4th DCA 2017)).[2]

The State Board has the statutory authority and obligation to adopt rules pursuant to Florida law, § 1001.02, Fla. Stat., and has statutorily granted tools to exercise its mandate to ensure school districts comply with laws and rules, see § 1008.32, Fla. Stat. Similarly, the Department of Health has the

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[2] This educational scheme fits neatly within the broader framework of the Florida Constitution, which simultaneously promotes and limits the home rule authority of Article VIII counties considering the Article III state Legislature's broad prerogative to decide and preempt matters of public policy. Compare, e.g., Art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches."), and Art. III, § 1, Fla. Const. ("The legislative power of the state shall be vested in a legislature of the State of Florida[.]"), with Art. VIII, § 1(f), Fla. Const. ("Counties not operating under county charters shall have such power of self-government *as is provided by general or special law*." (emphasis added)), and Art. VIII, § 1(g), Fla. Const. ("Counties operating under county charters shall have all powers of local self-government *not inconsistent with general law*[.]" (emphasis added)).

statutory authority and obligation to adopt rules governing the control of preventable communicable diseases in schools. See § 1003.22(3), Fla. Stat.

The State's actions in this case were in accord with both the Florida Constitution and Florida Statutes. The Governor, consistent with Article IV, Section 1(a) of the Florida Constitution and Sections 20.03(4) and (13), Florida Statutes, issued Executive Order 21-175 to ensure that schools implemented appropriate safety precautions without infringing on the Parents' Bill of Rights. As the Department of Health operates under the direction and supervision of the Governor, see §§ 20.03(4), (13); 20.43(2), Fla. Stat., it implemented Emergency Rule 64DER21-12 pursuant to Florida Statute Section 1003.22. Lastly, the State Board can, consistent with its supervisory powers under Article IX, Section 2 of the Florida Constitution, enforce the Rule and the Parents' Bill of Rights through its discretionary application of its statutory enforcement powers under section 1008.32, Florida Statutes. This procedure comports with the powers granted in and the requirements imposed by the Florida Constitution and statutes.

B. Procedural Posture

On August 6, 2021, Plaintiffs filed their Complaint and Demand for Emergency Injunctive Relief in this lawsuit. The Complaint attempts to assert six causes of action. Counts I through IV seek declarations that the Executive Order violates the Constitution; Count V seeks a declaration that the Rule

violates the Constitution; and Count VI, titled Emergency Injunctive Relief, seeks to enjoin Defendants "from unnecessarily and unconstitutionally enforcing the Executive Order . . . ."

Plaintiffs are comprised of twelve parents[3] ("Parent Plaintiffs") individually and on behalf of fourteen minor children ("Children Plaintiffs"). Plaintiffs reside in Miami-Dade, Orange, Alachua, Hillsborough, and Pinellas counties. Compl. ¶¶ 3–11. Plaintiffs allege generally that COVID-19 cases are rising in Florida and that they bring suit to "safeguard the health and welfare of Florida public school students" because Defendants allegedly did not "take the necessary steps to mitigate community spread of COVID-19." Id. ¶ 33. Each Plaintiff, except for Robin and John McCarthy, alleges that "the presence of non-masked students and unvaccinated students within the school setting is an actual harm . . . ." Id. ¶¶ 35–42. Plaintiffs' only supporting allegations for an actual harm is that "students *risk* exposure according to medical professionals that will certainly lead to contracting COVID-19 and transmitting it to others." Id. ¶ 45 (emphasis added). This internally inconsistent allegation defies logic as a potential exposure to a virus cannot

[3] Although Plaintiffs filed a "Notice of Dropping Parties" purportedly under Rule 1.250(b), Florida Rules of Civil Procedure, the Notice is procedurally improper and ineffective. Only an adverse party may drop parties under Rule 1.250(b). For certain plaintiffs to remove themselves from the case, they are required to file a notice of voluntary dismissal pursuant to Rule 1.420(a)(1).

equate to a certainty of contracting the virus. Nonetheless, Plaintiffs claim that the Executive Order and Rule violate their constitutional rights.

Specifically, Count I attempts to allege that the Executive Order violates Article IX, Section 1(a) of the Florida Constitution. Article IX, Section 1(a) states, in part: "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 . . . ." Consisting of primarily boilerplate, conclusory allegations, Count I tries to assert that the Governor failed to follow Article IX, Section 1(a) of the Florida Constitution by enacting the Executive Order. Compl. ¶ 60. Count II, containing many of the exact same boilerplate, conclusory allegations, seeks a declaration that the Executive Order violates Article IX, Section 4 of the Florida Constitution that allows local school boards to "operate, control and supervise all free public schools within the school district." Count III alleges that the Executive Order violates constitutional due process because it is arbitrary and capricious. Id. ¶¶ 105–107. Confusingly, Count III also alleges that "Parents and public school employees have a right to rely on their elected officials to make decisions safeguarding their health and the health and safety of their families." Id. ¶ 112. Count IV alleges that the Executive Order violates constitutional due process and seeks a declaration "that the Executive Order exceeds the authority of the Department of Education and the subject matter of public

health matters, such as masking in schools, is appropriately within the authority of the Florida Department of Health under section 1003.22, Florida Statutes." Id. ¶ 136. Plaintiffs make this allegation despite that the Governor issued the Executive Order directing the Departments of Health and Education to use all legal means available to adopt rules implementing Florida's laws, and that the Department of Health promulgated its Rule pursuant to Section 1003.22. Id. ¶ 155. Count V alleges that the Rule violates Article IX, Section 1(a)'s requirement to provide safe schools. Lastly, as stated, Count VI seeks "Emergency Injunctive Relief" "enjoining all named Defendants from . . . enforcing the Executive Order and any additional relief this Court deems equitable, just, and proper." Count VI makes no reference to the Rule.

Generally, Counts I through IV assert various alleged constitutional violations (of questionable applicability to Plaintiffs) that are based upon a fundamentally flawed factual premise: that the Executive Order either "precludes county school boards from enacting mandatory masking," or "bans all county school boards from enacting mandatory masking." See Compl. ¶¶ 60, 83, 108, 137. This is false. The Executive Order directs the Florida Department of Health and the Florida Department of Education, working together, to engage in rulemaking pursuant to Section 120.54, Florida Statutes. The

Department of Health and Department of Education were further instructed to promulgate rules:

> [T]o ensure safety protocols for controlling the spread of COVID-19 in schools that:
>
> A. Do not violate Floridians' constitutional freedoms;
>
> B. Do not violate parents' rights under Florida law to make health care decisions for their minor children; and
>
> C. Protect children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements.
>
> Section 2. Any action taken pursuant to Section 1 above shall at minimum be in accordance with Florida's "Parents' Bill of Rights" and protect parents' right to make decisions regarding masking of their children in relation to COVID-19.

Exec. Order 21-175 §§ 1–2. The Executive Order does not expressly preclude or otherwise ban county school boards from enacting mandatory masking. Furthermore, two school districts—Alachua[4] and Broward County—have issued mask mandates. The Alachua County and Broward County School District Policies are attached as Exhibits A and B, respectively. A cause of action based on allegations that are clearly refuted by the applicable and

[4] The Complaint alleges that Plaintiff, Kristen Thompson, individually and on behalf of her minor child, P.T., reside in Alachua County. Compl. ¶ 6. Because the Alachua County school district has imposed a mask mandate, Ex. A, Plaintiff Thompson lacks standing to bring her claims for this additional reason.

incorporated written instrument as well as the specific, subsequent actions of local school boards necessarily fails.

The six counts can be distilled to three requests of the Court: declare the Executive Order unconstitutional, declare the Rule unconstitutional, and enjoin enforcement of the Executive Order. But the Executive Order and the Rule were both duly enacted under Florida law, and the State Board has discretion to enforce the laws and rules. Ultimately, Plaintiffs, who lack standing, ask the Court to make policy decisions reserved for the executive and legislative branches of government—such action is forbidden by the Florida Constitution.

III. LEGAL STANDARD

"Whether a complaint is sufficient to state a cause of action is an issue of law." W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc., 728 So. 2d 297, 300 (Fla. 1st DCA 1999). "To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." Id. (quoting Perry v. Cosgrove, 464 So. 2d 664, 665 (Fla. 2d DCA 1985)); Fla. R. Civ. P. 1.110(b). "The purpose of a motion to dismiss is to test the legal sufficiency of the complaint and not to determine issues of fact." Andrew v. Shands At Lake Shore, Inc., 127 So. 3d 1289, 1289 (Fla 1st DCA 2013) (quoting Brock v. Bowein, 99 So. 3d 580, 585 (Fla. 2d DCA 2012)). Thus, in ruling on a motion to dismiss, a trial court must accept as true all well-pled allegations,

construing all reasonable inferences in favor of the nonmoving party, and limit its consideration of facts to the four corners of the complaint and its incorporated attachments. Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 592-93 (Fla. 2013); Fla. Carry, Inc. v. Univ. of Fla., 180 So. 3d 137, 148 (Fla. 1st DCA 2015).

However, courts are "not required 'to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party . . . ." McCall v. Scott, 199 So. 3d 359, 366 (Fla. 1st DCA 2016) (quoting Shands Teaching Hosp. & Clinics, Inc. v. Est. of Lawson ex rel. Lawson, 175 So. 3d 327, 331 (Fla. 1st DCA 2015) (en banc)). "While the granting of motions to dismiss with prejudice is generally not favored, it is proper if the pleading cannot be amended to state a cause of action." Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc., 785 So. 2d 1232, 1236 (Fla. 4th DCA 2001).

Here, as will be shown in further detail below, Plaintiffs cannot state a claim for relief because each claim cannot overcome the threshold bars of the political question doctrine, lack of standing, and separation of powers. Accordingly, the Court must dismiss Plaintiffs' Complaint with prejudice.

IV. ARGUMENT

A. Plaintiffs have not presented a justiciable issue

The implementation of policies and procedures to ensure the safe and secure operation of schools is a decision exclusively within the province of the legislative and executive branches. See Fla. Educ. Ass'n, 306 So. 3d at 1214. The First District Court of Appeal has already concluded that whether a school policy regarding precautions during a pandemic is "safe" and "secure" is a political question that lacks a judicially manageable standard and relies upon policy determinations that should be left to the executive branch. Id. at 1215. Plaintiffs' claims similarly present a non-justiciable political question and, therefore, must be dismissed.

"The nonjusticiability of a political question is primarily a function of the separation of powers." Fla. Educ. Ass'n, 306 So. 3d at 1214 (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)). As the Florida Supreme Court has cautioned, "each branch of government has certain delineated powers that the other branches of government may not intrude upon." Coal. for Adequacy & Fairness, 680 So. 2d at 407. The judiciary's powers extend to legal questions whereas "political questions 'fall within the exclusive domain of the legislative and executive branches under the guidelines established by the Florida Constitution.'" Fla. Educ. Ass'n, 306 So. 3d at 1214–15 (quoting Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995)). "[C]ourts must refrain from answering

political questions because it is not the judiciary's role to decide questions that 'revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch.'" Id. at 1215 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

The United States Supreme Court has outlined six factors to "gauge" in determining whether a case involves a political question:

> (1) the issue raised has been demonstrably and textually committed to a coordinate political department; (2) judicially discoverable and manageable standards for resolving the question are lacking; (3) the court cannot decide the question "without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) the trial court cannot undertake independent resolution of the issue "without expressing lack of respect due coordinate branches of government"; (5) there is "an unusual need for unquestioning adherence to a political decision already made"; and (6) there is a potential of "embarrassment from multifarious pronouncements by various departments on one question."

Id. (quoting Baker, 369 U.S. at 217); see also Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ. (Citizens II), 262 So. 3d 127, 137 (Fla. 2019) (acknowledging the Florida Supreme Court's usage of the Baker factors). If a single factor is present, the case presents a non-justiciable political question. Fla. Educ. Ass'n, 306 So. 3d at 1215.

This case presents many of the Baker factors. First, determining whether the State has met its obligation to provide for safe and secure schools would require the Court to make policy decisions reserved for the legislative

and executive branches. Fla. Educ. Ass'n, 306 So. 3d at 1215. Additionally, resolving Plaintiffs' claims would express a "lack of respect due coordinate branches of government." Id. (quoting Baker, 369 U.S. at 217). Lastly, no manageable standard exists for the Court to resolve whether a school policy is "safe" or "secure" under the Florida Constitution. Id.

Florida courts have repeatedly assessed the political question doctrine as it relates to school policies and constitutional rights. In 2011, the *en banc* First District Court of Appeal, in a 7-1-7 decision, certified the following question to the Florida Supreme Court:

> DOES ARTICLE IX, SECTION 1(A), FLORIDA CONSTITUTION, SET FORTH JUDICIALLY ASCERTAINABLE STANDARDS THAT CAN BE USED TO DETERMINE THE ADEQUACY, EFFICIENCY, SAFETY, SECURITY, AND HIGH QUALITY OF PUBLIC EDUCATION ON A STATEWIDE BASIS, SO AS TO PERMIT A COURT TO DECIDE CLAIMS FOR DECLARATORY JUDGMENT (AND SUPPLEMENTAL RELIEF) ALLEGING NONCOMPLIANCE WITH ARTICLE IX, SECTION 1(A) OF THE FLORIDA CONSTITUTION?

Haridopolos v. Citizens for Strong Sch., Inc., 81 So. 3d 465, 473 (Fla. 1st DCA 2011). The Florida Supreme Court declined to review the First District Court of Appeal's split decision denying a writ of prohibition. See Haridopolos v. Citizens for Strong Sch., Inc., 103 So. 3d 140 (Fla. 2012). Since that time, the First District Court of Appeal has reviewed challenges under Article IX, Section 1(a) numerous times—in each instance, the Court found the issue to be non-justiciable. See Fla. Educ. Ass'n, 306 So. 3d at 1216 ("The terms 'safe'

and 'secure' as used in article IX, section 1(a), lack judicially discoverable or manageable standards. . . . Any judicial effort to evaluate the State's compliance with those constitutional and statutory requirements would violate Florida's strict requirement for the separation of powers."); Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017) (holding that challenges to whether educational policies were "adequate," "efficient," or "high quality" were barred by the political question doctrine); Corcoran v. Geffin, 250 So. 3d 779, 784 (Fla. 1st DCA 2018) (finding that challenge to school appropriations under Article IX, Section 1(a) violated separation of powers); McCall, 199 So. 3d at 374 (affirming dismissal based on lack of standing).

Recently, the Florida Supreme Court found a challenge to Article IX, Section 1(a) to be non-justiciable. See Citizens II, 262 So. 3d at 135. In Citizens II, the Florida Supreme Court declined to hold that there could never be a justiciable challenge to Article IX, Section 1(a), but held that the petitioners had "failed to present the courts with any manageable standard by which to avoid judicial intrusion into the powers of the Legislature" and had improperly asked the Court "to inject itself into education policy making and oversight." Id. at 141–42. The Florida Supreme Court's holding relied heavily on the absence of any manageable standard by which to judge the implementation of policy. Id.

Moreover, the First District Court of Appeal recently found a preliminary injunction to be invalid based, in part, upon the political question doctrine. Fla. Educ. Ass'n, 306 So. 3d at 1216. In Florida Education Association, the plaintiffs sought to enjoin an emergency order that conditioned certain funding for schools on the requirement that schools have a plan to open for in-person classes. Id. at 1210. The plaintiffs claimed that re-opening schools amid the Pandemic failed to satisfy the obligations under Article IX, Section 1(a) of the Florida Constitution requiring a safe and secure public school system. Id. After an evidentiary hearing, the trial court entered an order enjoining the emergency order and substantially revising it. Id. at 1211–12. The defendants appealed.

The First District Court of Appeal reversed and vacated the order, finding that, for a multitude of reasons, the plaintiffs had failed to demonstrate their entitlement to injunctive relief and that the trial court had exceeded its authority. Specifically, the First District Court of Appeal found that the claims were non-justiciable under the political question doctrine. Id. at 1214–18. The court stated:

> The court cannot decide whether the State has met its obligation to provide for safe and secure schools unless it makes policy determinations reserved for the executive branch and the non-party school districts. . . . . And the court cannot resolve the questions here "without expressing lack of respect due coordinate branches of government." Last, no judicially discoverable or

> manageable standards exist for the trial court to resolve the questions raised by Appellees' constitutional claims.
>
> . . . .
>
> The trial court's analysis reveals the perils of judicial decision-making in this policy-laden arena. To measure whether the public school system is "safe" and "secure," the trial court would need to identify standards to make that measurement—beginning by evaluating the risks posed by COVID-19. And even if the trial court were qualified to isolate and weigh the safety risks posed by the virus, whether it is safe enough to reopen schools is not a binary question answered with a simple yes or no based on the latest public health metrics on COVID-19. The court would still need to consider many other factors to determine whether the State met its obligation to provide for safe and secure schools. Indeed, the trial court would have to consider the myriad concerns the State had to ponder in deciding whether schools should reopen for in-person instruction—the risks associated with the virus if schools reopen and the risks associated with **not** reopening schools—before deciding which risks were tolerable.

Id. at 1215–17 (footnote and citations omitted).

Here, exactly as in Florida Education Association, Plaintiffs have not presented a manageable standard by which the Court can avoid intrusion into the responsibilities of the co-extant branches. See Fla. Educ. Ass'n, 306 So. 3d at 1216; see also Citizens II, 262 So. 3d at 141. Instead, Plaintiffs ask the Court to "inject itself into education policy making and oversight" by determining whether a policy provides for a "safe" and "secure" system of public schools. Id. at 142. This, the Court should not do. This is because "[t]he term ['safe'] in and of itself does not have 'straightforward content'" as to Plaintiffs' challenge. Id. at 141; Fla. Educ. Ass'n, 306 So. 3d at 1216. Moreover, determining which

policies sufficiently promote "safe" schools is a slippery slope that would undoubtedly require frequent policy decisions for the court. Once the Court opens the door to these types of decisions, there is no ascertainable end to the myriad of decisions the Court would be asked to decide, such as whether to mandate or foreclose metal detectors, drug sniffing dogs, or armed teachers—all in the name of creating a "safe" school environment. The propriety of any of these policies—including whether masks should be mandated in schools—are decisions reserved for the legislative and executive branches.

In addition to a lack of "discoverable and manageable standards," Plaintiffs' claims also implicate the third Baker factor: "the court cannot decide the question without an initial policy determination of a kind clearly for nonjudicial discretion." Fla. Educ. Ass'n, 306 So. 3d at 1215. The conflicting views on masking in schools—including the conflicting scientific and medical support for those views—demonstrates that such decisions should be left to the executive branch. This issue is political in nature and subject to differing views. Assessing the best approach requires balancing a multitude of factors—not only for the parties involved but for children, parents, educators, and citizens throughout the State. This is a task for politicians who are accountable to their electorate.

This case also implicates the fourth Baker factor because the Court "cannot resolve the questions here 'without expressing lack of respect due

coordinate branches of government.'" Fla. Educ. Ass'n, 306 So. 3d at 1215 (quoting Baker, 369 U.S. at 217). Policy decisions are left to the executive and legislative branches, and any attempt by the Court to weigh-in on those decisions would be improper. To resolve the claims here, the Court, as did the trial court in Florida Education Association, would need to weigh expert testimony on COVID-19 and the harms and benefits of masking. See id. at 1216. This is exactly what Defendants did—the Court should not supplant its policy decisions for theirs. As the First District Court of Appeal stated in reviewing education safety policy during a pandemic: "*Any* judicial effort to evaluate the State's compliance with those constitutional and statutory requirements [of providing safe and secure schools] would violate Florida's strict requirement for the separation of powers." Fla. Educ. Ass'n, 306 So. 3d at 1216 (emphasis added).

The Court must dismiss Counts I, III, IV, V, and VI because Plaintiffs' claims do not amount to judicial determinations—they seek policy determinations from the Court. Plaintiffs do not challenge the Governor's exercise of his authority under the Florida Constitution to direct various state agencies to adopt rules implementing Florida laws in accordance with their respective delegated rulemaking authority. They simply disagree with the policy decisions and balancing of various interests expressed in the Executive Order. If, for example, the Governor had stated that mask mandates were

required, Plaintiffs would likely not have brought this lawsuit. Plaintiffs also do not challenge the constitutionality of Section 1003.22, Florida Statutes, the statute by which the Department of Health issued its Rule, as unconstitutional on its face. Instead, they again challenge the Agency's *policy determinations* expressed in the Rule. Plaintiffs want the Court to supplement the Defendants' policy decisions with their own. Because the Court cannot do this, Counts I, III, IV, V, and VI must be dismissed.

B. Plaintiffs lack standing

Plaintiffs lack standing to assert each of their claims. "To establish standing to sue, a plaintiff must have a legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." Fla. Educ. Ass'n, 306 So. 3d at 1213 (citations and quotations omitted). Standing is reduced to three requirements: an injury-in-fact, causation, and redressability. Id. (citing State v. J.P., 907 So. 2d 1101, 1113 n.4 (Fla. 2004)). Plaintiffs cannot demonstrate any of the three factors.

First, Plaintiffs cannot demonstrate an injury-in-fact. To satisfy the injury requirement, a plaintiff must show an injury that is actual, imminent, and concrete and neither speculative nor conjectural. See id. Plaintiffs complain that they will be injured if they are forced to return to in-person schools without mask mandates. But their allegations regarding their specific

injuries are highly general, conclusory, and hypothetical. Such injuries fail to satisfy the rigors of the standing analysis.

The Children Plaintiffs, with the exception of L.M., allege that "the presence of non-masked students and unvaccinated students within the school setting is an actual harm." Compl. ¶¶ 35–39, 41–42. These allegations are incorporated into every count. While Defendants respect Plaintiffs' personally expressed concerns, as a legal matter, high level, conclusory allegations such as these fail to demonstrate a particularized, concrete, and imminent injury. The Children Plaintiffs fail to allege how they face a palpable, imminent harm by the mere *potential* for non-masked students within the school setting. Instead, Plaintiffs ask the Court to make the illogical leap that the *potential* to be around non-masked individuals at school *will* result in the Children Plaintiffs contracting COVID-19. But the fear of potentially being exposed to some harm is not an actual, imminent injury.

Further, similar to the Plaintiffs in Florida Education Association, Plaintiffs fail to allege that any student who could potentially lose their magnet school spot by attending virtual classes was denied an accommodation or exception to this policy. Plaintiffs fail to sufficiently allege why online learning is not an option. Plaintiffs fail to allege that other safety measures, including but not limited to routine cleaning of classrooms and high-traffic areas, routine handwashing throughout the day, and students staying home when they are

sick, are insufficient. Plaintiffs fail to allege how their fear of potentially being around non-masked individuals is concrete. See Fla. Educ. Ass'n, 306 So. 3d at 1214. Plaintiffs cannot demonstrate an injury sufficient to confer standing.

The next requirement for standing is demonstrating "a causal connection between the injury and the conduct complained of." Id. (quoting J.P., 907 So. 2d at 1113 n.4). Plaintiffs are unable to do this based on their complaint that having unvaccinated and non-masked students in school is an "actual harm." Compl. ¶¶ 34–42. Moreover, the State's conduct has not caused unvaccinated and non-masked students in schools. School boards still have the option—albeit with consequences—to categorically mandate masking without exception.[5] The Executive Order tasks agencies to draft rules and the State Board to enforce the laws and rules. As for vaccinations, the FDA has the sole authority to authorize emergency use for COVID-19 vaccines. And under the Parents' Bill of Rights, § 1014.01–.06 Fla. Stat. (2021), parents—not school boards—have the discretion to choose whether their children will wear masks in school.[6] Thus, the complained of conduct will not cause the alleged harm.

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[5] Two school districts—Alachua and Broward County—have issued mask mandates. See Exs. A & B.

[6]As it relates specifically to Count II, only the local school boards would have standing to challenge a statute or rule that allegedly infringes upon the school board's constitutional authority under Article IX, Section 4 of the Florida Constitution. To be sure, any such challenge would fail in light of the clear hierarchical structure established by the education article specifically and the Florida Constitution generally. To the extent Count III also alleges that the Executive Order is arbitrary

Lastly, Plaintiffs fail to allege that there is a "substantial likelihood that the requested relief will remedy the alleged injury-in-fact." Fla. Educ. Ass'n, 306 So. 3d at 1214 (quotation marks omitted). As it relates to Count IV, Plaintiffs ask for a declaration that the Executive Order exceeds the constitutional authority of the Department of Education and that public health matters in schools are appropriately within the authority of the Department of Health under Section 1003.22, Florida Statutes. This request, however, changes nothing because it was the Governor, not the Department of Education, who directed that the Department of Education and the Department of Health issue rules with safety protocols for controlling the spread of COVID-19 in schools. The Department of Health—not Education—issued the Rule. As explained previously, these actions were in complete accord with the Florida Constitution and Florida law. See Art. IV, § 1(a), Fla. Const.; §§ 20.02(3), 20.03(4), (13), 20.43(2), 1003.22, Fla. Stat. Plaintiffs merely disagree with the *policy decisions* the Department of Health made regarding wearing masks in schools.

For every other count, Plaintiffs ask this Court to declare that the Executive Order, the Rule, and any "related actions or threatened actions to

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and capricious because it allegedly infringes on local school board powers, again, only local school boards would have standing to challenge the Executive Order on that basis.

enforce [them] violate the Florida Constitution" and for the Court to enjoin all named Defendants from "enforcing the Executive Order."[7] These actions will not redress the alleged harm of having unvaccinated and non-masked students in school. Neither the Executive Order nor the Rule require that unvaccinated or non-masked students attend school. Rather, they seek to ensure that school boards are complying with the Parents' Bill of Rights—leaving the decision of masking of children to the children's parents. Thus, even if the Court were to declare the Executive Order and Rule unconstitutional and enjoin their enforcement, school boards would still be required to allow parents to choose whether their children wear masks. See §§ 1014.04(e), Fla. Stat. (giving the right to parents to make health care decisions for their children); 1014.03, Fla. Stat. (prohibiting any governmental entity from infringing on a parents' right to direct the health care of their children).

Even if the school boards were not required to follow the Parents' Bill of Rights, there would be no *requirement* for school boards to implement mask mandates—the relief Plaintiffs seek. This decision would still be in the

[7] Plaintiffs only ask the Court to enjoin enforcement of the Executive Order. The Executive Order, however, merely tasks the Department of Health and Department of Education with promulgating rules using all legal means available and for the Commissioner to enforce these rules. The Department of Health's Rule requires school boards to comply with the Parents' Bill of Rights by not mandating mask wearing. Thus, if the Court grants the full relief requested the State Board would remain free to enforce the Parents' Bill of Rights and prohibit mask mandates. In any event, the school boards would remain obligated to comply with the Parents' Bill of Rights.

discretion of individual school administrators and school boards. Further, the Executive Order and Rule do not require that local school boards eliminate mask mandates. Instead, the Executive Order provides that the Commissioner can pursue the withholding of certain funding if the district has such a mandate—i.e., a categorical, exceptionless mask mandate—which is merely a reference to the supervisory authority the State Board possesses when enforcing laws and rules pursuant to Florida statutes. Several counties have determined that less funding for schools was appropriate. Ultimately, the Court cannot mandate masks in schools. Yet that is precisely what Plaintiffs want.

C. Plaintiffs Seek Relief that would Violate the Separation of Powers Doctrine

In this case, Plaintiffs ask the Court to violate the "foundational principle" of separation of powers by urging the Court to make policy decisions reserved for the executive branch. See Fla. Educ. Ass'n, 306 So. 3d at 1218. Article II, Section 3 of the Florida Constitution states: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Further, the Florida Constitution grants the Governor with the "supreme executive power" and requires that he "take care that the laws be faithfully executed" and "transact all necessary business with the officers of the government." Art.

IV, § 1(a), Fla. Const. "The judiciary violates the doctrine of separation of powers if it directs an administrative agency to perform its duties in a particular manner." Fla. Fish & Wildlife Conservation Comm'n v. Daws, 256 So. 3d 907, 917 (Fla. 1st DCA 2018).

The First District Court of Appeal has repeatedly held that courts lack the power to dictate education policy, which is left to the discretion of the executive branch. See Fla. Educ. Ass'n, 306 So. 3d at 1219 ("[T]he trial court had no authority to direct the executive to act in a specific manner when the constitution and statutes provide for discretion."); Citizens for Strong Sch., 232 So. 3d at 1165–66 ("[T]he strict separation of powers embedded in Florida's organic law requires judicial deference to the legislative and executive branches to adopt and execute educational policies those branches deem necessary and appropriate . . . . There is no language or authority in Article IX, section 1(a) that would empower judges to order the enactment of educational policies . . . ."). In other contexts, the First District Court of Appeal and this Court have held that an agency's discretionary, planning-level decisions are not subject to judicial review based upon the separation of powers doctrine. See Daws, 256 So. 3d at 917–18; Walls v. Fla. Dep't of Econ. Opportunity, No. 2020 CA 802 (Fla. 2d Cir. Ct. Mar. 8, 2021) (Cooper, J.) (relying on separation of powers doctrine to dismiss complaint against Department of Economic Opportunity).

Here, the Governor used his executive power to task the Departments of Health and Education to develop rules that implement safety policies in school without encroaching on parents' rights. Exec. Order 21-175. Further, he tasked the Commissioner to ensure that the local school districts adhere to the laws and rules. Id. The Commissioner and the State Board, through their constitutional and statutory powers, have such authority and discretion to ensure that school districts adhere to the law. See Art. IX, § 2, Fla. Const.; § 1008.32, Fla. Stat.; Sch. Bd. of Collier Cnty., 279 So. 3d at 286–87 (explaining that the Florida Constitution creates an educational hierarchy where the State Board has supervisory powers). Counts I, III, IV, V, and VI ask the Court to prevent the State Board from enforcing the laws and the Rule. The Florida Constitution prohibits the Court from doing so. Art. II, § 3, Fla. Const.

IV. CONCLUSION

The Executive Order and the Rule are not determinative of whether children should wear masks in school. Instead, they aim to protect the persons who should make that decision and are entitled to do so under Florida law—the child's parents. The Executive Order and the Rule were implemented after balancing the legitimate state interests of school safety and parental rights. Although Plaintiffs may disagree with the Governor's policy decision, the Court lacks the authority to elevate Plaintiffs' policy decision and impose it upon the entire State. The Governor, as the public official duly elected by the majority

of the citizens of the State of Florida, was entrusted with the sole authority to make such statewide policy determinations—not the Parent Plaintiffs, and not a court. As such, Plaintiffs' Complaint is due to be dismissed.

Wherefore, Defendants respectfully request that the Court grant this motion and dismiss Plaintiffs' Complaint with prejudice.

DATED: August 16, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 2021, the foregoing was filed with the Clerk of Court by using the e-portal electronic filing system, which will serve via email this filing on all counsel of record named below.

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EXHIBIT A

Book	Policy Manual
Section	8000 Operations
Title	PROTECTIVE FACIAL COVERINGS DURING PANDEMIC/EPIDEMIC EVENTS
Code	po8450.01
Status	Active
Adopted	October 20, 2020

8450.01 - **PROTECTIVE FACIAL COVERINGS DURING PANDEMIC/EPIDEMIC EVENTS**

During times of elevated communicable disease community spread (pandemic or epidemic), the Superintendent will issue periodic guidance through School Board plans/resolution(s) in alignment with public health officials and/or in accordance with government edicts and including any Pandemic Plan developed by the District's Pandemic Response Team. (See also Policy 8420.01 - *Epidemics and Pandemics*.)

School settings can be a source of community spread. Wearing face masks/coverings is especially important during these times and can help mitigate the risk of exposure from person to person.

As such, during times of elevated communicable disease community spread, the Superintendent may activate this policy by notifying the school community, requiring all school staff, volunteers and visitors (including vendors) to wear appropriate face masks/coverings on school grounds unless it is unsafe to do so or where doing so would significantly interfere with the Districts educational or operational processes.

Face masks/coverings will be provided by the District to employees and students, as necessary. Individuals may elect to wear their own face coverings if they meet the requirements of this policy as well as any requirements issued by State or local health departments.

In addition, the Board may require students to wear a face mask unless they are unable to do so for a health, sensory, or developmental reason. Efforts will be made to reduce any social stigma for a student who, for medical or developmental reasons, cannot and should not wear a mask. Children in kindergarten and below will be educated, encouraged and expected to wear face coverings, but failure to wear a face covering will not prohibit their attendance if they are unable to wear a face covering at all times.

If face masks/coverings are required, and no exception is applicable, students who refuse to wear a face mask/covering, in accordance with policies of the Board, may be reassigned by the Superintendent to an online/virtual learning environment if the Superintendent determines that reassignment is necessary to protect the health and safety of the student or others.

All students and staff are required to wear masks while being transported on District school buses or other modes of school transportation.

School nurses or staff who care for individuals with symptoms consistent with those of a communicable disease must use appropriate personal protective equipment (PPE), provided by the school, in accordance with OSHA standards.

When facial masks/coverings are required by the Board, and no exception has been applied, staff members who violate this policy shall be subject to disciplinary action in accordance with policies of the Board or applicable collective bargaining agreement.

Use of Mask/Face Covering

Face coverings/mask should:

A. fully cover the mouth, nose, and chin;

B. fit snugly against the side of the face so there are no gaps;

C. not create difficulty breathing while worn; and

D. be held securely through either a tie, elastic, etc., to prevent slipping.

Facial masks/coverings generally should not include surgical masks or respirators unless medically indicated (as those should be reserved for healthcare workers) or masks designed to be worn for costume purposes. Additionally, facial masks/coverings with respiration valves or vents are prohibited.

All employee facial masks/coverings shall meet the requirements of the appropriate dress/staff grooming policies (Policy 1216/Policy 3216/Policy 4216). All student facial masks/coverings shall meet the requirements of the appropriate Student Code of Conduct and Policy 5511 - *Code of Student Conduct - Dress and Grooming*.

Any person may be required to temporarily remove a face mask or covering when instructed to do so for identification or security purposes. Failure to comply with such a request violates this policy and may lead to disciplinary or other action.

Exceptions

Exceptions to the use of masks/face coverings include:

A. To promote the social and emotional health of students who may struggle wearing a face covering for several hours, schools will provide students with opportunities for breaks where they can remove their face covering while maintaining appropriate distancing and while under supervision.

B. Wearing a face covering is not required while eating or drinking.

C. Persons who have difficulty breathing or suffer sensory issues due to a documented medical or psychological issue will not be required to wear a face covering. If appropriate, they will be asked to wear a clear face shield, unless wearing the face shield would also cause breathing or sensory issues. Documentation from a medical provider must be on file before a person will be excused from this face covering requirement.

D. Persons communicating with hearing-impaired individuals who need to see the other person's mouth to communicate will not be required to wear a face covering.

E. Teachers, staff members, and students, at the direction of the teacher, may remove their face coverings when wearing them would impede instruction. Students participating in extra-curricular activities, like athletics or marching band, where the wearing of face coverings is not practicable or may create a health risk will not be required to wear face coverings during the activity but must still follow any and all safety procedures in place for the activity. The District will follow all FHSAA guidance for athletic activities.

F. When facial masks/coverings in the school setting are prohibited by law or regulation, are in violation of documented industry standards, or are in violation of the school's documented safety policies.

G. When a staff member works alone in an assigned work area or when social distancing outside is maintained, as determined by an adult staff member.

The Board may be required to provide written justification to the local health officials upon request explaining why a staff member is not required to wear a facial covering in the school. Therefore, if any exceptions are made to the requirement for facial coverings, the request for such exception must be submitted in writing to the individual's supervisor with appropriate medical documentation provided. A decision on the request will be provided in writing.

All medical, sensory, or developmental exceptions to the face mask/covering requirement must be supported by appropriate medical documentation which includes an indication whether a face shield may be worn even if a face mask/covering cannot be.

Use of Face Shields

Face shields that wrap around the face and extend below the chin may be permitted as an alternative to face masks/coverings with permission of the Superintendent as the Board recognizes that face shields may be useful in some situations, including:

A. when interacting with students, such as those with disabilities, where communication could be impacted;

B. when interacting with English-language learners or when teaching a foreign language;

C. settings where face masks/coverings might present a safety hazard (i.e. science labs); or

D. for individuals who have difficulty wearing a face mask/covering for documented health, sensory, or developmental reasons.

If employees receive approval from the District administration after discussing their request not to wear a face mask/covering/shield due to a physical, mental or developmental health condition, and/or if wearing a mask/covering/shield would lead to a medical emergency or would introduce significant safety concerns, the District administration may also discuss other possible accommodations for the staff member. Such discussion shall follow Board policies and guidelines under the ADA.

Legal	F.S. 120.54(4)
	F.S. 120.81
	F.S. 286.011
	F.S. 286.0114
	F.S. 1001.32
	F.S. 1001.33
	F.S. 1001.41
	F.S. 1001.42
	F.S. 1001.43

Last Modified by Tammy R Shroyer on December 9, 2020

EXHIBIT B

2170 FACE COVERINGS

PURPOSE:

ONE OF THE SCHOOL BOARD'S HIGHEST PRIORITIES IS TO ENSURE THE HEALTH AND SAFETY OF ITS COMMUNITY INCLUDING EMPLOYEES. STUDENTS AND THE PUBLIC. THE CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) AND THE FLORIDA DEPARTMENT OF HEALTH (FDOH) ADVISE THAT PEOPLE WHO MAY BE INFECTED WITH COVID-19 (WHETHER SYMPTOMATIC OR PRE-SYMPTOMATIC) PLAY AN IMPORTANT PART IN REDUCING COMMUNITY SPREAD. THE USE OF FACE COVERING BY EVERYONE CAN LIMIT RELEASE OF INFECTED DROPLETS WHEN TALKING, COUGHING, AND/OR SNEEZING.

I. RULES:

A. **Subject to the EXCEPTIONS set forth below,** each student, employee, visitor, vendor or other person shall properly wear a face covering while at or inside a school campus, district facility, a vehicle owned, leased or operated by The School Board or a school/district sponsored activity. **Proper wearing of an approved face covering, means the face covering should cover both the nose and mouth of the person and should fit snugly against the sides of the person's face with no gaps. This includes:**

> **Musical and Theatrical Performances:** A face covering will be required for all individuals while playing a musical instrument or performing or rehearsing for a choral or theatrical performance. This includes the singing of the National Anthem, school alma maters, or other songs.

1. **EXCEPTIONS:** A face covering will not be required in the following instances:

a. **For All (Students, Employees, Vendors and Visitors):**

i. **Infants:** A face covering shall not be required for persons younger than two (2) years of age;

ii. **Outdoors with Physical Distancing:** A face covering shall not be required for persons outside of any school district building or vehicle provided that such person maintains physical distancing (six (6) feet minimum distance) from other persons. However, a face covering shall be worn during change of classes even if it involves use of outside areas; or,

iii. **Identification:** Administrators, security staff and other appropriate employees may ask someone to *briefly* remove their face covering to verify their identity. Physical distance will be observed during these requests, whenever possible.

b. For Students:

i. **Students with Approval:** A face covering shall not be required for a student if the student's IEP or 504 team, after receiving a certification from a health care provider that the student has a medical, physical or psychological contraindication that prevents the person from being able to safely wear an approved face covering, authorizes the student to remove her/his face covering during an activity provided that the student maintains physical distancing (six (6) feet minimum) from other persons when not wearing a face covering. Face shields should be considered when granting an accommodation for not wearing an approved face covering;

ii. **Regularly Scheduled Mealtimes:** A face covering shall not be required for any student inside or outside a school district facility or a school/district sponsored activity while student is eating during a planned mealtime provided that the student maintains physical distancing (six (6) feet minimum) from other persons when not wearing a face covering.

iii. **Strenuous Physical Activity:** A face covering shall not be required for any student outside of any school, district building, or at a school/district sponsored activity while the student is engaged in strenuous physical activity provided that the student maintains physical distancing (six (6) feet minimum) from other persons when not wearing a face covering. Students participating in indoor physical activities are required to wear a face covering, including weight rooms and physical education classes;

iv. **Extracurricular Athletic Team Activities:** Students actively participating in indoor or outdoor practice or competition are not required to wear face coverings;

v. **During Receipt of Health Care:** A face covering shall not be required for any student inside or outside any school district facility or building when removal of the face covering is necessary for the student to receive health care or to undergo a health care examination from authorized health care personnel; or,

vi. **Demanding Circumstances:** A face covering will not be required if a student is experiencing acute trouble breathing, is unconscious

or incapacitated. A staff member may remove the student's mask if the student is unable.

c. **For Employees:**

i. **Employees with Approval:** An employee may request a reasonable accommodation under the Americans with Disabilities Act (ADA) and other statutes, through the Office of Equal Educational Opportunities, if the employee has a medical, physical or psychological contraindication that prevents the person from being able to wear an approved face covering. Face shields should be considered when granting an accommodation for not wearing an approved face covering. A face covering may not be required when the school district official supervising an employee authorizes the employee to remove her/his face covering when wearing a face covering would create a safety risk to the person as determined by local, state, or federal regulators or workplace safety guidelines. If this occurs, the employee must maintain physical distancing (six (6) feet minimum) from other persons;

ii. **Regularly Scheduled Mealtimes:** A face covering shall not be required for any employee inside or outside a school district facility or at a school/district sponsored activity while the employee is eating during a planned mealtime provided that the employee maintains physical distancing (six (6) feet minimum) from other persons when not wearing a face covering;

iii. **Strenuous Physical Activity:** A face covering shall not be required for any employee outside of any school, district building or school/district sponsored activity while such employee is engaged in strenuous physical activity provided that the employee maintains physical distancing (six (6) feet minimum) from other persons when not wearing a face covering. Employees participating in indoor physical activities are required to wear a face covering including weight rooms and physical education classes;

iv. **Extracurricular Athletic Team Activities:** Employees participating in indoors or outdoors practice or competition (coaching) are required to wear face coverings at all times; or,

v. **Demanding Circumstances:** A face covering will not be required if a person is experiencing acute trouble breathing, is unconscious or incapacitated. A staff member may remove the employee's mask if the employee is unable.

d. **Visitors and Vendors:**

i. **Outdoors with Physical Distancing:** A face covering shall not be required for persons outside of any school district building or vehicle provided that such person maintains physical distancing (six (6) feet minimum distance) from other persons;

ii. **Regularly Scheduled Mealtimes:** A face covering shall not be required for any person inside or outside a school district facility while such person is eating during a planned mealtime;

iii. **Strenuous Physical Activity:** A face covering shall not be required for any person outside of any school, district building or at a school/district sponsored activity while such person is engaged in strenuous physical activity. Visitors participating in indoor physical activities are required to wear a face covering; or,

iv. **Extracurricular Athletic Team Activities:** Visitors participating in indoors or outdoors practice or competition are required to wear face coverings at all times; or,

v. **Demanding Circumstances:** A face covering will not be required if a person is experiencing acute trouble breathing, is unconscious or incapacitated. A staff member may remove a visitor's mask if the visitor is unable.

2. **FACE COVERING TYPES (Students, Vendors and Visitors):** All students, visitors and vendors must supply and wear their own face coverings while at or inside a school district campus/facility or inside a school district vehicle. All students, visitors and vendors must properly maintain their face covering. The following face covering types are approved for compliance with this policy by persons other than school district employees:

a. Commercially Produced Surgical Masks:

b. Cloth Face Masks: That have two or more layers of washable, breathable fabric. The U.S. Center for Disease Control has issued instructions on how to make a cloth face covering at: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-make-cloth-face-covering.html

3. **FACE COVERING TYPES (Employees):** The School District will have face coverings available at all district facilities and in all vehicles, including school buses. All school district employees must wear face coverings while in a school district campus/facility or inside a school district vehicle.

4. **FACE COVERINGS NOT IN COMPLIANCE: (Students, Employees, Vendors and Visitors):** Students, employees, visitors or vendors who wear one of the following type of face coverings **will not** be in compliance with this policy:

   a. Face masks that are made of fabric that makes it hard to breathe, for example vinyl;

   b. Face masks that have inhale/exhalation values or vents; or,

   c. Gaiters.

5. **LIMITED FACE SHIELD USE:** Face shields are less effective than commercial and cloth face coverings and may not be used by any persons to comply with this policy except under the following limited circumstances:

   a. In Addition to a Face Covering: When used in addition to an approved face covering to protect eyes, as well;

   b. Medical Certification: A face shield may be worn in lieu of other approved face coverings by students and/or employees who are observing physical distancing and the need for such an accommodation is provided through the process described in paragraphs I. A. 1. b. i. or I. A. 1. c. i.; or,

   c. Instruction: Face shields may be used by school district employees in situations where physical distancing is observed and it is important for students to see how the instructor pronounces words (e.g., English Learners, early childhood instruction, speech therapy, foreign language, etc.) and/or an instructor may wear a clear mask when it is important for a student to observe the instructors mouth.

B. LIMITATIONS/ENFORCEMENT:

1. **NO STUDENT or EMPLOYEE:** shall wear a face covering that has markings that are suggestive, revealing, indecent[1], associated with gangs or cults, encourage the use of drugs, alcohol, or violence, or support discrimination on the basis of age, color, ethnicity, gender, gender identity, gender expression, linguistic differences, marital status, national origin, race, religion, socioeconomic background, sexual, orientation, physical appearance, or any other basis while on a school campus district building or a school/district sponsored activity.

2. **EMPLOYEES**: All employees are expected to comply with the face covering requirements above for the health and safety of themselves, their colleagues, students and others. Employees who do not comply should be reminded of the policy. If they refuse to comply, after being reminded the employee may be

[1] Indecent, suggestive, and revealing refer to exposure of private body parts and/or pictures or words with a sexual connotation.

disciplined according to their respective Collective Bargaining Agreement or other School Board Policies for insubordination. Additionally, face coverings shall not be worn that promote a political party, political ideas, and/or an individual seeking elected office.

3. **STUDENTS**: All students are expected to follow face covering requirements while in school or school sponsor activities/events for the health and safety of themselves, school staff, and others. Students who do not comply should be reminded of the policy and the student's parent will be called. If a student blatantly disregards the health and safety of others and/or refuses to comply with wearing a face covering, discipline will be in accordance with the Code of Student Conduct. Additionally, face coverings may be worn to promote an individual seeking elected office, to support political ideas, as long as they do not cause a substantial disruption to the educational environment.

4. **VISITORS:** Members of the public and visitors will be reminded that face coverings are required while at or inside a District school/facility. A visitor will not be admitted to a District school/facility without wearing a face covering. If a visitor blatantly disregards the health and safety of others and/or refuses to wear a face covering, they will be asked to leave the school facility.

II. DELEGATION OF AUTHORITY:

In consultation with and guidance from public health officials, the Superintendent has the authority to determine when the Face Covering Policy will be implemented and when it will no longer be required. Further, as new face coverings are developed and produced the Superintendent is authorized to change the types of face coverings that would be both in compliance and not in compliance with this policy.

SPECIFIC AUTHORITY: Section 1001.41(1), (2) and (3), Florida Statutes.

LAW IMPLEMENTED: Sections 1001.42(4) and (8), 1003.31, 1012.23 and 1012.27(1) and (7), Florida Statutes.

Policy Adopted as Emergency Policy: August 19, 2020

Policy Adopted: December 15, 2020