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

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

Plaintiffs,

v. Case No.: 2020-CA-001450

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,

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

Plaintiffs,

v. Case No.: 2020-CA-001467
RON DESANTIS, in his official capacity as Governor of the State of Florida, et al.,

Defendants.
_____/

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO LIFT THE AUTOMATIC STAY

Defendants Ron DeSantis, in his official capacity as Governor of the State of Florida; Richard Corcoran, in his official capacity as Commissioner of Education; Andy Tuck, in his official capacity as the chair of the Florida Board of Education; Jacob Oliva, in his official

capacity as Chancellor, Division of Public Schools, Florida Department of Education (the "DOE"); and the Florida Board of Education (collectively, the "Defendants"), submit this response in opposition to the Plaintiffs' Motion to Lift the Automatic Stay (the "Motion") imposed by Defendants' appeal of the Court's Order Granting Plaintiffs' Temporary Injunction on August 24, 2020 (the "Order").

I. INTRODUCTION

Plaintiffs cannot show that "the equities are overwhelming[ly] tilted against maintaining the stay." *Fla. Dept. of Health v. People United for Medical Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018). Five days have passed since the injunction hearing. Since then, schools have reopened, the positivity rates throughout Florida are falling,[1] and no school board has come forward complaining to the DOE or any court about coercion. The equities have not changed. Yes, some teachers in various districts may not personally feel safe returning to school, but 1.6 million students and their parents have chosen to do so. To date, approximately 711,000 students are already attending brick and mortar schools in 45 districts throughout the state.[2] Vacating the stay will only sow confusion among the more than 60 school districts that are already implementing approved reopening plans, overturn the status quo, and potentially send thousands of parents scrambling to find day care and work accommodations.

Contrary to Plaintiffs' argument, allowing the automatic stay to remain in place while the appellate courts resolve the important constitutional issues raised in this case will have no bearing on the expressed concerns by certain teachers about potential harm of in-person instruction. The Order does not apply to school districts. Districts are still free to offer in-person instruction and to assign teachers to those teaching duties, and they are doing so. None of the

[1] *See* Florida's COVID Dashboard with testing information by state and county, available at https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

[2] Declaration of Jacob Oliva, attached hereto as Exhibit A.

school boards are parties to this case, or enjoined in any manner. To the extent that individual teachers feel unsafe about providing in-person instruction, the Order is of no effect—such a concern would necessarily need to be addressed by the teacher and the employer school board. On this record, the unsubstantiated concerns of a handful of teachers cannot possibly overcome the needs of 1.6 million Florida school children.

The Order discusses a 5% COVID-19 positivity standard that the school districts will be hard pressed not to follow. That standard that is unworkable and contrary to CDC guidance because it is only a single data point. *See* Oliva Dec. ¶¶ 16-18. The Order also discusses a 6-foot social distancing standard that is not supported by guidance from the CDC and others and is unworkable in many classrooms. Not only will this sow confusion and disarray, but will likely spawn skirmishes across the state as the teachers' unions pressure school boards to close so long as any teacher is 'forced' to appear in-person. Whether this pressure succeeds in any district is unknown, but the damage caused by the uncertainty it spawns is known. And if schools close based on this judicially created law there is no question it will cause severe, irreparable, and concrete harm to students and families who are deprived of their choice to return to school.

This is an important case, raising complex constitutional concerns. Although Defendants respect the Order of this Court and the effort and attention the Court devoted to this case, it was presented with the herculean task of analyzing hundreds of pages of exhibits in little more than three days. Some of those exhibits included dense scientific discussions explained by only three testifying experts. This school year, though only in its infancy, has already had its share of confusion and uncertainty, which school districts have managed to date by making their own informed policy decisions on whether, when, and how to open schools for in-person instruction. This Court should not add to that by vacating the stay pending the appeal.

II. FACTUAL BACKGROUND

Although the Court found that Plaintiffs met the burden necessary for the relief granted in the Order, the burden to vacate the automatic stay is much higher. *Fla. Dept. of* Health, 250 So. 3d at 828 (the automatic stay should only be lifted "under the most compelling circumstances"). A party moving to vacate an automatic stay must demonstrate that "the equities are overwhelming[ly] tilted against maintaining the stay." *Id*. (quoting *Tampa Sports Auth. v. Johnston*, 914 So.2d 1076, 1084 (Fla. 2d DCA 2005). When viewed against that higher standard, Plaintiffs' Motion must be denied.

There is no question the Injunction Order will cause severe, irreparable, and concrete harm to students and families if they are deprived of their choice to return to school. *See* Oliva Dec. ¶¶6-7, 21-29. In response, Plaintiffs presented the testimony and declarations of 8 teachers and staff who explain their general concern about returning to school for health reasons, or who have chosen not to return.[3] One teacher-Plaintiff, Kathyrn Hammond, even admits that she has recently been "provided with an accommodation to teach . . . remotely."[4] Plaintiffs offered no evidence in any form to establish the number of teachers in Florida who are being asked to return to school against their will. That fact alone requires the stay be maintained and their Motion denied.

Plaintiffs also, surprisingly, offered no evidence to support their mantra that school boards across the state were being "coerced" into opening. No school board appeared, testified, or submitted any declaration in an official capacity in this case. Plaintiffs offered only the

[3] *See, e.g.*, Declaration Cheryl Brown, ¶ 10 ("I could not return to [school]" and "had no choice but to retire"); Declaration of Tim Schomburg (explaining his concern about the safety measures adopted by DeSoto High School, but not stating whether or not he will choose to return); Declaration of Ana Palomo (explaining her concern about being exposed to COVID as a bus driver, but not stating whether she will choose to return); Declaration of Eileen Walentin (stating that she was presented with three options: "teach my classes in person, retire or resign" but that "this was no choice at all." She chose to "resign" from her position.). Plaintiffs declarations are attached hereto as Composite Exhibit B.

[4] *Id*.

testimony of Tamara Shamburger, a school board member in Hillsborough County, where none of the named Plaintiffs reside or are employed. She testified about her interpretation of the Emergency Order and about Hillsborough's amended plan, but there is no evidence that this plan was denied by the DOE. Rather, DOE requested additional information consistent with the Emergency Order and its statutory supervisory authority. Hillsborough declined to provide that information and decided to proceed with the approved reopening plan. It did not file suit against the DOE for coercion; it did not raise any safety concerns with the DOE; and it did not seek to implement a new plan. Dr. Scott Hopes, a Manatee County School Board member, testified to a completely different interpretation of the Emergency Order. As such, Plaintiffs cannot possibly have met their high burden to obtain a temporary injunction based on this unsupported coercion theory.

Moreover, even assuming arguendo that DOE does not have the authority to implement "strong incentives and disincentives to force accountability for results," and it clearly does, Fla. Stat. § 1000.03(2)(b), and assuming further that the testimony of a single school board member is sufficient to establish that Hillsborough County was "coerced," and it is not, there is no evidence on the record of any kind from a student, parent, or teacher in Hillsborough County—except for Lindsey Arthur, a teacher in Hillsborough County who chose to return to school. Several teachers from various school districts testified that they are being asked to return to school, but there is no evidence on the record that the school boards in any of those districts have been coerced by the Defendants or that they would have done anything different in the absence of the Emergency Order. This glaring evidentiary omission requires the instant Motion be denied.

III. Argument

Automatic stays provided under Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure are triggered when a government entity appeals an adverse judgment to accord deference to governmental decisions. *Fla. Dept. of Health*, 250 So. 3d at 828. Although a trial court may vacate this stay pending appeal, a searching inquiry is required and the trial court may not vacate the stay simply because it already ordered injunctive relief; to the contrary "it may do so only under the most compelling circumstances." *Id*. (internal quotation marks and citations omitted). A party moving to vacate an automatic stay must demonstrate that "the equities are overwhelming[ly] tilted against maintaining the stay." *Id*. (quoting *Tampa Sports Auth. v. Johnston*, 914 So.2d 1076, 1084 (Fla. 2d DCA 2005)). Further, "the burden is on the party [] seeking to vacate the automatic stay to establish an evidentiary basis for the existence of such 'compelling circumstances.'" *Dep't of Envtl. Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998) (*quoting St. Lucie Cnty. v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984)), *vacated on other grounds*, 743 So. 2d 1189 (1999). Last, in determining whether to vacate a stay, courts must consider: (1) the government's likelihood of success on appeal, and (2) the likelihood of irreparable harm if the automatic stay is reinstated." *Fla. Dept. of Health*, 250 So. 3d at 828.

a. Plaintiffs Cannot Show Compelling Circumstances for Vacating a Stay of Injunction Relief.

There are no compelling circumstances to justify vacating the stay in this case. On the contrary, the automatic stay is designed for exactly this situation. *Pringle*, 707 So. 2d at 390. It is based on an important policy rationale and "involves the fact that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the

public generally." *Id*. With all due respect to the Court's Order, the sheer amount of evidence presented in this case, combined with the extraordinarily short time frame and limited legal briefing, means the chances of error are high. This is not a simple case. It raises a variety of complex issues of constitutional law, separation of powers, and standing, and involves not a statute or an agency rule, but an Emergency Order issued in an unprecedented crisis.

Competing and contradictory judgements of this Court and the appellate courts would create confounding uncertainty for thousands of parents and students. As of August 24, 2020, an estimated 711,000 students are learning in-person in the 45 school districts that have reopened brick and mortar schools, and as of August 31, 2020, 64 school districts will be providing in-person instruction, serving in excess of a million students. Oliva Dec., ¶ 7. The Court should deny the Motion and maintain the stay so that families already beset by uncertainty and concern will not be further burdened by repeated and potentially contradictory orders.

b. Even if the automatic stay were lifted, the Court's Order does not address the harm Plaintiffs have presented to this Court.

At its heart, this case revolves around disputes over working and classroom conditions—primarily for teachers—at public schools operated by Florida's 67 independent local school districts. But none of those school districts or the local boards that oversee them have been joined as parties. Nothing in the Court's Order requires any of them to operate their local schools differently or to change the classroom assignments or working conditions for any of their teachers or other employees. Plaintiffs' speculation about how the local districts that actually employ teachers and deliver education services to students *might* respond to the Court's Order here cannot satisfy the requirements to lift the automatic stay pending review under Rule 9.310(b)(2).

Plaintiff James Lis and Andre Escobar both testified that they would be forced to return to in-person teaching in Orange County. There is no evidence on the record that the Court's Order will redress these projected injuries. Districts would still be free to choose in-person instruction and many indisputably will. Even under the Plaintiffs' reading of the Emergency Order, districts could have waited until August 31, 2020 to reopen for in-person instruction, but many of them chose to reopen sooner. Oliva Dec., ¶ 7. Thus, for example, if the Orange and Osceola County school boards opted to offer in-person instruction at all schools, then some teachers would be required to report in person. Nothing in the Court's Order protects the Plaintiffs from being given an in-person assignment.

The mere possibility that non-parties may or may not take actions that might remedy the Plaintiffs' claimed harm cannot meet the extraordinarily high burden required to lift the stay. As a rule, "[i]njunctions must be specifically tailored to each case and they must not infringe 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), *quoted with approval in Eadgear, Inc. v. Baca*, 93 So. 3d 1246, 1247 (Fla. 1st DCA 2012). That limitation is especially important in the context of a preliminary injunction against the state regarding a requirement to adopt local plans that have already been approved for the current school year. Even if the Court accepts the premise of the Plaintiffs' argument that there is a threat of irreparable injury if their local school districts were to require (or continue requiring) in-person instruction, there is no good reason to lift the automatic stay when then injunction at issue would not prevent the districts from doing so.

c. Lifting the automatic stay would cause irreparable harm.

Vacating the automatic stay will mean that some of 711,000 students currently attending brick and mortar schools may need to return home to parents who have not planned for their return. Tens-of-thousands of Florida families, none of whom are parties to this case, may need to quickly line-up day care, re-negotiate work schedules, and alter their daily lives for what, ultimately, may be overturned by the appellate courts. Oliva Dec., ¶¶ 21-24, 27. Moreover, vacating the automatic stay would disrupt months of careful planning and undermines the ability of the DOE to fulfill its constitutional and statutory supervisory authority. Oliva Dec., ¶ 13. This uncertainty, combined with the possibility of numerous skirmishes between the teachers' unions and school boards on whether, based on conclusions in the Order, the COVID testing rate is sufficiently low and appropriate mitigation measures or accommodations are in place, is exactly what the automatic stay provided by Rule 9.310(b)(2) was designed to avoid. *Fla. Dept. of Health*, 250 So. 3d at 829 (finding that it was abuse of discretion to vacate the automatic stay where "[a]ppellees . . . failed to demonstrate that they will suffer irreparable harm if the automatic stay is reinstated" particularly as "reinstating the automatic stay will maintain the status quo pending appeal").

c. Defendants have a high likelihood of success on appeal.

Defendants have a high likelihood of success on appeal for a variety of reasons, including the following: First, Plaintiffs' entire case is based on invoking a constitutional provision indisputably intended to benefit children and using it as a means to elevate the fears of a handful of teachers over the choices of 1.6 million students. There is no basis in fact or law for this outcome.

Second, assuming arguendo that the standards of "safe" and "secure" could be teased out from the other terms such as "high quality" or "uniform," the Plaintiffs have not met their burden to show that the Emergency Order threatens the safety and security of the education system or violates the mandate of Article IX. The weight of the evidence established that there is no bright line litmus test for reopening schools under these circumstances. Each of the experts recognized that a basic risk balancing policy decision must be made. The fallacy of Plaintiffs' bright line approach is demonstrated in rural districts, where the county tested 10 residents, for example, a single family of two parents and two children that test positive for COVID-19 would result in a positivity rate of 40% that day for the entire county. Oliva Dec., ¶ 16. And, a bright line approach is inconsistent with CDC guidance regarding the reopening schools. Def. Ex. 5. Finally, courts must give great deference to the executive and legislative branches of government in connection with their considerable authority under the Constitution. *Citizens for Strong Schools, Inc. v. Florida State Bd. of Educ*., 232 So.3d 1163, 1172 n. 5 (Fla. 1st DCA 2017),

Third, the Order is improper because it alters, rather than preserves, the status quo. *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So.3d 918, 924 (Fla. 2017) ("[T]he purpose of a temporary injunction is to preserve the status quo while final injunctive relief is sought."). As discussed above, the status quo is that an estimated 711,000 students are already attending brick and mortar schools. Oliva Dec., ¶ 6. The Order would suspend those plans, throw the school system into uncertainty, and could disrupt the education of millions of students indefinitely.

Fourth, Plaintiffs have an adequate legal remedy. No student is obligated to return to school for in-person instruction under any plan submitted under the Emergency Order. Teachers or staff members asked to return may still take any number of alternative courses—such as

taking paid time off—and may make use of the dispute resolution procedures in their collective bargaining agreements. These agreements contain negotiated-for grievance procedures through which teachers may contest their working conditions.

Fifth, the Emergency Order, issued pursuant to emergency authority delegated by the Legislature, under sections 252.36 and 252.46, Florida Statutes, is indisputably constitutional and entitled to deference. Plaintiffs cannot overcome the presumption in light of the competing obligations to provide for a safe, uniform, and high quality education.

Sixth, the Emergency Order is a proper exercise of the Defendants' constitutional supervisory authority which includes "strong incentives and disincentives to force accountability for results." Fla. Stat. § 1000.03(2)(b); *see also* Art. IX, § 1, Fla. Const. Plaintiffs have not, and cannot, meet their high burden to show that the Emergency Order, in incentivizing school reopening, is not rationally related to these goals.

Finally, the severance granted by the Order here destroys the entire purpose of the Emergency Order. The parties have not disputed the actual purpose of the Emergency Order, which is abundantly clear on its face: to provide for the safe reopening of schools while ensuring "the well-being of students and families, such as nutrition, socialization, counseling, and extra-curricular activities" and to "ensure the quality and continuity of the education process."

CONCLUSION

Plaintiffs' Motion falls short of the significant burden required to vacate the automatic stay. Regardless of the merits of appeal, policy decisions like those reflected in the Emergency Order that affect millions of Floridians must be afforded deference to protect Florida's students and parents from the significant harm that could be wrought by various competing orders. *Fla. Dept. of Health*, 250 So. 3d at 828. The Court should deny the Motion and uphold the automatic stay pending appellate review of the Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, the foregoing was electronically filed using the E-filing Portal System, and a copy was furnished by email on the following Service List:

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