

**IN THE FIRST DISTRICT COURT OF APPEAL  
FOR THE STATE 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.

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

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

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**AMICUS CURIAE BRIEF OF FOUNDATION FOR EXCELLENCE  
IN EDUCATION, INC. IN SUPPORT OF APPELLANTS**

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## **STATEMENT OF INTEREST**

The Foundation for Excellence in Education, Inc. (“ExcelinEd”) is a 501(c)(3) nonprofit, nonpartisan organization founded in 2008 whose mission is to transform education to unlock opportunity and lifelong success for each and every child. ExcelinEd designs and promotes student-centered education policies and provides model legislation, rule-making expertise, implementation assistance, and public outreach. ExcelinEd’s interest in this case is linked to its mission: it believes that Florida’s education system provides high-quality, student-centered education in the state and, for that reason, is interested in the outcome of this litigation in order to preserve the state’s high-quality, student-centered education.

## **SUMMARY OF THE ARGUMENT**

The circuit court vastly exceeded its authority in declaring unconstitutional and severing portions of the Emergency Order 2020-EO-06 (the “Emergency Order”) on the basis that the Emergency Order violated Section 1(a), Article IX of the Florida Constitution and denied Appellees’ due process. The Emergency Order was an executive level planning and operational decision regarding policy judgments, beyond the power of the courts to second-guess. Moreover, in assessing the public interest prong for injunctive relief and granting the preliminary injunction, the circuit court abused its discretion by completely disregarding the harm that prolonged physical closing of schools will have on Florida public school students.

The digital divide and challenges faced by parents who have no choice other than to work outside the home but can't afford childcare make full-time virtual learning untenable for too many students. Additionally, large numbers of students and parents rely on the in-person instruction and services that public schools provide, such as for students with special needs or heightened behavioral issues, English learners, and students facing food insecurity or living in abusive homes.

With these concerns in mind, the Florida Department of Education ("DOE") exercised its executive emergency authority during the current pandemic by enacting the Emergency Order in an attempt to fulfill the goal set forth in Article IX, Section 1(a) of the Florida Constitution to provide a "uniform, efficient, safe, secure and high quality system of free public schools" for Florida's students. While the Plaintiffs may disagree with the way in which the Emergency Order accomplishes this goal, there is simply no justiciable basis upon which they can challenge this decision. Nor did they meet their burden of establishing a substantial likelihood of success on their claim that Defendants acted arbitrarily and capriciously in balancing these multi-directional goals. To the contrary, as demonstrated by the record and supported by the data below, the DOE's decision to include an in-class option in the Emergency Order undoubtedly serves a conceivably rational basis.

Parental choice is one of the pillars of the Emergency Order and permeates Florida education policy. Nothing in the Emergency Order requires a parent to send a child to class or a school district to offer only in-class instruction. It does facilitate both,

however, by providing additional funding support to schools whose plans include classroom instruction as one option for students. The order below threatens to undercut the right of parents with children in K-12 public schools to choose the best education settings for their children – a right in which they should share equally with parents of children in private or parochial schools that have reopened. Facilitated by the Emergency Order, the families of more than 700,000 public school students chose to have them return to in-person instruction at brick-and-mortar schools throughout Florida. (IB 18)<sup>1</sup>. The circuit court’s ruling and “severance” of key provisions of the Emergency Order ignored the state’s stated public interest in providing these choices, without legal grounds to do so, and should be reversed.

### **ARGUMENT**

As explained in the Appellants’ Initial Brief, school districts that submitted approved plans pursuant to the Emergency Order, instead of being funded under Florida statutes and rules that tie state funding to actual enrollment and reimburse districts at a discounted rate for district-operated virtual classes, would effectively receive additional state funding—despite potentially decreased enrollment and increased participation in distance learning during the pandemic. (IB 14-17). If upheld, the circuit court’s order would take away the incentive for school districts to offer in-

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<sup>1</sup> Citations to Appellants’ Initial Brief are in the form of “IB [page number].”



person instruction, which could therefore threaten the broad availability of in-person instruction statewide. A reduction in the availability of in-person instruction at K-12 public schools would lead to declines in the state’s learning gains and create greater disparities in educational achievement for minority, lower-income and learning disabled children.

**I. THE COURTS EXCEED THEIR BOUNDS IN SECOND-GUESSING DECISIONS OF THE EXECUTIVE BRANCH IN HOW TO DELIVER A “SAFE” “SECURE” AND “HIGH QUALITY” EDUCATION – ESPECIALLY IN AN EMERGENCY SITUATION.**

This Court’s decision in *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017), *approved*, 262 So. 3d 127 (Fla. 2019), is dispositive of this case. Questions regarding the overarching question of “adequate provision” for a high quality education under Art. IX(1)(a) are constitutionally committed to the executive and legislative branches, because Art. IX(1)(a) creates no justiciable standards by which the courts can determine adequacy. *Id.* at 1167 n.3 (“As to “safe” and “secure,” the trial court ruled that these terms are subject to judicially manageable standards, but that Appellants had withdrawn any challenge to the safety or security of the public school system before trial. The court found that these issues were nonetheless tried with regard to the adequacy of funding to meet repair and maintenance needs, but that the evidence submitted did not demonstrate insufficient funding for these needs. As we hold that the overarching question of adequacy is not justiciable, we do not opine on the trial court's conclusion

in this regard.”). The Emergency Order falls squarely within the “overarching question of adequacy;” therefore, the order below must be reversed.

Article IX(1)(a)’s provisions for “safe” and “secure” likewise are non-justiciable, as they involve the state’s police powers in providing for the health, safety and welfare of its citizens. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of injunctive relief involving state COVID-19 restrictions) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), 197 U.S. 11, 38 (1905); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)) (IB 36-37); *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 n.4 (Fla. 1996).

The DOE (consistent with the authority granted in the Governor’s Executive Orders), has exercised its executive discretion to address the safety and security of allowing students who wish to return to classroom learning by requiring school districts to submit plans on how they will provide instruction and the necessary services for students with disabilities. Nowhere does the Emergency Order mandate school districts to offer solely classroom learning (and, indeed, the DOE also approved plans for Florida’s three most pandemic-affected counties that call for exclusively remote instruction at the beginning of the school year and guaranteed their projected per student funding notwithstanding). But the DOE exercised its constitutional authority to distinguish fiscally between school districts that incur additional expenses by opening up classroom instruction amidst the current pandemic emergency and those that do not.

Such distinctions clearly fall within the executive province of planning level decisions. *Citizens for Strong Sch., Inc.*, 232 So. 3d at 1171. As noted in the Initial Brief, “the State’s discretion is ‘especially broad’ in emergencies ‘fraught with medical and scientific uncertainties.’ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613. (2020) (Roberts, C.J.) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).” (IB 32).

The circuit court improperly intruded into a policy judgment of the executive branch and violated the constitutionally-mandated separation of powers. Art. II, § 3, Fla. Const. (“[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”); *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] . . .”). As noted by the Florida Supreme Court, separation of powers is the “cornerstone of American democracy.” *Corcoran v. Geffin*, 250 So. 3d 779, 783 (Fla. 1st DCA 2018) (quoting *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004)).

**II. THE EMERGENCY ORDER IS RATIONALLY RELATED TO DEFENDANTS’ AUTHORITY TO ENSURE A UNIFORM, EFFICIENT, SAFE, SECURE AND HIGH QUALITY SYSTEM OF PUBLIC SCHOOLS**

In addition to being immune from judicial review due to separation of powers, the Emergency Order is rationally related to the provisions of Art. IX(1)(a) of the State

Constitution. Thus, even if the courts could review whether the Emergency Order complied with Art. IX(1)(a), the Plaintiffs were required to “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.”” *See Citizens for Strong Schools, Inc.*, 232 So. at 1172 n.5. This standard applies in all cases challenging the State's compliance with Article IX of the Florida Constitution, and deference in these matters is crucial to avoid intrusion by the courts into legislative and executive authority. *Id.* Similarly, under their state due process claim under Art. I, Section 9 of the Florida Constitution, the Plaintiffs still had the burden to negate *every conceivable rational basis* which might support it. *Agency for Health Care Admin. v. Hameroff*, 816 So. 2d 1145, 1149 (Fla. 1st DCA 2002) (citing *Coy v. Fla. Birth- Related Neurological Injury Compensation Plan*, 595 So. 2d 943, 945 (Fla. 1992)).

Appellees were not and will not be able to negate every conceivable rational basis which supports the enactment of the Emergency Order. For example, the below data relating to the impacts on student learning outcomes and parents establish that the DOE acted in a conceivably rational manner, which Appellees cannot negate, by including an in-class option for students. In addition, the Emergency Order is consistent with express statutory authority under Fla. Stat. § 1001.10(8), which favors the reopening of schools for in-person instruction after health, safety, and welfare issues are considered.

Therefore, given the great deference afforded to the executive branch in matters of education policy, and in light of the emergency and unprecedented nature of the COVID-19 pandemic, the circuit court erred in failing to defer to the Appellants and finding the Emergency Order unconstitutional.

### **III. FAILURE TO OFFER IN-PERSON INSTRUCTION WILL IMPACT ACADEMIC OUTCOMES AND CAUSE LEARNING LOSS**

ExcelinEd is on record as supporting virtual learning as an important component in providing educational choice and expanding students' access to learning. (ExcelinEd Motion for Leave at 2). School districts, principals, teachers and parents have conducted a heroic and unprecedented effort to ensure that Florida's K-12 students continued to receive instruction throughout the pandemic. However, the well-documented mixed results of this monumental effort, as well as the burden it places on working parents and students with special education needs, demonstrates that Florida still has further work to do before virtual learning becomes the substitute for rather than a supplement to K-12 education. In addition to the challenges of safely reopening schools during the pandemic (challenges which the DOE directed school districts to address), there are significant individual and societal costs of keeping schools closed and relying solely on virtual learning, including significant impacts on academic outcomes and learning gains. A recent study by McKinsey & Company shows that students who already face disadvantages in traditional school settings will be disproportionately impacted by

continued months of virtual learning due to the coronavirus; some students do not learn well in a virtual setting, and far too many students do not have access to high-quality virtual options.<sup>2</sup> Florida has implemented student-centered policies that have narrowed achievement gaps in over the last two decades; however, such disparities across socio-economic status, race, and ethnicity can worsen and cause serious, hard-to-repair damage to educational outcomes due to school closures.<sup>3</sup>

The National Assessment of Education Progress (“NAEP”) is a criterion-referenced examination given to a nationally representative sample of students in grades 4 and 8 reading and mathematics every other year. It is the only tool educators and policymakers have to compare student performance across the United States. Florida’s most recent NAEP results reflect, in part, the sustained and consistent commitment of Florida’s Legislative and Executive branches to improving the state’s public education system.<sup>4</sup> According to the NAEP:

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<sup>2</sup> McKinsey & Company, *COVID-19 and student learning in the United States: The hurt could last a lifetime*, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>.

<sup>3</sup> Florida Department of Education, *Reopening Florida’s Schools and the CARES Act*, <http://www.fldoe.org/core/fileparse.php/19861/urlt/FLDOEReopeningCARESAct.pdf>; Centers for Disease Control and Prevention, *The Importance of Reopening America’s Schools this Fall*, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

<sup>4</sup> *NAEP State Profiles: Florida Demographics*, THE NATION’S REPORT CARD, <https://www.nationsreportcard.gov/profiles/stateprofile/overview/FL>.

- In 2019, **Florida students outperformed the national average in every student group on the fourth-grade NAEP reading assessment:**
  - Florida fourth grade readers outperformed the national average by more than half a grade level. (6 points)
  - African-American readers outperformed their peers by more than half a grade level. (8 points)
  - Hispanic readers outperformed their peers by one and a half grade levels. (13 points)
  - Low-income readers outperformed their peers by a grade level. (9 points)
  - Students with disabilities performed better than their peers by one and a half grade levels. (16 points)
- Differences in the average overall scale of performance between White students on the one hand and Black and Hispanic students on the other remained meaningfully smaller than they were 22 years ago.

Prolonged school closures could cause these academic achievements to regress.

A study by NWEA and scholars at Brown University and the University of Virginia suggest there will already be a severe learning loss due to the early school closures in March 2020.<sup>5</sup> This study projects that even if schools were to reopen in Fall 2020, the average student could begin the school year having lost as much as a third of the expected progress from the previous year in reading, and half of the expected progress in math.<sup>6</sup> As no NAEP test was due to be conducted in 2020, it is possible the projected losses could have underestimated the true scale of the learning losses.

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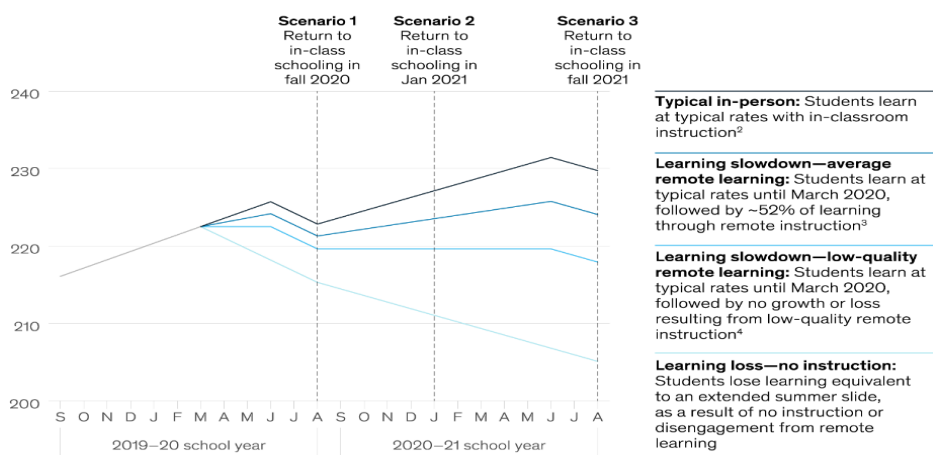
<sup>5</sup> Annenberg Brown University, *Projecting the potential impacts of COVID-19 school closures on academic achievement*, <https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf>.

<sup>6</sup> *Id.*

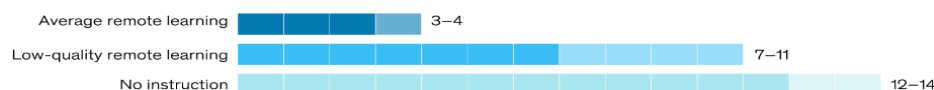
Additionally, McKinsey & Company created a statistical model which projects three epidemiological scenarios: 1) in-class instruction resumes in Fall 2020; 2) school closures and part-time schedules continue intermittently through the 2020–21 school year, and in-school instruction does not fully resume before January 2021; and 3) schools operate remotely for the entire 2020–21 school year.

**In all three scenarios, students are at risk for significant learning loss.**

**Projected 6th-grade math performance, example, NWEA<sup>1</sup> RIT Scores**



**Average months of learning lost in scenario 2 compared with typical in-classroom learning**



<sup>1</sup>NWEA is a K–12 assessment provider serving over 9,500 schools across the US; their RIT scores are a standardized scaled score that measures student performance and progress.  
<sup>2</sup>Normal school year growth rates estimated using NWEA data.  
<sup>3</sup>52% assumed growth for high-quality instruction.  
<sup>4</sup>0% assumed average growth for low-quality instruction. Rates of learning loss may differ by student groups.  
 Source: Megan Kuhfeld, Dennis Condron, and Doug Downey, *When does inequality grow?*, 2019; Center for Research on Education Outcomes, Online Charter Schools Study, 2016

McKinsey  
& Company

### **A. Learning Loss Will Be Most Significant Among Low-income, Black, and Hispanic Students.**

Low-income students are less likely to have access to high-quality remote learning or to a conducive learning environment, such as a quiet study space with minimal distractions, devices they do not need to share, high-speed internet, and parental academic supervision. Black and Hispanic students not reading at the third-



grade level are eight times more likely to drop out or fail to graduate high school.<sup>7</sup> These drop out numbers are significant because as the testimony at the injunction hearing of Glenton Gilzean Jr, President and Chief Executive Officer of Central Florida Urban League, noted: “there was a recent study that showed that more than 60 percent of individuals who are incarcerated today in Florida's prisons lack a high school diploma ... So we understand that if the – the education components... are not there, you're basically feeding into the school-to-prison pipeline.” Hr’g Tr. [A. 1273-4].

A study by Brown and Harvard Universities assessed how 800,000 students used Zearn, an online math program, both before and after schools closed in March 2020.<sup>8</sup> Data showed that through late April, student progress in math decreased by about half in low-income ZIP codes, by a third in classrooms in middle-income ZIP codes, and not at all in classrooms in high-income ZIP codes.

There are several reasons low-income students are experiencing the greatest impacts.

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<sup>7</sup> Annie E. Casey Foundation Report, *Double Jeopardy, How Third Grade Reading Skills and Poverty Influence High School Graduation* <https://www.aecf.org/resources/double-jeopardy/>.

<sup>8</sup> Chetty, et al., *How Did COVID-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector Data. Opportunity Insights*. [https://opportunityinsights.org/wp-content/uploads/2020/05/tracker\\_paper.pdf](https://opportunityinsights.org/wp-content/uploads/2020/05/tracker_paper.pdf).

### **i. Lack of Access to High Speed Internet**

Many low-income families do not have the capacity to facilitate distance learning (*e.g.* limited or no computer access, limited or no internet access) and may have to rely on school-based services that support their child’s academic success.

According to Future Ready Schools, a project of the Alliance for Excellent Education, 22% of Florida households are without high-speed home internet. Of the more than 859,000 Florida children without high-speed home internet, approximately 256,000 are from households with an annual income of less than \$25,000.<sup>9</sup>

According to a report by the Economic Policy Institute, 35% of low-income households with school-aged children don’t have high-speed internet – this is in contrast to 17% for moderate-income families, and only 6% for middle-class and affluent families.<sup>10</sup> When measured by race and ethnicity, the gap is greater for Black and Hispanic families:

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<sup>9</sup> Future Ready Schools, *Students of Color Caught in the Homework Gap*, <https://futureready.org/homework-gap/>

<sup>10</sup> Economic Policy Institute, *The coronavirus will explode achievement gaps in education*, <https://www.epi.org/blog/the-coronavirus-will-explode-achievement-gaps-in-education/>.

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**Many school-age children live in households without high-speed internet**

*% of U.S. households with children ages 6 to 17 who do not have a high-speed internet connection*

|   | All | White | Black | Hispanic | Asian |
|---|-----|-------|-------|----------|-------|
| All households with school-age children | 15% | 10    | 25    | 23       | 5     |
| BY ANNUAL HOUSEHOLD INCOME              |     |       |       |          |       |
| Less than \$30K                         | 35% | 28    | 41    | 38       | 14    |
| \$30K-\$74,999                          | 17% | 13    | 21    | 22       | 7     |
| \$75K or more                           | 6%  | 4     | 9     | 9        | 2     |

Note: Race and ethnicity are based upon the race and ethnicity of the head of household. Whites, blacks and Asians include only those who reported a single race and are only non-Hispanics. Hispanics are of any race. Household income data reported for the calendar year prior to the survey year.

Source: Pew Research Center analysis of 2015 American Community Survey (IPUMS).

PEW RESEARCH CENTER

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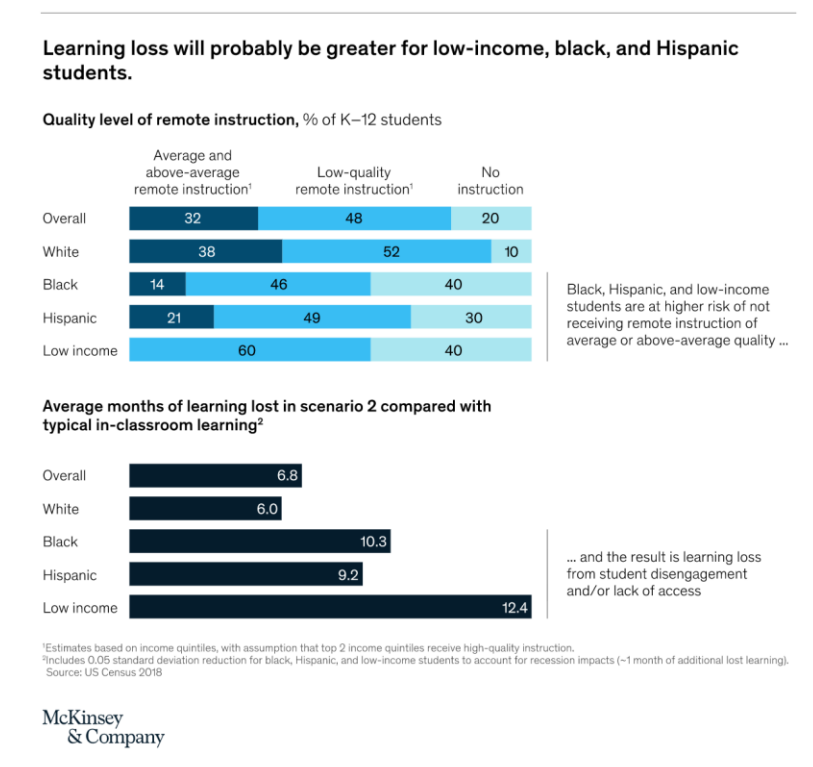
## ii. Decline in Student Engagement

Even with internet access, minority and lower income students as a group are less engaged in their online classes. Younger children require constant supervision and cannot be left unattended to fend for themselves in a virtual class. Parents who must work outside the home must either leave students at home alone, hire a care taker or send their student to a “pop up academic centers” or “Virtual school assistance programs.” While the latter two options provide a student with required supervision, cost is often an insurmountable barrier for those in the lower income levels.<sup>11</sup>

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<sup>11</sup> The Miami Herald, *What do working parents do when school starts Monday? Communities have this solution*, <https://www.msn.com/en-us/news/us/what-do-working-parents-do-when-school-starts-monday-communities-have-this-solution/ar-BB18wvEh>; WINK News, *Virtual learners have local options for getting help with studies*, <https://www.winknews.com/2020/08/31/virtual-learners-have-local-options-for-getting-help-with-studies/>.

Data from Curriculum Associates suggest that only 60% of low-income students are regularly logging into online classes compared to 90% of high-income students.<sup>12</sup> Engagement rates are also lagging behind in schools serving predominantly Black and Hispanic students with just 60-70% logging in regularly. The below chart created by McKinsey & Company displays quality level of remote instruction and associated learning loss<sup>13</sup>:



<sup>12</sup> McKinsey & Company, *COVID-19 and student learning in the United States: The hurt could last a lifetime*, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>.

<sup>13</sup> *Id.*

When all of the impacts are taken into account, the average student could fall seven months behind academically, while Black and Hispanic students could experience even greater learning losses, equivalent to 10 months for Black children and nine months for Hispanics or Latinos.<sup>14</sup> This is estimated to exacerbate existing achievement gaps by 15-20%.<sup>15</sup>

#### **IV. THE FLORIDA CONSTITUTION SUPPORTS STATE POLICIES THAT FACILITATE PARENTAL CHOICE IN K-12 EDUCATION**

The circuit court’s ruling may have little or no effect on one segment of parents who can afford childcare options or have a child who is able and willing to learn independently through exclusively virtual learning methods. However, for a large segment of the state’s population, remote learning is not viable as an exclusive option. The Emergency Order takes into account the public policy of the state to provide a “high quality” education, while also providing for a “safe” and “secure” education. Addressing how best to attain these goals is a policy decision the executive branch is authorized to make and is due substantial deference. *Citizens for Strong Sch., Inc.*, 232 So. 3d at 1171. The circuit court gave it no deference. It also ignored the state’s public interest in giving parents a choice in their children’s K-12 education.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

### **A. Challenges for Working Parents**

Nearly two-thirds of employed parents of minor children in Florida say that school closures and/or lack of childcare have either somewhat (41%) or greatly (23%) hurt their ability to fully perform their job responsibilities during the pandemic.<sup>16</sup> Working mothers have reported the closures to be particularly difficult. According to the report, 71% of mothers said juggling childcare and their job has somewhat or greatly hurt their performance at work, compared to 44% of fathers.<sup>17</sup>

### **B. Challenges for Parents of Students with Disabilities**

Last year, nearly 415,000 publicly-educated students in Florida qualified for Individualized Education Plans (“IEP”).<sup>18</sup> With classes being virtual, parents face significant challenges as they take on the role of not only the primary educator, but also the child’s IEP team – teacher, aide, therapist, interventionist and specialist.

Parents of students with disabilities are disproportionately likely to say that their children’s schooling has stalled during the pandemic. In a ParentsTogether survey, 35% of parents of students in special education said their kids were doing little to no remote

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<sup>16</sup> Florida Council of 100, *The Impacts Of PreK-12 School Campus Closures*, [https://fp100.clubexpress.com/content.aspx?page\\_id=86&club\\_id=111430&item\\_id=51429](https://fp100.clubexpress.com/content.aspx?page_id=86&club_id=111430&item_id=51429).

<sup>17</sup> *Id.*

<sup>18</sup> Florida Department of Education, *2020 SEA Profile Florida*, <http://www.fldoe.org/core/fileparse.php/7602/urlt/SEAProfile20.pdf>

learning, compared to 17% of families with kids in general education classes. A big factor is the technological difficulty that these students experience due to their disabilities. A Pew Research Center survey of Americans conducted in spring 2016 found disabled Americans express lower levels of comfort with using technology.<sup>19</sup>

### **C. Challenges of Low-income Parents and Students**

For children from low-income families, school meals are an especially critical source of affordable, healthy foods.<sup>20</sup> In the 2019-2020 school year, 64% of Florida students were on free and reduced lunch.<sup>21</sup> According to surveys administered by the Urban Institute and the Brookings Institution in Spring 2020, approximately one in five parents living with children have experienced food insecurity due to the pandemic, and rates of food insecurity are even higher among black and Hispanic households.<sup>22</sup> With the closure of schools in Spring 2020, however, many children and families lost access to these meals, with one recent piece of research suggesting that only 61% of families

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<sup>19</sup> Pew Research Center, *Disabled Americans are less likely to use technology*, <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>

<sup>20</sup> *Id.*

<sup>21</sup> Florida Department of Education, *DOE 2019 -2020 Lunch Status by District Spreadsheet*, [https://fp100.clubexpress.com/content.aspx?page\\_id=86&club\\_id=111430&item\\_id=51429](https://fp100.clubexpress.com/content.aspx?page_id=86&club_id=111430&item_id=51429).

<sup>22</sup> Brookings, *The COVID-19 crisis has already left too many children hungry in America*, <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/>.

whose children usually receive free or reduced-price school meals continued to receive meals during the closures.<sup>23</sup>

As the Defendants' witness, Mr. Gilzean, testified, for some students in Florida, schools also are a safe haven. Hr'g Tr. [A. 1295]. Students living in low-income, disinvested, overcrowded, or high-crime neighborhoods are more likely to experience toxic stress from exposure to violence, homelessness, and economic insecurity that interferes with emotional health and learning.<sup>24</sup>

The Emergency Order encourages school districts to offer in-person instruction to provide the parents and students facing these types of challenges with an option to attend in-person classes, so that they can be afforded uniform and high-quality education. In doing so, the DOE's goal was to fulfill the state's strong public policy as expressed in Article IX(1)(a). Importantly, the ultimate decision of whether the student returns to the classroom was left to parents in school districts that chose the option of offering classroom learning. By striking the portions of the Emergency Order it deemed

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<sup>23</sup> Urban Institute, *More Than One in Six Adults Were Food Insecure Two Months into the COVID-19 Recession*, <https://www.urban.org/research/publication/more-one-six-adults-were-food-insecure-two-months-covid-19-recession>.

<sup>24</sup> Economic Policy Institute, *Toxic stress and children's outcomes, African American children growing up poor are at greater risk of disrupted physiological functioning and depressed academic achievement* <https://www.epi.org/publication/toxic-stress-and-childrens-outcomes-african-american-children-growing-up-poor-are-at-greater-risk-of-disrupted-physiological-functioning-and-depressed-academic-achievement/>.



objectionable, the circuit court has jeopardized the opportunity to offer classroom learning to those who want it and those who need it.

### **CONCLUSION**

The circuit court violated the Florida Constitution's separation of powers when it attempted to second guess the Emergency Order and rewrite it. Moreover, it abused its discretion in entering the preliminary injunctions because Plaintiffs failed to meet their burden of showing that the Emergency Order was not conceivably rationally related to the Defendants' constitutional authority and because the circuit court ignored the countervailing public interest in favor of giving parents a choice in of the delivery of their children's education. Encouraging school districts to give parents and students a choice to attend an in-class is critical to the success of many Florida students. The circuit court erred by failing to defer to the Appellants in this time of emergency and improperly intruded into a policy judgment of the executive branch. The circuit court's orders should be reversed and the case dismissed.

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**CERTIFICATE OF COMPLIANCE**

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