IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION

CASE NO. 2020-015211-CA-24

FLORIDA EDUCATION ASSOCIATION; STEFANIE BETH MILLER; LADARA ROYAL; MINDY FESTGE; VICTORIA DUBLINO-HENJES; and, ANDRES HENJES,

Plaintiffs,

vs.

RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; FLORIDA BOARD OF EDUCATION; CARLOS GIMENEZ, in his official capacity as Mayor of Miami-Dade County,

Defendants.
_____/

**DEFENDANTS'[1] RESPONSE TO PLAINTIFFS' MOTION TO COMPEL EXPEDITED MEDIATION**

The Court should deny Plaintiffs' request for mediation because (1) no justiciable controversy exists between the parties; (2) there exists no present or actual harm which would give rise to any case or controversy; (3) Plaintiffs lack standing; and (4) this Court lacks subject matter jurisdiction to grant Plaintiffs relief. These threshold legal issues should be resolved prior to ordering any mediation.

[1] The responding Defendants are 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 Florida Board of Education.

Moreover, mediation could never accomplish what Plaintiffs seek, as critical stakeholders are not and likely cannot be before the Court. According to the Complaint, Plaintiffs are comprised of an association of unions (though not the local unions, which are the actual contracting parties with the school districts), a Broward County teacher, an Orange County teacher, a Miami-Dade County teacher/parent, and the parents of two Pinellas County students. Plaintiffs do not represent and do not claim to represent all teachers, parents, and teachers' unions in the State, yet they purport to speak for those unrepresented groups and seek relief on their behalf. These critical stakeholders, who are necessary to afford Plaintiffs the broad statewide relief sought, are not parties to this case. Nor can they become parties to this case because many of them, such as the school districts and local teachers' unions, have grievance procedures incorporated into their contracts that require out-of-court resolution of disputes.[2] They also have their own home venue privilege affording them the right to litigate in their own Circuit. In summary, mediation would be improper because this Court is not the proper forum to resolve Plaintiffs' future and conjectural disputes and Plaintiffs are not the right parties to demand mediation.

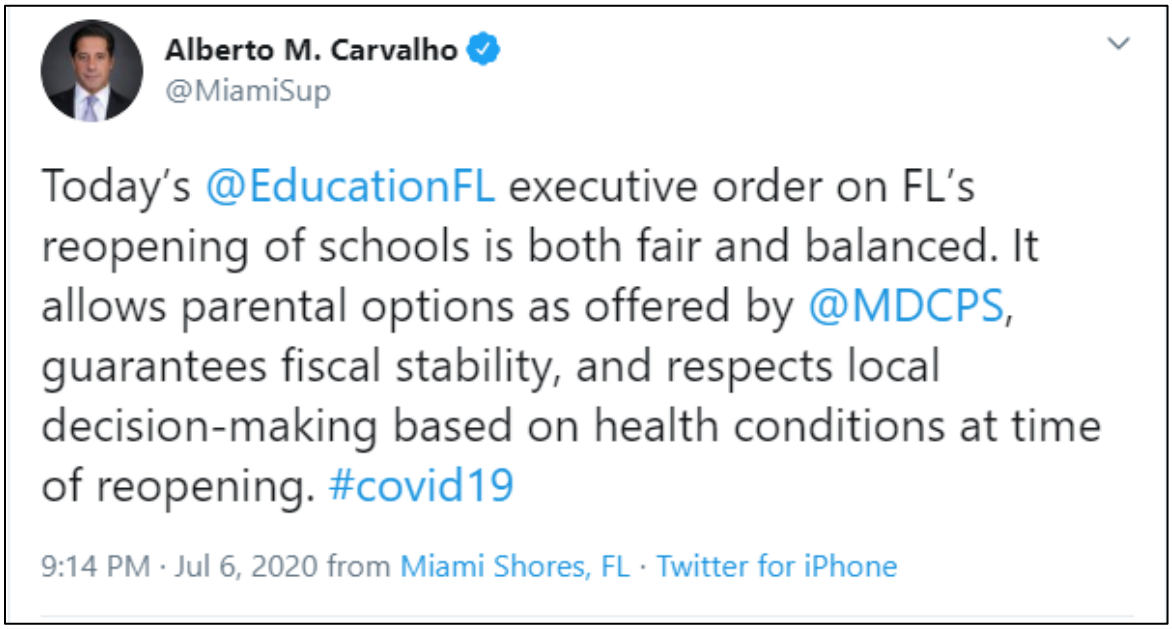
**BACKGROUND**

Plaintiffs' Complaint and request for mediation is based on a fundamental misunderstanding of Emergency Order 2020-EO-06 (the "Emergency Order"), issued by the Florida Department of Education on July 6, 2020. The Emergency Order confirms that, upon reopening in August 2020, decisions on how schools open and what safety measures are in place

[2] *See, e.g.*, http://www.dadeschools.net/spanish/employees/labor_union/UTD/pdf05/App_A.pdf. The contract between the United Teachers of Dade and the Miami-Dade County School District sets forth detailed dispute resolution procedures culminating in a final and binding arbitration decision. *Id*. at pp. 3-7. To the extent Plaintiff Florida Education Association claims to be advocating on behalf of the United Teachers of Dade or any other union that has a similar contract with a school district, it is bound by the alternative dispute resolution procedures in those agreements.

are left to the local school districts. The Emergency Order further provides that school opening is always subject to the guidance of state and local health officials. It affords school districts the funding flexibility to implement innovative learning options that enable parents to choose what works best for the health and safety of their families. On its face, the Emergency Order does not implicate, let alone impinge upon, any constitutional rights of parents, students, or teachers.

Tellingly, upon issuance of the Emergency Order, Alberto M. Carvalho, Superintendent of Schools for Miami-Dade County—the largest school district in the State and not a party here—recognized the balanced and flexible approach taken by the Emergency Order, stating publicly:




Carvalho, Alberto M. (@MiamiSup), TWITTER (Jul. 6, 2020 9:24 PM), https://twitter.com/MiamiSup/status/1280309191543062528.

Nevertheless based on their critical misreading of the Emergency Order, Plaintiffs seek a declaration that the Emergency Order violates the Florida Constitution, and ask this Court to mandate that the State of Florida impose a statewide host of policy-based requirements on schools, teachers, and students related to staffing, internet-connectivity, and class size, among others.

As stated above, because there is no actual justiciable controversy and because the Complaint is, in reality, a policy challenge and not a constitutional one, the Court should first address threshold legal issues such as standing and lack of jurisdiction over this suit.[3]

## ARGUMENT

### I. Threshold issues should be resolved before the court orders any mediation.[4]

#### A. Plaintiffs lack standing and the Court lacks jurisdiction because no justiciable controversy exists.

"[S]tanding is a threshold issue which must be resolved before reaching the merits of a case." *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). "To have standing the plaintiff must show that a case or controversy exists between that plaintiff and the defendant." *Collins v. Gov't Employees Ins. Co.*, 922 So. 2d 353, 353 (Fla. 3d DCA 2006). Similarly, subject matter jurisdiction is a threshold issue the Court should resolve at the beginning of a case. *See Bradenton Group, Inc. v. Dep't of Legal Affairs, State of Fla.*, 701 So. 2d 1170, 1173 (Fla. 5th DCA 1997) ("A threshold issue is whether the circuit court lacks subject matter jurisdiction in this case."), *decision approved in part, quashed in part sub nom. Dep't of Legal Affairs v. Bradenton Group, Inc*., 727 So. 2d 199 (Fla. 1998); *Chapoteau v. Chapoteau*, 659 So. 2d 1381, 1383 (Fla. 3d DCA 1995) (addressing subject matter jurisdiction as a "threshold consideration").

To obtain declaratory relief, Plaintiffs must establish that:

> (1) there is "a bona fide, actual, present practical need" for the declaration;

[3] Defendants reserve all additional arguments and defenses and will timely assert them in their response to the Complaint.

[4] These threshold grounds for dismissal will be set forth in more detail in Defendants' response to the Complaint.

> (2) the declaration sought deals with "a present, ascertained or ascertainable state of facts or present controversy as to a state of facts;"
>
> (3) an "immunity, power, privilege or right" of the plaintiff depends on the facts or the law that applies to the facts;
>
> (4) some persons have an "actual, present, adverse and antagonistic interest" in the subject matter;
>
> (5) all persons with an adverse and antagonistic interest are before the court; and
>
> (6) the declaration sought does not amount to mere legal advice.

*Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 195 (Fla. 3d DCA 2012); *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952).

Each declaratory judgment element is not only necessary to state a cause of action, it is required to confer jurisdiction upon the Court. *See id; Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991); *Webster v. Inch*, 286 So. 3d 847 (Fla. 1st DCA 2019). The absence of any element deprives the Court of jurisdiction. *See Helfrich v. City of Jacksonville*, 204 So. 3d 39, 42 (Fla. 1st DCA 2016) (affirming the dismissal of a declaratory judgment action for lack of a justiciable controversy where plaintiffs posed a hypothetical question seeking an advisory opinion); *State, Dept. of Environmental Protection v. Garcia*, 99 So. 3d 539, 544 (Fla. 3d DCA 2011) (finding that "the trial court lacked jurisdiction to enter the declaratory judgment" because plaintiff had not shown "a bona fide, actual, present, and practical need for the declaration").

In their mediation motion and in the Complaint, Plaintiffs rail against a supposed State of Florida mandate requiring teachers and students to return to school regardless of health concerns. In fact, the Emergency Order does not contain any such mandate and the State of Florida has issued

no such orders.[5] *See Santa Rosa County v. Admin. Com'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (declaratory judgment action cannot seek advisory opinions on contingent, uncertain, or future facts). Plaintiffs' concerns about the health and safety of all participants in Florida's education system are misdirected at the Emergency Order. A fair reading of the Emergency Order shows there is no justiciable controversy between the State of Florida and the Plaintiffs because that order does not do what Plaintiffs claim.

The Emergency Order expressly recognizes that "school openings must be consistent with safety precautions as defined by the Florida Department of Health, local health officials and supportive of Floridians, young and adult, with underlying conditions that make them medically vulnerable." Emergency Order at 2. And conditions school openings "subject to advice and orders of the Florida Department of Health [and] local departments of health . . ." *Id*. The Emergency Order further acknowledges that "the day-to-day decision to open or close a school must always rest locally with the board or executive most closely associated with the school, the superintendent or school board in the case of a district-run school, the charter governing board in the case of a public charter school or the private school principal, director or governing board in the case of a nonpublic school." *Id*. at 2-3.

Accordingly, as set forth in the Emergency Order, decisions concerning the who, what, when, where, why, and how of school reopening are to be made by each school district, subject to guidance from state and local health officials. If a school district, in coordination with health officials, its teachers, and parents determines it is appropriate to open schools and if such decision has a legally cognizable effect on any Plaintiff, then any future grievance they may have would be

[5] And, as it has done since 1997, the State of Florida continues to offer parents and students the option of enrolling in Florida Virtual School. *See* http://www.fldoe.org/schools/school-choice/virtual-edu/. Thus, providing yet another alternative to attending in-person classes.

with those local decision makers, not with the State of Florida. Plaintiffs cannot use this litigation to force a seat at the table they did not have before they filed suit in order to extract concessions from those who are not parties to the case. Yet that is precisely what Plaintiffs are attempting to do by requesting mediation.

The heart of Plaintiffs' Complaint is the assertion that the State of Florida should not decide for students and teachers when and under what conditions they should be required to attend in-person classes or participate remotely in schooling during the COVID-19 pandemic. However, the Emergency Order leaves it to each local school district to make these decisions. This provides each school district the flexibility to make plans in coordination with its local school participants. Thus, no justiciable controversy exists.

**B. Plaintiffs have presented a non-justiciable political question.**

Ruling on a political question impermissibly infringes upon the exclusive province of the Executive and Legislative branches of government. *Citizens for Strong Sch., Inc. v. Florida State Bd. of Educ*., 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017), *approved*, 262 So. 3d 127 (Fla. 2019). The Florida Constitution explicitly provides that "[n]o 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. (emphasis added).

In *Citizens*, the First DCA reviewed a challenge to the quality of the public school system by a plaintiff claiming a violation of the same constitutional section Plaintiffs rely upon in this case. In affirming the trial court's decision that the plaintiff in *Citizens* had impermissibly raised a non-justiciable political question, the First DCA held:

> A strict separation of powers supports the foundation and logic of the political-question doctrine, in that Florida's organic law does not permit a "dispersal of decisional responsibility" which would allow the courts to dictate educational policy choices and their implementation to the other two branches of government, absent

> specific authorization by law. *Id*. Absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in such matters, as the legislative branch has sole power to appropriate and enact substantive policy, and the executive branch has the sole power to faithfully execute the substantive policies and budgetary appropriations enacted by the legislative branch. **The judiciary cannot dictate the manner of executing legislative policies or appropriations in any particular way**. *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."); Art. V, § 14(d), Fla. Const. ("The judiciary shall have no power to fix appropriations.").

*Id*. (emphasis added).

Plaintiffs rely upon the same nebulous passage from the Florida Constitution as in *Citizens*, providing that "[a]dequate 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." Art. IX, § 4(b), Fla. Const. As in *Citizens*, Plaintiffs ask this Court to invade the province of coequal political branches and declare a statewide standard for social distancing, sanitation, internet accessibility, and class size, and mandate and supervise what it believes to be appropriate funding to satisfy those judicially imposed standards. Even more troubling, Plaintiffs ask the Court to determine and define the meaning of "safe" and "secure" as it applies to each of the 67 school district across the state and thereafter to make a global policy decision about which schools to open, when, how much additional funding is necessary to accomplish those goals and, as Plaintiffs request, direct that such funding be made by the State of Florida.

When faced with these and similar circumstances—ambiguous terms meant to set goals for the legislative and executive branches and otherwise lacking in judicially discoverable or manageable standards to allow for meaningful interpretation—both Florida and federal courts have rightly invoked the political question doctrine and withheld ruling. *See Baker v. Carr*, 369 U.S.

186, 210 (1962); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

Article IX of the Florida Constitution unequivocally tasks the Legislature with providing "adequate provision" for the public school system. *Citizens for Strong Sch., Inc.*, 232 So. 3d at 1170. The executive branch, including Florida's sixty-seven local school districts, is charged with executing these goals and planning for the safety of Florida public schools. *See* §§ 1001.42, 1001.43, Fla. Stat. Florida law is clear that "[a]bsent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction in such matters, as the legislative branch has sole power to . . . enact substantive policy and the executive branch has the sole power to faithfully execute the substantive policies and budgetary appropriations enacted by the legislative branch." *Citizens for Strong Sch., Inc.*, 232 So. 3d at 1171.

Not only would judicial intervention impermissibly invade the province of the other branches, there are no judicially discoverable and manageable standards for resolving the political questions posed by Plaintiffs' Complaint. Moreover, these political questions involve policy determinations not suited for judicial determination. As in *Citizens for Strong Schools, Inc.*, Plaintiffs here seek to wrongfully "entangle courts in the details and execution of educational policies and related appropriations, involving millions of students and billions of dollars, in an arena in which the courts possess no special competence or specific constitutional authority" despite the fact that "the drafters of Article IX . . . declined to allocate such a role to the judiciary." *Id*. at 1171. The attempt is wholly improper and violative of the Florida Constitution. The Court should address this additional threshold issue prior to ordering Defendants to do anything, since the political question posed by Plaintiffs is fatal to the Complaint.

## II. Mediation is not feasible because necessary stakeholders are not parties to this case.

Assuming, arguendo, that Plaintiffs have standing to sue, and this Court has jurisdiction to enter a declaratory judgment, mediation would still be fruitless. Plaintiffs cannot and do not speak for teachers, unions, parents, and students in the 67 school districts throughout the State of Florida. They are in no position to request statewide relief, which extends far beyond any future or potential injury Plaintiffs claim in the Complaint. Plaintiffs' quarrel is not with the State of Florida but with each local school district and the teachers' unions, parents, and students who will collectively decide how to open schools. These critical stakeholders are not parties to this case.

## III. Conclusion

Defendants respectfully request that the Court deny Plaintiff's motion for mediation.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 30, 2020, the foregoing was electronically filed using the E-filing Portal System, and a copy was furnished by email on the following Service List:

By: /s/ Angel A. Cortiñas

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