

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

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

GENERAL JURISDICTION

CASE NO. 2020-015211-CA-31

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.

**REPLY IN SUPPORT OF DEFENDANTS’
MOTION TO DISMISS BASED UPON IMPROPER VENUE**

Defendants, Ron DeSantis, in his official capacity as Governor of the State of Florida; Richard Corcoran, in his official capacity as Commissioner of Education; the Florida Department of Education (the “DOE”); and the Florida Board of Education (collectively, the “Defendants”), hereby file this Reply in Support of Defendants’ Motion to Dismiss Based Upon Improper Venue (the “Motion”), and respectfully request that the Court apply the home venue privilege and dismiss this action as to the Defendants or transfer it to the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, where all of the State of Florida Defendants are headquartered.

SUMMARY OF THE ARGUMENT

It is undisputed that the State of Florida Defendants are headquartered in Leon County, Florida. *See* Affidavit of Jacob Oliva (Exhibit 2 to Motion). Plaintiffs also concede that Florida’s

well-established home venue privilege entitles the State of Florida Defendants to litigate in their home venue of Leon County, Florida. Plaintiffs' sole argument against dismissal or transfer to Leon County, Florida, is that one of the limited exceptions to the home venue privilege—the so-called sword-wielder exception—exists in this case. Plaintiffs concede that narrow exception applies only “[w]hen . . . the State reaches into a jurisdiction with a directive compelling action.” (Response at 4); see *Worldwide Appraisal Services, Inc. v. Dep't of Bus. & Prof'l Regulation*, 905 So. 2d 968, 971 (Fla. 5th DCA 2005) (rejecting application of sword-wielder exception where the challenged action had statewide impact and the defendant had taken no enforcement action against plaintiff in the county where the lawsuit was filed).

Here, the State of Florida has not reached into Miami-Dade County, Florida, for anything, nor do Plaintiffs allege otherwise in their Complaint. Indeed, Plaintiffs' Complaint is particularly meritless in Miami-Dade County because the speculative future injury they allege was conclusively negated by the actions of Miami-Dade County School Board Superintendent Carvalho, who recently announced that Miami-Dade County schools would commence the 2020-21 school year entirely remotely with no in-person attendance. Thus, even if Plaintiffs' allegations were well-founded, and they are not, there is zero possibility of immediate harm to them in Miami-Dade County, which is one of the elements of the sword-wielder exception. The immediate harm requirement is at the crux of the sword-wielder exception to the home venue privilege that Plaintiffs cite and is totally absent here. See, e.g., *Jacksonville Elec. Auth. v. Clay County Util. Auth.*, 802 So. 2d 1190, 1192 (Fla. 1st DCA 2002) (cited in Response at 4). Because the State of Florida Defendants are entitled to litigate in their home venue of Leon County, and because the sword-wielder exception does not and cannot apply to the allegations in the Complaint, the Court should dismiss the case or, at minimum, transfer it to Leon County, Florida.

ARGUMENT

1. The Home Venue Privilege Requires Dismissal or Transfer to Leon County.

Florida Rule of Civil Procedure 1.140 requires that actions be brought in the proper venue. As Defendants' own cases make abundantly clear (Motion at 6-9), the home venue privilege requires that any civil suit against the State of Florida or any of its agencies be brought where they maintain their principal headquarters. *Bush v. State*, 945 So.2d 1207, 1212 (Fla. 2006) (cited in Motion at 6);¹ *see also Sch. Bd. of Osceola County v. State Bd. of Educ.*, 903 So. 2d 963, 966 (Fla. 5th DCA 2005) (noting that “the home venue privilege appears to be a matter of right . . . **A trial court does not have discretion to ignore the application of the home venue privilege.**” (citations omitted)) (emphasis added). And yet Plaintiffs utterly disregard this in their Response, offering nothing by way of argument beyond posturing about the rights of a plaintiff to select its forum. Plaintiffs do not address or respond to the cases cited in the Defendants' Motion, including *School Board of Hernando County v. Rhea*, 213 So. 3d 1032 (Fla. 1st DCA 2017), where the First DCA reversed a trial court order wrongfully denying a motion to dismiss for improper venue based on the home venue privilege.

It is well-established in Florida that “**venue in civil actions brought against the state or one of its agencies or subdivisions, absent waiver or exception, properly lies in the county where the state, agency, or subdivision, maintains its principal headquarters.**” *Bush*, 945 So. 2d at 1212 (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 363–64 (Fla. 1977) (citations omitted)) (emphasis added). The “home venue privilege,” as it is known, “promotes orderly and uniform handling of state litigation and helps to minimize expenditure of

¹ Plaintiffs suggest that under *Bush*, transfer rather than dismissal is the preferred method of applying the home venue privilege. Here, Defendants have moved on both grounds. And while transfer may be preferable in some instances, where there are multiple Defendants who may claim their own home venue privilege, dismissal is proper. *Sch. Bd. of Hernando County v. Rhea*, 213 So. 3d 1032 (Fla. 1st DCA 2017).

public funds and manpower.” *Id.* Plaintiffs rely on empty generalities, arguing that “the plaintiff has the right to choose venue” (Response at 3) and “it is a plaintiff’s prerogative to select the venue.” (Response at 5). But these hollow pronouncements are meaningless here where home venue privilege applies. As Defendants have already shown, unrebutted, “a trial court may not dispense with the home-venue privilege on policy grounds, but rather the court **must apply the privilege** unless one of the recognized exceptions is satisfied.” *Rhea*, 213 So. 3d at 1039 (emphasis added) (cited in Motion at 9).

2. The Sword-Wielder Exception is Entirely Inapplicable Because the Emergency Order Does Not Target Miami-Dade County or Cause Any Imminent Harm to Plaintiffs.

Plaintiffs attempt to invoke the sword-wielder exception to the home venue privilege, but that narrow exception only applies, as Plaintiffs are forced to concede, “[w]hen . . . the State reaches into a jurisdiction with a directive compelling action.” (Response at 4); *see Worldwide Appraisal Services, Inc.*, 905 So. 2d at 971. Here, however, Defendants have not compelled any action, and certainly none in Miami-Dade County. Neither the Emergency Order, nor any school board plan approved pursuant to it, requires Plaintiffs to return to school in-person. *See* Motion to Dismiss Complaint at 7-9. Indeed, the Emergency Order allows for districts and schools to craft a plan for a remote learning curriculum, and expressly recognizes that any plan to offer in-person instruction will be subject to the guidance of local and state health officials. Ultimately, it is the 67 local school districts and school boards that will be directing under what circumstances Florida schools may offer in-person instruction. It could be no other way; the Florida Constitution and Florida Statutes place the responsibility for operating Florida schools with the individual school boards. *See* Florida Constitution, Article IX, Sec. 4(b) (“The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein.”); *see also* §§ 1008.25(2), Florida Statutes (“Each

district school board shall establish a comprehensive plan for student progression which must provide for a student’s progression from one grade to another”). And in fact, as Plaintiffs themselves concede, “[s]ince the Complaint was filed in this action, the Miami-Dade County School District has submitted its plan to begin the school year with *online-only instruction* for students for at least the first few weeks of the school year, in light of the dangerous conditions present in the County.” (Response at 2).

The crux of the Complaint is that Plaintiffs seek a ruling on the constitutionality of the Emergency Order—a ruling that would clearly have a statewide impact. Nothing in the Complaint alleges the Emergency Order will inflict unique or special injuries on Plaintiffs located in Miami-Dade County. Thus, as the court explained in *School Board of Osceola County*, 903 So. 2d at 967, where a ruling is sought on the constitutionality of a statute (or in this case an Emergency Order) **that will have a statewide impact**, and where any claimed invasion of an individual’s constitutional rights is secondary, “the sword-wielder exception does not apply to excuse compliance with the home venue rule.” *Id.*; see also *Worldwide Appraisal Services, Inc.*, 905 So. 2d at 971.

Plaintiffs have not been directed to be physically present at a Miami-Dade or Florida school for in-person instruction. No Miami-Dade or Florida teacher or student has been directed by a State of Florida Defendant to be physically present at a school for in-person instruction. The sword-wielder exception simply has no application here.

3. Plaintiffs’ Remaining Authorities Establish that Dismissal is Required.

The remainder of Plaintiffs’ authority is a page-long string cite (Response at 5-6) to cases addressing circumstances where a violation of constitutional rights had already taken place or was imminent. The very cases Plaintiffs rely upon support dismissal of this case because the Emergency Order does not cause harm to Plaintiffs or any other persons in Miami-Dade County

or anywhere in Florida. *See Pinellas Cty. v. Baldwin*, 80 So. 3d 366, 369 (Fla. 2d DCA 2012) (applying the exception where plaintiff alleged the State had taken her property in violation of article X, section 6, of the Florida Constitution by causing the land to be permanently flooded); *Dep't of Labor & Emp't Sec. v. Lindquist*, 698 So. 2d 299, 303-05 (Fla. 2d DCA 1997) (applying the exception where Department of Labor allegedly seized fishing nets without procedural due process); *Dep't of Revenue v. Arvida Corp.*, 315 So.2d 235 (Fla. 2d DCA 1975) (applying the exception where the alleged delivery of a tax warrant in taxpayer plaintiff's home county supported conclusion that "[o]bviously, the blow was imminently about to be laid on") (internal citation omitted); *Rehman v. Fla. Dep't of Law Enforcement*, 681 So. 2d 854 (Fla. 5th DCA 1996) (applying the exception to permit a suit in the county to which FDLE employee claimed FDLE transferred him in retaliation for whistle-blowing); *Barr v. The Fla. Bd. of Regents*, 644 So. 2d 333 (Fla. 1st DCA 1994) (applying exception where state university instructor had alleged retaliatory discharge in county where Board of Regents terminated her employment); *Bd. of Med. Exam'rs v. Kadivar*, 482 So. 2d 501 (Fla. 4th DCA 1986) (applying exception where complaint alleged deprivation of physician's right to practice medicine through revocation of medical license); *Swinscoe v. State*, 320 So. 2d 11 (Fla. 4th DCA 1975) (applying exception where plaintiffs filed complaint in county where Department of Revenue executed and recorded a tax warrant against them); *Hancock v. Wilkinson*, 407 So. 2d 969, 970 (Fla. 2d DCA 1981) (applying exception where plaintiff boarding home operator and occupants alleged state agency harassment including attempting to remove residents from the home and excessive inspections made with the intent to harass and intimidate). *See also Graham v. Vann*, 394 So. 2d 178, 179 (Fla. 1st DCA 1981) (applying sword-wielder exception on the basis of actual and existing conditions in Florida prisons) (Response at 4).

Indeed, in one case Plaintiffs rely on, involving the termination of a State Department of Transportation employee, the Third District Court of Appeal expressly recognized the limits of the sword-wielder exception to those circumstances, unlike this case, where there was an imminent invasion of a constitutional or statutory right:

[T]his state has long recognized the dichotomy between those cases in which a questioned agency action results in ***no imminent invasion of a constitutional or statutory right*** of the plaintiff and those in which the primary purpose of the litigation is judicial protection against an alleged unlawful infringement of a plaintiff's constitutional rights. Where agency action presents ***a genuine threat*** to such interests, venue is proper ***in the county*** where the alleged intrusion upon constitutional rights ***has occurred***.

Dep't of Transp. v. Morehouse, 350 So. 2d 529, 533 (Fla. 3d DCA 1977) *cert. denied*, 358 So. 2d 129 (Fla. 1978) (Response at 5) (emphasis added); *see also Jacksonville Elec. Auth. v. Clay County Util. Auth.*, 802 So.2d 1190, 1192 (Fla. 1st DCA 2002) (cited in Response at 4); *PSC v. Triple "A"*, 387 So. 2d 940, 942 (Fla. 1980) (cited in Response at 4); *State, Dep't of Labor and Employment Security v. Summit Consulting, Inc.*, 594 So. 2d 862, 863 (Fla. 2d DCA 1992) (cited in Response at 5).

Plaintiffs have not and cannot allege that any purported deprivation of rights has occurred or is imminent. The Emergency Order does not compel Plaintiffs or any individual Miami-Dade or Florida teacher, parent, or student, to take any action whatsoever, particularly to be physically present for in-person instruction at any Florida school. The home venue privilege unquestionably applies.

CONCLUSION

Requiring the Defendants to defend this case in Miami-Dade County as well as a related action in Orange County would frustrate the goals of orderly, efficient, and economical government and risk conflicting judicial rulings in different jurisdictions—exactly what the home venue privilege was designed to prevent. Based on Defendants' home venue privilege, the Court

should dismiss this action as to the Defendants or transfer it to the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, where all of the State of Florida Defendants are headquartered.

Because the State of Florida Defendants are entitled to an interlocutory appeal on the denial of a claim for home venue, Fla. R. App. P. 9.130(a)(3)(A), and because any action of the State of Florida Defendants to contest the merits of the claims presented could constitute a waiver of the home venue privilege, *Smith v. Williams*, 35 So. 2d 844, 847-48 (Fla. 1948), the State of Florida Defendants respectfully request that the Court enter a ruling on the pending venue motion prior to any other substantive litigation on the merits. Indeed, the State of Florida Defendants appear in this litigation for the limited purpose of asserting their home venue privilege while preserving all rights until such time as the venue has been resolved.

GUNSTER
600 Brickell Avenue, Suite 3500
Miami, Florida 33131
Telephone: 305-376-6000
Facsimile: 305-376-6010
acortinas@gunster.com
jkaskel@gunster.com
*Counsel for Defendants Governor Ron
DeSantis, Commissioner Richard Corcoran,
Florida Department of Education, and
Florida Board of Education*

By: /s/ Angel A. Cortiñas
Angel A. Cortiñas, FBN 797529
Jonathan H Kaskel, FBN 52718

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 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

SERVICE LIST

COFFEY BURLINGTON, P.L.
Kendall B. Coffey, Esquire
Josefina M. Aguila, Esquire
Scott A. Hiaasen, Esquire
kcoffey@coffeyburlington.com
jaguila@coffeyburlington.com
shiaasen@coffeyburlington.com
yvb@coffeyburlington.com
service@coffeyburlington.com
lperez@coffeyburlington.com
Counsel for Plaintiffs

FLORIDA EDUCATION ASSOCIATION
Kimberly C. Mencion, Esquire
kimberly.mencion@floridaea.org
Counsel for Plaintiffs

MEYER, BROOKS, BLOHM & HEARN, P.A.
Ronald G. Meyer, Esquire
rmeyer@meyerbrookslaw.com
lthomas@meyerbrookslaw.com
Counsel for Plaintiffs

PHILLIPS, RICHARD & RIND, P.A.
Lucia Piva, Esquire
Mark Richard, Esquire
Kathleen M. Phillips, Esquire
lpiva@phillipsrichard.com
mrichard@phillipsrichard.com
mmcdougald@phillipsrichard.com
Counsel for Plaintiffs

MIAMI-DADE COUNTY ATTORNEY'S OFFICE
Angela Benjamin, Esquire
angela.benjamin@miamidade.gov
jeane.neal@miamidade.gov
Counsel for Miami-Dade County Mayor
Carlos Gimenez