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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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

Defendant–Appellants,

v.

FLORIDA EDUCATION ASSOCIATION, et al.,

Plaintiff–Appellees,

and

MONIQUE BELLEFLEUR, et al.,

Plaintiff–Appellees.

Case Nos. 1D20-2470
(Consolidated) 1D20-2472

L.T. Case Nos. 2020-CA-001450
(Consolidated) 2020-CA-001467

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

REPLY BRIEF OF DEFENDANT–APPELLANTS

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

PAGE(S)

Cases

Constitutional Provisions

Other Authorities

I. INTRODUCTION

The Plaintiffs' answer brief confirms they are challenging the hypothetical "adequacy" of education funding if school districts had failed to submit local reopening plans as a condition for receiving additional state funds under DOE Emergency Order No. 2020-EO-06. That challenge is foreclosed by the holdings in *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 262 So. 3d 127 (Fla. 2019), and *School Board of Collier County v. Florida Department of Education*, 279 So. 3d 281 (Fla. 1st DCA 2019). In addition to the Plaintiffs' lack of standing or any irreparable injury attributable to the State Defendants, Florida's separation-of-powers doctrine and justiciability concerns require the circuit court's preliminary injunction to be vacated. Regardless of the scant (and conflicting) evidence on the Plaintiffs' policy preferences for closing public schools, they are unlikely to prevail on the merits because they cannot show that the Emergency Order's planning conditions are unconstitutional. There is no good reason to disturb the status quo for students now receiving in-person instruction by allowing the circuit court's improper injunction to take effect.

II. ARGUMENT

A. The Circuit Court's Injunction Rewriting the Emergency Order Would Not Protect the Plaintiffs from Irreparable Harm.

The Plaintiffs' answer brief appears to abandon their contention that the terms of the Emergency Order itself are unlawful. In response to the State

Defendants' arguments (and this Court's observation) that the circuit court's injunction would not prevent an irreparable injury, the Plaintiffs concede that "the Emergency Order does not expressly require teachers and educational staff to return for in-person instruction." (Answer Br. 26; *see also id.* at 2.) This about-face (*cf. FEA* Compl. 25 [A. 248]) confirms that the circuit court's injunction—which struck and reworded parts of the Emergency Order—was not "tailored to" avoid "infring[ing] upon conduct that does not produce the harm sought to be avoided." *Angelino v. Santa Barbara Enters., LLC*, 2 So. 3d 1100, 1104 (Fla. 3d DCA 2009).

None of the Plaintiffs' arguments that the Emergency Order still "effectively forces" them to risk exposure to COVID-19 (Answer Br. 24) shows that the State Defendants could be found responsible for threatening any legally cognizable irreparable harm. If some "*teachers are being forced to teach*" in specific schools that the Plaintiffs believe are "*unsafe*" (*id.*), the Emergency Order does not require that result, and the circuit court's modified version of the Emergency Order would not prevent it. Regardless of the Plaintiffs' anecdotes about allegedly unhelpful public-health officials in Hillsborough County, the circuit court's blue-penciled version of the Emergency Order does not require those officials to provide any "better" advice.[1] Nor does it require local school boards (in Hillsborough County

[1] The circuit court's statement that the Emergency Order's references to public-health officials were "essentially meaningless" (Order Granting Mot. Temporary

or elsewhere) to close supposedly "unsafe" schools. Health officials and local boards are not parties to this litigation, and the Emergency Order itself leaves "the day-to-day decision to open or close a school" with "the superintendent or school board"— all "subject to advice and orders of the Florida Department of Health[] [and] local departments of health." Emergency Order § I.a [A. 133-4]. In other words, even if Plaintiffs believe that some schools are unconstitutionally "unsafe," the circuit court's preliminary injunction does nothing to solve that problem.

The Plaintiffs' insistence that they have no other remedies is also incorrect. Teachers and other district employees could take personal or medical leave or request accommodations under federal law.[2] Moreover, "school board grievance procedures" (Answer Br. 26) are also available to address potential concerns about workplace safety. The *Bellefleur* Plaintiffs specifically allege that their local collective bargaining agreement requires their local school board "to maintain safe and healthful working conditions, including the provision of safety equipment." (*Bellefleur* Am. Compl. 3 [A. 446].) The circuit court's observation that "[c]ollective bargaining arbitrators do not have jurisdiction or authority to decide constitutional questions" (Answer Br. 26 (quoting Order Granting Mot. Temporary

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Inj. [A. 1546) overlooked testimony showing that public-health officials throughout Florida *are* willing to advise (and in fact *have* advised) school districts. (*E.g.*, Hr'g Tr. 647:20–647:21 [A. 1367]; *id.* at 214:20–214:24 [A. 1048].)

[2] *See, e.g.*, Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

Inj. [A. 1552])) thus missed the point. "[T]he teachers, through their respective union and the [local school board] have incorporated these ideas and principles of our constitution of providing a safe and secure classroom into their contracts." (*Bellefleur* Am. Compl. ¶ 79 [A. 465].)[3] If the Plaintiffs have specific concerns about their classroom assignments or working conditions, they can bring those concerns to their local employers or union representatives. And "[p]arents may go to the school board with their concerns, as they always do." (Answer Br. 46.)

The Plaintiffs' other efforts to identify an injury allegedly threatened by the State Defendants are even less convincing. The constitutional education clause on which the Plaintiffs rely describes a "system" for the education of "children" and "students," art. IX, § 1(a), Fla. Const.—*not* an "entitle[ment]" of "all Floridians" to individual public schools that they think are adequately "safe" or "secure" (Answer Br. 27). And again, the Emergency Order does not require any of the Plaintiffs' children or students to attend public schools in person. The Plaintiffs' assumption

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[3] *See also Bellefleur* Am. Compl. ¶ 80 (quoting collective bargaining agreement: "The Board agrees to maintain safe and healthful working conditions, including the provision of safety equipment. . . . No employee shall be disciplined for refusal to work in an unsafe or hazardous situation where there is an eminent danger to the employee's health, safety or well-being . . . . In the case of an infectious disease outbreak that affects the District's workforce, the procedures in the Emergency Procedures Manual shall be followed."). This agreement was impliedly incorporated into the *Bellefleur* Plaintiffs' complaint, *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015), and is available (with other COVID-19 accommodations) on the Orange County Public Schools' website (https://www.ocps.net/departments/human_resources/labor_relations).

that the parents and students who nevertheless have opted for in-person instruction must have made "[un]informed decisions" (Answer Br. 44; *accord id.* at 28) is not only condescending but also without any evidentiary support. None of the Plaintiffs' arguments demonstrates an actionable risk of irreparable injury.

B. The Plaintiffs Are Not Likely to Succeed on the Merits.

1. The Plaintiffs cannot show that they have standing.

The Plaintiffs' lack of injury highlights their lack of standing. And their arguments to the contrary are so overbroad that they would reduce Florida's standing requirement to a dead letter.[4] The Plaintiffs argue that "all parents—whether they chose On-Line Learning or in-person learning" (Answer Br. 30)—have standing to assert constitutional claims that Florida's "system of free public schools" is not "safe" or "secure," art. IX, § 1(a), Fla. Const., on the unsupported theory that "*academics often suffer* when . . . teachers, staff, parents, and students also are worried about contracting COVID-19" (Answer Br. 30–31 (emphasis added)). The Plaintiffs further suggest that parents have standing to assert claims against the State Defendants "because they are not receiving the information *from public health authorities* needed to know whether their local schools are safe." (*Id.* at 31 (emphasis added).) And the Plaintiffs contend that all "teachers, staff, parents,

[4] The Plaintiffs argue that some of the State Defendants' standing arguments are "procedurally barred" (Answer Br. 32 n.10), but standing was raised and argued before the circuit court (*e.g.*, Defs.' Opp'n to Pls.' Mots. Inj. 14–15 [A. 718]).

and students alike" have standing to sue the State Defendants because school districts were presented with a "Hobson's choice" to obtain additional state funds outside "the 'default' funding structure'" established by Florida law. (*Id.* at 34, 33.)

There is no constitutional basis and no Florida precedent to support *any* of these sweeping theories of standing. The Plaintiffs were not "directly impacted" (Answer Br. 34) or harmed by the Emergency Order. There is no evidence to support the Plaintiffs' assertion that "academics often suffer" when school constituents are "worried" about public health (*id.* at 30)—much less any authority for the proposition that the Plaintiffs have standing to ask the courts to declare the whole system of public schools unconstitutionally "unsafe" on that ground. Nor have Florida courts ever held that private plaintiffs can sue the State Defendants over information provided or decisions made by nonparties.

The Plaintiffs' reliance on *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), is misplaced. The *Holmes* court observed that the Florida Constitution's education clause does *not* refer to public education as a "fundamental right," precisely because of "'concerns . . . that the state might become liable for every individual's dissatisfaction with the education system.'" *Id.* at 404 (quoting commentary on 1998 constitutional amendment by the Executive Director and the General Counsel of the Constitution Revision Commission). "*Holmes* did not involve a blanket 'adequacy' challenge" based on state funding and "in no way answers the question

presented" here. *Citizens for Strong Sch.*, 262 So. 3d at 141. "Not only did *Holmes* expressly note the 'narrow' scope of the issue presented in that case, *Holmes*, 919 So. 2d at 397, but *Holmes* turned on language in article IX that long predated the 1998 amendments [that introduced the terms 'safe' and 'secure']." *Id.* at 141 n.8.

At any rate, "conjectural or merely hypothetical" interests do not establish standing to sue the State. *Nedeau v. Gallagher*, 851 So. 2d 214, 215 (Fla. 1st DCA 2003) (holding that plaintiffs lacked standing to sue the State and State Treasurer to recover fees assessed by the State against nonparties that then charged related fees to plaintiffs). "Even if the [Plaintiffs] were able to prevail on th[eir] claim, it does not appear that this would" require county school districts to address the risk of exposure to COVID-19 by closing the Plaintiffs' local schools. *Id.* at 216. "A successful challenge to the contested [Emergency Order] would therefore not necessarily benefit the [Plaintiffs], who would presumably still be obligated" to fulfill their employment duties or make decisions about in-person instruction based on the offerings of the county school district. *Id.* "The claim which the [Plaintiffs] presented is thus not one in which they could be granted relief, and their interest is too conjectural upon which to predicate standing." *Id.*

2. The Plaintiffs' claims are barred by the separation of-powers doctrine.

The Plaintiffs' responses to the State Defendants' separation-of-powers arguments ignore binding Florida precedent on the limits of the judiciary's

authority to interfere with the legislative and executive powers—particularly in the context of public education (not to mention a global pandemic). The parts of the Emergency Order that the circuit court "deci[ded] to excise" (Answer Br. 35) imposed a reasonable, policy-driven condition on additional state funding: districts would have to submit a plan to reopen local schools, subject to the advice of public-health officials. Yet this Court has reaffirmed the constitutionality of State-imposed conditions on public-education funding within just the past year.

Like the plaintiffs in last year's *Collier County* decision, 279 So. 3d 281, the Plaintiffs in this case essentially contend "that the Florida Constitution requires the funding decisions"—here, decisions about how to use additional state funds to educate students during the COVID-19 crisis—"to be made by local elected officials, not by state employees far removed from local needs and concerns." *Id.* at 291. But the Plaintiffs have "failed to explain how the Florida Constitution could preclude the State from imposing conditions on a discretionary" source of additional funding "that can be [raised] only with [state] authorization." *Id.*; *cf. id.* at 288 ("This requirement is no more intrusive than the presumptively constitutional requirements imposed on local school districts by the FEFP and many other statutory requirements that the Local Boards have not challenged in this litigation." (quoting and affirming circuit court's judgment)).

The Plaintiffs' and circuit court's severability analyses improperly assumed

that the most likely alternative to the Emergency Order was an unconditional grant of additional state funding to county school districts, with no strings attached. It is not the courts' role to determine the permissible "thrust" of an emergency order (Answer Br. 36) under the education clause in any event. But the circuit court's more fundamental error from a separation-of-powers perspective was its conclusion that imposing conditions in the first place was *unconstitutional* and, instead, that the *courts* could determine which terms were acceptable to ensure public safety. That conclusion is flatly inconsistent with the *Collier County* holding, and it alone shows that the Plaintiffs are unlikely to succeed on the merits.

3. The Plaintiffs' claims are not justiciable.

The Plaintiffs' flawed arguments about severability and the supposed Hobson's choice to obtain more state funding are in keeping with the non-justiciable nature of their claims. The premise of those arguments—and the Plaintiffs' claims as a whole—is that it was unconstitutional for the State to include conditions for additional funding in the Emergency Order, because school districts that failed to satisfy those conditions might not receive "adequate funding." (Answer Br. 17, 19, 24.) But the Florida Supreme Court has twice held that claims based on "'a blanket assertion that the entire system is constitutionally inadequate'" because of "purported inadequacies in funding" are not justiciable. *Citizens for Strong Sch.*, 262 So. 3d at 129 (quoting *Coalition for Adequacy &*

Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406 (Fla. 1996)). The courts therefore lack jurisdiction to entertain the Plaintiffs' claims or decide questions about whether the State had a constitutional obligation to provide additional, unconditional "emergency" funding.

Indeed, given the Plaintiffs' express concerns about "ensur[ing] adequate funding" (Answer Br. 17), *Citizens for Strong Schools* and the *Coalition* case are right on point. This Court has already correctly observed that the Emergency Order does not require county school districts to reopen for in-person instruction or require any students to attend brick-and-mortar public schools. The inherently political question at the heart of the Plaintiffs' claims is therefore whether the funding for public education "under the 'default' funding structure" (Answer Br. 33) would have been unconstitutional without the Emergency Order's *extra* funding. But "Florida courts have repeatedly acknowledged the constitutionality of Florida's basic funding formula for public education," *Collier County*, 279 So. 3d at 286—and this case is not a proper vehicle to disturb that settled precedent.

Neither of the two cases cited by the Plaintiffs on this point warrants a different result. The first case, *Martinez v. School Board of Hillsborough County*, 711 F. Supp. 1066 (S.D. Fla 1989), concerned the federal statutory rights of an HIV-positive student, and the court concluded that even if "[k]eeping this child out of school does not guarantee her safety and long life," it could not "find that the

risk is significant enough to counterbalance the benefit and rights to this child inherent in attending school with other children." *Id.* at 1071. That case had nothing to do with "safety" or "security" under Florida's education clause—which was not amended to include the terms "safe" and "secure" until 1998, almost a decade after *Martinez*. *See generally Citizens for Strong Sch.*, 262 So. 3d at 129.

The second case cited by the Plaintiffs, *In re Statewide Grand Jury #20*, No. SC19-240, 2019 WL 908518 (Fla. Feb. 25, 2019), likewise had nothing to do with interpreting the terms "safe" or "secure" under article IX, section 1(a) of the Florida Constitution. That case involved a grand jury empaneled at the Governor's request to "investigate crime, return indictments, make presentments, and otherwise perform all functions of grand jury with regard to" potential fraud, deceit, and other misconduct related to the implementation of Florida's school-safety statutes. *Id.* at *2. The Governor's request to investigate potential violations of Florida's statutory laws was in no way a concession "that courts are perfectly capable of managing school health safety standards" (Answer Br. 39) in the context of a public-health emergency. Nor does *Statewide Grand Jury #20* provide any "judicially manageable standard[s]" for assessing safety and security under the Florida Constitution's education clause. *Citizens for Strong Sch.*, 262 So. 3d at 139.

4. The Plaintiffs cannot show that the Emergency Order is arbitrary and capricious.

The Plaintiffs' due-process arguments reflect an unsuccessful, attempted end

run around the problems with their claims under the education clause. No matter how much the Plaintiffs misconstrue the evidentiary record and the circuit court's opinions about school safety, that court correctly observed that the Plaintiffs must "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 Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1172 n.5 (Fla. 1st DCA 2017) (quoting art IX, § 1(a), Fla. Const.) (*quoted in* Order Granting Mot. Temporary Inj. [A. 1546]), *approved*, 262 So. 3d 127 (Fla. 2019). And the Plaintiffs cannot carry that heavy burden.

As explained in the State Defendants' initial brief, the evidence presented at the circuit court's injunction hearing reflected evolving perspectives on the risks, policy judgments, and competing priorities to be balanced during the ongoing pandemic. Where the Plaintiffs presented testimony about a 5% "positivity rate" for COVID-19 tests, the State Defendants presented testimony from medical experts (including an epidemiologist serving on a local board of education) to the effect that those statistics cannot be viewed in isolation and may be unhelpful in measuring risk within a particular community. (*See* Initial Br. 34–35 & nn.15, 16.) There was certainly no consensus that the Plaintiffs' preferred safety metrics and policy proposals were the "gold standard" (Answer Br. 37). Instead, there was

evidence presented on many sides of the various debates over the importance of in-person instruction, the potential effects of school closures on vulnerable student populations,[5] and the community-specific risks presented by the COVID-19 pandemic. Furthermore, to the extent that the circuit court drew conclusions about "safety" or "unsafe conditions" for purposes of its constitutional analysis, those conclusions were inherently *legal* conclusions about the proper interpretation of the terms "safe" and "secure" under article IX, section 1(a)—not "factual findings" (Answer Br. 23) entitled to special deference in this appeal.

The Plaintiffs thus have not satisfied their burden of proof by showing that there was no conceivable rational basis for the Emergency Order or its conditions on receiving additional (and optional) state funding. Nor is this a case in which the Plaintiffs can avoid the rational-basis test by arguing that the Emergency Order is unconstitutionally vague or ambiguous. (*See* Answer Br. 40–41 (citing vagueness cases).) Aside from the fact that they have not asserted such a claim in their complaints, there is no competent, substantial evidence "that the Emergency Order is being administered in an arbitrary and capricious manner" (*id.* at 42).

First, the Plaintiffs' assertion that the Emergency Order gave the Department

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[5] The Plaintiffs themselves acknowledge this legitimate concern by suggesting that it could be reasonable "to partially reopen schools for in-person learning in some instances so as to protect certain student populations—such as providing in-person instruction for special needs students." (Answer Br. 31.)

of Education "*unbridled discretion to approve or disapprove reopening plans*" (Answer Br. 41) ignores the fact that 66 of Florida's 67 county school districts have already received DOE approval for the reopening plans they developed. (Decl. of J. Oliva (Aug. 26, 2020) ¶ 12 [A. 1558].) Any concerns about the requirements and process spelled out in section I of the Emergency Order for approving those plans—including the one for Hillsborough County—are moot.

Second, the Plaintiffs criticize the State's differential treatment of the reopening plans for several counties that had not yet progressed from Phase 1 to Phase 2 of Florida's statewide reopening plan under the Governor's executive orders. But that phased reopening plan was effectively incorporated into the Emergency Order (*see* Initial Br. 38–39), and the Plaintiffs' assertion that "school districts could not determine the requisite criteria and distinctions between Phase 1 and other reopening brick and mortar phases" (Answer Br. 42–43) is baseless.[6]

Finally, this Court should decline the Plaintiffs' invitation to draw speculative and conspiratorial "inference[s]" from the alleged actions (or inaction) of a nonparty, the Florida Department of Health (Answer Br. 44). Such an

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[6] The Plaintiffs have not asserted (and could not assert) any claim challenging the Governor's phased reopening plan, but their suggestion that it was not "based on any public health or safety criteria" (Answer Br. 10) is belied by the executive orders that describe it. *See, e.g.*, Executive Order No. 20-112, at 1, 2 [A. 18-19] (Apr. 29 2020) (referring to "data-driven strategy," "core safety principles," and "guidance" from the federal government and public-health officials).

"inference" would not be "competent, substantial evidence" sufficient to justify a preliminary injunction either. *SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012). Nor could it overcome the standing, separation-of-powers, and justiciability barriers to the Plaintiffs' claims.

C. The Preliminary Injunction Would Not Serve the Public Interest.

The status quo is that most public schools have reopened for the current school year, in accordance with local reopening plans, all of which are subject to evolving public-health guidance moving forward. Allowing the circuit court's injunction to take effect would upset that balance and could disrupt the lives of the more than a million Florida students now receiving in-person instruction. A preliminary injunction in these circumstances would not serve the public interest.

III. CONCLUSION

The Plaintiffs cannot satisfy the requirements for a preliminary injunction—not for the injunction issued by the circuit court, and not for any "alternative remedy" that might be developed if permitted on remand (Answer Br. 48). The circuit court's order should therefore be vacated with appropriate instructions to conclude this litigation, without the interference of any temporary injunction.

Respectfully submitted September 9, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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