FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2470

RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and STATE BOARD OF EDUCATION,

Appellants,

v.

FLORIDA EDUCATION ASSOCIATION; STEFANIE BETH MILLER; LADARA ROYAL; MINDY FESTGE; VICTORIA DUBLINO-HENJES; ANDRES HENJES; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC.; and NAACP FLORIDA STATE CONFERENCE,

Appellees.

No. 1D20-2472

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

Florida; ANDY TUCK, in his official capacity as the chair of the State Board of Education; STATE BOARD OF EDUCATION; RICHARD CORCORAN, in his official capacity as Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and JACOB OLIVA, in his official capacity as Chancellor, Division of Public Schools,

Appellants,

v.

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

Appellees.

On appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

[Date]

ORDER ON EMERGENCY MOTION TO REINSTATE AUTOMATIC STAY

ROWE, J.

On March 9, 2020, Governor Ron DeSantis declared a state of emergency throughout Florida based on the state surgeon general's declaration of a public health emergency stemming from the COVID-19 pandemic. That declaration and subsequent emergency orders granted state agencies authority to waive regulatory statutes and their own rules when "strict compliance with the provisions of any such statute, order, or rule would in any

way prevent, hinder, or delay necessary action in coping with the emergency." Fla. Exec. Order No. 20-52 at 4 (Mar. 9, 2020).[1]

On March 13, 2020, Florida's Emergency Management State Coordinating Officer issued Emergency Order 20-004. That order authorized "the Department of Education to take all appropriate actions coordinated with Florida's school districts, state colleges, and other educational providers to promote the health, safety, welfare and education of Florida students under the circumstances presented by this emergency." Fla. Div. of Emerg. Mgmt. Order No. 20-004 at 2 (Mar. 13, 2020). Soon after, the Department of Education (DOE) issued Emergency Order 2020-EO-01 recommending that school districts close all public schools in the state. Fla. Dep't of Educ. Order No. 2020-EO-01 (Mar. 23, 2020). For the rest of the 2019–20 school year, Florida's public schools shifted to virtual instruction.

In planning for the 2020–21 academic year, school districts became concerned because their funding is tied to student enrollment numbers. Various statutes and administrative rules provide the formulae for per-student funding, which is tied to student enrollment surveys conducted in February and October. Per-student funding for virtual instruction is around twenty-five percent less than per-student funding for in-person instruction. And school districts receive funding for virtual classes only when the classes are completed. If schools reopened in the fall and large numbers of students chose virtual instruction or did not enroll in public schools, then districts would lose significant funding.

In the spring, school districts did not face the same potential loss of funding when schools shifted to virtual instruction because per-student funding was based on the February 2020 enrollment survey. But with the October survey approaching, Florida school districts faced significant funding shortfalls by operation of the

[1] The executive order defines "necessary action in coping with the emergency" to mean "any emergency mitigation, response, or recovery action: (1) prescribed in the State Comprehensive Emergency Management Plan . . .; or (2) ordered by the State Coordinating Officer." Fla. Exec. Order No. 20-52 at 4.

funding formulae if students chose virtual rather than in-person instruction.

To provide financial stability for school districts, while also giving school districts the flexibility to continue to offer both virtual and in-person instruction, Commissioner of Education Richard Corcoran issued Emergency Order 2020-EO-6 (Emergency Order). Fla. Dep't of Educ. Order No. 2020-EO-6 (July 6, 2020). The Emergency Order addressed the potential funding shortfalls that school districts faced with increased student enrollment in virtual classes by waiving the statutes and rules providing the funding formulae.[2] But to obtain the statutory and rule waivers, school districts needed to submit a reopening plan to DOE for approval. And for their reopening plans to be approved, school districts had to offer students the choice of in-person instruction, with classes beginning in August. Still, the Emergency Order made clear that school districts were not required to submit a reopening plan, but they could "open in traditional compliance with statutory requirements for instructional days and hours." *Id.* at 6. In other words, school districts that chose not to submit a reopening plan would be funded under the existing statutory formulae approved by the Legislature and the administrative rules adopted by DOE.

The Florida Education Association, six Florida teachers, five parents of Florida students, the National Association for the Advancement of Colored People, Inc., and the NAACP Florida State Conference (collectively, Appellees) filed suit in circuit court seeking an injunction to prevent the Emergency Order from taking effect. Appellees contended that the order forced school districts to open schools for in-person instruction by threatening school districts with a loss of funding. Appellees also argued that the order required students and teachers to return to brick-and-mortar schools when it was unsafe to do so. And Appellees alleged that this requirement violated article IX, section 1(a) of the Florida

[2] The Emergency Order waived these provisions: sections 1001.42(4)(f), 1003.02, 1003.23(1), 1008.385, 1011.60(2), and 1011.61(1)(a), Florida Statutes; and Florida Administrative Code Rules 6A-1.0014, 6A-1.0451, and 6A-1.0452.

Constitution by failing to adequately provide for a "safe" and "secure" public school system. Appellees moved to temporarily enjoin the Emergency Order while the case was litigated.

The circuit court granted the motion for temporary injunction following a two-day evidentiary hearing and two hours of closing arguments. The circuit court declared certain provisions of the Emergency Order unconstitutional on grounds that it "arbitrarily disregards safety, denies local school boards decision making with respect to reopening brick and mortar schools, and conditions funding on an approved reopening plan with a start date in August." The court then "severed" portions of the Emergency Order that it found to be unconstitutional by striking language and deleting entire sections from the order.

Governor DeSantis, Commissioner Corcoran, DOE, Andy Tuck as Chair of the Florida Board of Education, and Jacob Oliva as Chancellor of the Division of Public Schools (collectively, the State) appealed the circuit court's order. When the State filed its notice of appeal in this Court, the circuit court's temporary injunction order was automatically stayed under Florida Rule of Appellate Procedure 9.310(b)(2). Appellees promptly asked the circuit court to vacate the automatic stay. The circuit court granted that request and vacated the automatic stay.

The State asked this Court to reinstate the automatic stay, and we granted that request in an unelaborated order because of the time-sensitivity of the situation. Our order quashed the circuit court's order vacating the stay and reinstated the stay pending this Court's consideration of the State's appeal of the temporary injunction order. We now explain the reasoning for our order.

I.

Rule 9.310(b)(2) provides for an automatic stay when the state or a public officer seeks review of a trial court's order. The automatic nature of the stay is grounded in judicial deference to governmental decisions. *See St. Lucie County. v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984). The rationale for automatically staying such orders when a public official seeks appellate review is that "planning-level decisions are made in the

public interest and should be accorded a commensurate degree of deference." *Id.* An automatic stay also seeks to protect the public against "any adverse consequences realized from proceeding under an erroneous judgment." *Id.* And so, a trial court may vacate an automatic stay only "under the most compelling circumstances." *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018) (quoting *State, Dep't of Env't Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998)). The party seeking to vacate an automatic stay has the burden of producing evidence showing "the most compelling circumstances." *See Pringle*, 707 So. 2d at 390. In deciding whether to vacate the automatic stay, the court must consider "(1) the government's likelihood of success on appeal, and (2) the likelihood of irreparable harm if the automatic stay is reinstated." *People United*, 250 So. 3d at 828. A trial court abuses its discretion by vacating an automatic stay when the party seeking to vacate the stay does not make the necessary showing of compelling circumstances, when the government is likely to succeed on appeal, or when reinstatement of the stay is unlikely to cause irreparable harm. *See id.* at 828–29.

We hold that the circuit court abused its discretion in three respects when it vacated the automatic stay. First, no compelling circumstances warranted vacating the stay. Second, based on our preliminary review, the State has a substantial likelihood of succeeding on the merits in this appeal. And third, Appellees failed to show that reinstatement of the automatic stay would cause irreparable harm.

II.

Based "on the reasons stated in the order of August 24, 2020 granting the motion for temporary injunction," the circuit court found, without further explanation, that "there exists a clear evidentiary basis demonstrating compelling circumstances to warrant vacating the automatic stay." We disagree.

Before the circuit court issued its order enjoining enforcement of the Emergency Order, school districts published plans for reopening schools in August, including options for virtual instruction, in-person instruction, or both. While many students

opted for virtual instruction, most students—over 1.6 million—chose to return to brick-and-mortar schools for in-person instruction. When the circuit court issued its order, more than sixty school districts were already implementing reopening plans approved under the Emergency Order. And 711,000 students were attending brick-and-mortar schools in forty-five of Florida's school districts.

The circuit court issued the injunction order only seven days before all school districts seeking to qualify for the funding and reporting waivers under the Emergency Order needed to resume in-person instruction. The injunction order caused confusion and uncertainty for students, parents, and teachers. Thus, the circumstances did not support vacating the stay. Quite the opposite. The automatic stay restored the status quo and allowed schools to reopen under plans that local school districts carefully crafted before the circuit court entered the temporary injunction.

III.

Reinstatement of the automatic stay will not cause irreparable harm. Appellees argue that teachers, parents, and students are concerned about the potential harm posed by exposure to COVID-19 when school districts resume in-person instruction. When it vacated the automatic stay, the circuit court found that "[t]eachers are resigning or retiring due to the risk of exposure to COVID-19." But these arguments ignore that nothing in the Emergency Order requires **any** teacher or **any** student to return for in-person instruction at a brick-and-mortar school.

As to teachers, whether a school district assigns them to in-person instruction or virtual instruction is a matter between those teachers and their employing school districts. Governor DeSantis, Commissioner Corcoran, and the other appellants have no say in the matter. And the school districts that **do** have a say are notably absent from this lawsuit.

As to students, the Emergency Order does not compel any student to choose in-person instruction or attend a brick-and-mortar school. Rather, students and parents are free to choose a brick-and-mortar school for in-person instruction, virtual

instruction from their local school district, Florida Virtual School, private school, or homeschooling. While many students and their families chose virtual instruction, parents of over 1.6 million students have decided that the benefits of students returning to school for in-person instruction outweigh any risks posed by COVID-19.

As to school districts, none have been "forced" under the Emergency Order to offer in-person instruction for students. It is left to the individual school districts to determine whether offering in-person instruction poses risks to the welfare and safety of their students, teachers, and school personnel. Nothing in the Emergency Order disturbs the discretion of a school district to determine when to reopen schools and whether to offer in-person instruction. And nothing in the Executive Order limits a school district's ability to reopen schools under the funding formulae approved by the Legislature and administered by DOE.

Even so, over sixty school districts elected to seek the funding waivers available under the Emergency Order. Those districts submitted reopening plans to DOE and made plans to reopen schools for in-person instruction by the end of August. In so doing, those school districts satisfied the preferences of over 1.6 million students and their parents for in-person instruction. At the same time, school districts could continue to offer virtual instruction to students who preferred not to return to a brick-and-mortar school while maintaining their per-student funding—**which would have been unavailable absent a waiver of applicable statutes and rules**. Without the Emergency Order, by statute and by rule, school districts would have seen their state funding reduced based on the number of students choosing not to attend school in person.

In sum, nothing in the Emergency Order forces school districts to reopen brick-and-mortar schools. Nothing in the order requires a student to attend a brick-and-mortar school. And nothing in the order forces a teacher to return to the classroom. For these reasons, the circuit court abused its discretion in concluding that reinstatement of the automatic stay would cause irreparable harm.

IV.

The circuit court also abused its discretion in vacating the automatic stay because the State has shown a substantial likelihood of success on the merits of its appeal. The State advances at least three persuasive arguments for reversal.

First, the State argues that the circuit court erred when it concluded that the Emergency Order violated the State's duty to provide "safe" and "secure" schools under article IX of the Florida Constitution. The State is likely to prevail on this argument. The terms "safe" and "secure" as used in article IX, section 1(a), and construed in the context of a public health emergency appear, to "lack judicially discoverable or manageable standards that would allow for meaningful judicial interpretation." *See Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1168 (Fla. 1st DCA 2017), *aff'd*, 262 So. 3d 127 (Fla. 2017). In a similar context—an executive order addressing the COVID-19 pandemic—the United States Supreme Court held that policy choices for the "safety and health of the people" are principally entrusted "to the politically accountable officials of the States 'to guard and protect'" and should not "be subject to second-guessing" by the courts. *See S. Bay United Pentecostal Church v. Newsome*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

Second, the State also persuasively argues that the circuit court violated Florida's strict separation of powers doctrine when it excised from the Emergency Order certain provisions and retained others. *See* Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). The circuit court purported to "sever"[3] from the Emergency Order many

[3] *See Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 773 (Fla. 2005) ("Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of **legislative** enactments where it is possible to strike only the unconstitutional portions." (emphasis added) (quoting *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999))).

provisions and entire sections it found to be unconstitutional, while retaining other parts of the order. The Emergency Order authorized waivers of the statutory and administrative funding formulae only for school districts that submitted plans for reopening that provided for in-person instruction no later than August. School districts that did not submit reopening plans were subject to the funding formulae under statutes duly enacted by the Legislature and rules adopted by DOE—meaning that any increase in students enrolling in virtual classes would cause a decrease in funding for those school districts. When it revised the Emergency Order, the circuit court expanded the waivers from the funding statutes and rules to **all** school districts—not just those that submitted approved reopening plans. Thus, in revising the Emergency Order, the circuit court appears to have simultaneously exercised the authority vested in the executive, legislative, and judicial branches. *See Citizens for Strong Schs.*, 232 So. 3d at 1171 ("Absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in [educational policy choices and their implementation] . . . .").

Last, we find merit in the State's argument that Appellees failed to meet their burden to show that a temporary injunction is necessary to prevent irreparable harm. As explained above, the Emergency Order does not compel any student to return to a school for in-person instruction. Nor does it require any teacher to return to a brick-and-mortar school for in-person instruction.

VI.

Having considered the State's motion to reinstate the automatic stay and Appellees' responses, we hold that the circuit court abused its discretion by vacating the automatic stay. We thus quash the order vacating the automatic stay and grant the State's motion to reinstate the stay. The stay will remain in effect pending disposition of this appeal.

WINOKUR and JAY, JJ., concur.

David M. Wells and Nathan W. Hill of Gunster, Yoakley & Stewart, P.A., Orlando; Kenneth B. Bell of Gunster, Yoakley & Stewart, P.A., Tallahassee; and Lauren V. Purdy of Gunster, Yoakley & Stewart, P.A., Jacksonville, for Appellants.

Joseph W. Jacquot, General Counsel, Raymond F. Treadwell, Deputy General Counsel, and Joshua E. Pratt, Assistant General Counsel, Executive Office of the Governor, Tallahassee, for Governor Ron DeSantis.

Katherine E. Giddings and Kristen M. Fiore of Akerman LLP, Tallahassee; Gerald B. Cope, Jr. of Akerman LLP, Miami; and Ryan D. O'Connor of Akerman LLP, Orlando, for Appellees Florida Education Association, Stefanie Beth Miller, Ladara Royal, Mindy Festge, Vitoria Dublino-Henjes, Andres Henjes, National Association for the Advancement of Colored People, Inc.; and the NAACP Florida State Conference

Jacob V. Stuart of Jacob V. Stuart, P.A., Orlando; and William J. Wieland of Wieland & Delattre, P.A., Orlando for Appellees Monique Bellefluer, Kathryn Hammond, Ashely Monroe, & James Lis.