IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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

Appellants,

vs.

FLORIDA EDUCATION ASSOCIATION, et al.,

Appellees,

and

MONIQUE BELLEFLEUR, et al.,

Appellees.
_____/

Consolidated DCA Case Nos. 1D20-2470 and 1D20-2472
L.T. Case No.: 2020-CA-001450

ANSWER BRIEF OF APPELLEES

Appeal From a Non-Final Order of the Circuit Court

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STATEMENT OF CASE AND FACTS[1]

Introduction

The State's initial brief does not accurately state Plaintiffs' position below, ignores the trial court's factual findings entered after a full evidentiary hearing, and fails to address the trial court's rationale for the remedy it imposed.

The proceeding below was a challenge to the Department of Education's ("DOE") arbitrary and capricious administration of DOE Emergency Order 2020-EO-06 (the "Emergency Order"). [A 132-39.] That Emergency Order provided for funding to school districts for students opting to attend school via On-Line Learning. [A 137 (providing funding for "innovative learning environments").] But, to obtain the funding, school districts had to submit plans for reopening schools for "in-person" learning as well, which had to begin by August 31, 2020. [A 133-39.]

Governor DeSantis and Commissioner Corcoran repeatedly stated in public forums that local school districts would have decision-making authority as to reopening for in-person learning. [A 984 (Governor DeSantis stating "[a]nd if a school district needs to delay the school year for a few weeks so that everything will be in good shape, have at it."); A 985 (Governor DeSantis saying "I mean, I'm not

[1] References to the Appellants are to the "State." References to the Appellees are to the "Plaintiffs." References to the initial brief's appendix are to "A" (*e.g.* [A 1] references initial brief appendix page 1) and to the answer brief's appendix are to "AB" (*e.g.* [AB 1] references answer brief appendix page 1).

telling you [school districts] when you have to start the year. . . . So we really, really, you know, support that -- school districts making those decisions based on the best interests of the students[.]"); *Id.* (Commissioner Corcoran stating "we recognize that the local school districts are in charge . . . [a]nd so we have given them that flexibility, and they can absolutely make whatever decision they want").]

The Emergency Order says the same thing. [A 132-39.] The Emergency Order states that local school districts will make decisions as to reopening brick and mortar, "subject to advice and orders of the Florida Department of Health [("DOH")] [and] local health departments."[2] [A 133.] Absent such "advice" from DOH or its local departments that it is unsafe to physically open a school, local school districts had to reopen schools for in-person learning or lose funding. [*See* A 132-39.]

But, after an extensive evidentiary hearing, the trial court made a factual finding that "State health officials were instructed not to provide an opinion on the reopening of schools" for in-person learning. [A 1546 (emphasis added).] Thus, the school districts could not obtain a recommendation from DOH and local health departments as to whether it was safe to physically reopen. This meant that, under the Emergency Order's mandates, school districts had no real choice. The way the State implemented the Emergency Order's directives presented local school districts

[2] The local health departments constitute arms of DOH. [A 1052 ("So all the county health departments around the state, the 67, are just an extension of the State health department. They are not independent departments.").]

with a "Hobson's Choice" to essentially "take it or leave it." They had to reopen for in-person learning or they would not receive any funding for the vast number of students who opted for On-Line Learning—even if non-DOH health experts said it was unsafe to physically reopen some schools. [*Id.*]

As shown in this brief, the trial court rightly found that this was arbitrary and capricious behavior, which rose to the level of a constitutional violation. The trial court properly used its equitable powers to fashion a remedy that did what the Emergency Order said it would do—allow local school districts to make the decision as to whether they could safely open schools for in person learning based on recommendations from health experts. The trial court simply deleted the requirement for plan submission and approval as a condition of obtaining enhanced funding. Otherwise, teachers, staff, and students would unwittingly be attending some schools where in-person learning was unsafe due to either COVID-19 incidence or where individual school conditions presented an unsafe environment because masks, social distancing, and other COVID-19 protection methods could not be effectively implemented. [A 1550.]

Based on the record presented, the trial court properly entered the temporary injunction, which this Court should affirm.

Background

The COVID-19 pandemic has caused an unprecedented public health crisis across Florida and throughout the world. [A 1146-47.] The virus has killed more than 10,000 Floridians and afflicted approximately 600,000 in the state. [A 1541.] In fact, since the evidentiary hearing in this case took place, more than 4,604 children have tested positive for COVID-19 and at least 55 children have been hospitalized.[3] Because the novel coronavirus, which causes COVID-19, spreads from person-to-person through droplets and airborne particles, it thrives in areas where social distancing, strict mask compliance, frequent sanitization, and other precautionary measures are difficult to ensure—*i.e.*, like Florida's public schools. [*See* AB 685 (describing how COVID-19 is transmitted); A 1170-73 (describing the difficulties a public school is facing in implementing adequate safety measures).] While initially it was unclear whether children contributed to the virus's spread, evidence now shows that the highly contagious virus spreads "from child to adult and adult to child." [A 1056.]

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[3] *Compare Coronavirus: Characteristics of Cases in Pediatric Florida Residents <18 Years Old*, Fla. Dep't of Health, (DOH's pediatric statistics from September 6, 2020 evidencing 52,535 total cases with 653 hospitalized), *available at* http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/pediatric_report_latest.pdf, *with Coronavirus: Characteristics of Cases in Pediatric Florida Residents <18 Years Old*, Fla. Dep't of Health (those same statistics on the last day of the hearing in this case (August 21, 2020) evidencing 47,931 total cases with 598 hospitalized), *available at* http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/pediatric_report_20200822.pdf.

When evidence of COVID-19 infections first surfaced in Florida in March 2020, Governor DeSantis declared a state of emergency and authorized state agencies to suspend statutory and rule provisions that hinder the ability to perform actions necessary to address an emergency. [A 11-17.] Commissioner Corcoran issued DOE Emergency Order 2020-EO-01 that same month, authorizing school districts to close their physical facilities and shift to a remote or "On-Line Learning"[4] model without incurring any penalties or losing any funding for the remainder of the 2019-2020 school year. [A 33-42.] Although Florida had less than 50 confirmed cases of COVID-19 when Commissioner Corcoran issued Order 2020-EO-01, such measures were deemed necessary in light of the virus's catastrophic potential. [*See id.*; A 975.]

In the months after Commissioner Corcoran issued Order 2020-EO-01, the dangers of COVID-19 in Florida grew exponentially—Florida became the

[4] This Court's Order on the Motion to Reinstate Automatic Stay conflates two unrelated education concepts that are critical to understanding how schools are funded: "Virtual" versus "On-Line" instruction. Virtual school describes an existing (pre-COVID) program in which a student learns digitally from home at the student's own pace. Funding for these students is based on course completion rate regardless of attendance. Standard funding of schools is based on in-person attendance each day for the 180 day school year (or equivalent hours). *See* §§ 1001.42(12)(a), 1003.02(1)(g), Fla. Stat. "On-Line" Learning describes the many various types of remote instruction that schools employed in March when in-person classes were canceled and that vast numbers of students elected to take this fall. Under the current funding system—if school districts do not follow the Emergency Order, those students will not be counted at all in determining funding for local school districts. [A 1382-83 (Jacob Oliva describing the different funding methods).]

"epicenter of the coronavirus" nationwide with infection numbers growing from 50 to 600,000 in less than six months. [*See* A 975-77.] However, despite COVID-19 posing a substantially larger risk to students, teachers, and staff in the summer than it did when schools were closed in the spring, Commissioner Corcoran issued the Emergency Order at issue on July 6, 2020, for the express purpose of "reopening brick and mortar schools with the full panoply of services for the benefit of Florida students and families." [A 132-39.]

Both before and after the Emergency Order was issued, Governor DeSantis and Commissioner Corcoran repeatedly announced publicly that decisions on whether to open schools would be made at the local school district level—and that neither students nor teachers would be forced to attend school in person when schools reopened while COVID-19 was still a threat. [A 984-85.] These turned out to be empty promises. Although the Emergency Order allowed schools to offer On-Line Learning options, it required each school district in the state to submit a reopening plan offering brick and mortar school services five days per week in order to obtain full, guaranteed funding for the school year. [A 132-39.] Otherwise, school districts would receive funding subject to their "traditional compliance with statutory requirements for instructional days and hours." [A 137.] The "traditional" funding structure bases district funding on the in-person attendance of students for each day of the school year. *See* § 1003.23(1), Fla. Stat.

The only guidance in the Emergency Order as to the plans school districts had to submit for approval stated that the Emergency Order's brick and mortar reopening requirement was "subject to advice and orders of the Florida Department of Health" and "local health departments." [A 133.] Unfortunately, a number of school districts quickly learned that, by design, no such "advice" or "orders" would be forthcoming. [*See* A 954, 1050-51.]

When school district representatives asked DOH employees whether it was safe to reopen schools for in-person instruction, the DOH employees refused to answer. [*See* A 954 (DOH representative in Hillsborough County refused to answer); A 1050 (DOH representative in Volusia County refused to answer); A 1051 (DOH representative advising Brevard County School Board that "we can't give a recommendation" as to whether it is safe to reopen schools); A 1546 (trial court finding "Plaintiffs presented convincing evidence that State health officials were instructed not to provide an opinion on the reopening of schools.").] While some DOH employees offered guidance on how schools could attempt to operate in the event those schools reopened brick and mortar, they steadfastly refused to express any opinion as to whether it was safe or not for schools to reopen. [A 1050 (DOH official advising Volusia County School Board that she would not opine on the safety of reopening schools for in-person learning because "we've been advised that our role here is to just advise as to . . . what can we do to make the environment in

schools as safe as possible with COVID-19. It is not to make a decision on whether or not to open up the school.").]

DOH's refusal to give a recommendation was in contrast to the nearly unanimous responses from other public health experts that reopening brick and mortar schools in some areas would not be safe at this time. [*See, e.g.*, A 953, 1057, 1131-32.] For instance, after unsuccessful attempts to consult with DOH as the Emergency Order directed, the Hillsborough County School Board obtained advice from six different health experts, five of whom said it was not yet safe to open schools in Hillsborough County. [A 953-54.] Thus, Hillsborough County submitted a revised reopening plan that delayed in-person instruction until September based on the advice of these experts when DOH refused to provide any recommendation. [A 955, 1545.]

Commissioner Corcoran quickly rejected Hillsborough's plan, stating it was "inconsistent with the framework of the Emergency Order." [AB 1097-99.] Despite public health experts unequivocally stating that reopening brick and mortar would be unsafe in any capacity in Hillsborough County, Commissioner Corcoran directed that Hillsborough would need to "roll up their sleeves and go school-by-school, grade-by-grade, and classroom-by-classroom" to determine whether any portion of any individual school could be reopened brick and mortar. [*Id.*] Otherwise, Hillsborough had to either abide by a previous plan developed without the current

advice from health care experts that contemplated brick and mortar reopening in August, or "proceed under the existing statutory framework," which awarded funding based on an in-school student head count. [*Id.*]

Given the tremendous number of schools in Hillsborough County[5] as well as the fact COVID-19 statistics were not broken down on a school-by-school basis, Commissioner Corcoran's directive to conduct such an analysis was an impossible task. [A 956.] Thus, Hillsborough was placed in the untenable position of choosing either an unsafe brick and mortar reopening or losing its funding for the tremendous number of students who had opted for On-Line Learning. [*Id.*] Hillsborough County School Board Member Tamara Shamburger testified that Hillsborough's school district alone faced a loss of as much as $23 million in state funding if it failed to open brick and mortar schools by August 31 as directed by the Emergency Order. [A 957.]

Despite rejecting Hillsborough's plan to delay brick and mortar reopening following its determination that doing so would be unsafe, Commissioner Corcoran approved similar plans from three other counties—Miami-Dade, Broward, and Palm Beach. [A 1548.] Commissioner Corcoran did not require any of those three counties to provide the detail demanded of Hillsborough, claiming that delaying

[5] Testimony presented at the evidentiary hearing established there are over 200 public school "campuses" in Hillsborough County. [A 1392.]

brick and mortar reopening in those counties necessarily would be appropriate since they remain in "Phase 1" of Governor DeSantis's "Safe. Smart. Step-by-Step." plan for "reopening" the state generally. [*See id.*] Commissioner Corcoran made this determination despite the fact that public health criteria, or any other criteria for that matter, were not in the Emergency Order. [*See id.*]

Thus, schools districts could not obtain any recommendations from DOH as to physically reopening schools as set forth in the Emergency Order, and school districts were facing a constantly shifting set of criteria for developing reopening plans. As a result, the trial court found that Plaintiffs have a substantial likelihood of showing "the Order is being applied arbitrarily across Florida." [A 1549.]

Though the State now argues that Commissioner Corcoran's Emergency Order is based on the Governor's phased reopening plan promulgated by the "Task Force to Re-Open Florida" [IB at 14, 38], that is an "after-the-fact" based assertion unsupported by the record. There is no evidence that the Governor's reopening plan is based on any public health or safety criteria, nor is there any evidence in the record showing what, if any, standards or criteria the State employed in establishing the so-called "phases" of reopening discussed in the Governor's plan.

In addition, the fact that DOH officials were not allowed to give any reopening recommendations and that DOE was refusing to approve any plan that did not contain an in-person component (except for the three counties in Phase 1), made

clear that local school districts had no decision-making authority as to whether and how to reopen schools—despite Governor DeSantis's, Commissioner Corcoran's, and the Emergency Order's statements to the contrary. [*See* A 965 (Hillsborough County School Board member testifying that Commissioner Corcoran had effectively advised that "it was going to be his way or no way").] The bottom line: Reopen for in-person instruction regardless of COVID-19 incidence or safety concerns in your community or lose your funding for all students who selected On-Line Learning. [*Id.*]

Challenges to the Emergency Order's Constitutionality

The FEA Plaintiffs' Case

In light of the obvious health and safety concerns arising from reopening brick and mortar schools at the height of a once-in-a-lifetime pandemic, numerous concerned parties filed suit in Miami-Dade County on July 20, 2020, "to safeguard the health and welfare of Florida public school students, educators, staff, parents, and the general public . . . following the [State's] failure to take the necessary steps to mitigate community spread of [COVID-19], as set forth in the Centers for Disease Control ("CDC") guidelines." [A 224.] The plaintiffs included the Florida Education Association ("FEA") (a union representing more than 140,000 teachers and other school staff members across Florida), Stefanie Beth Miller (a second-grade teacher from Broward County who had contracted COVID-19 and been placed in a

medically-induced coma as a result), Ladara Royal (a middle school educator from Orange County who has asthma and suffers from an auto-immune disease that increases his risk of complications from COVID-19), Mindy Festge (a longtime educator from Miami-Dade County, spouse of another teacher, and parent of a high school senior with a compromised immune system), and Victoria Dublino-Henjes and Andres Henjes (Pinellas County parents of two elementary public-school students who suffer from respiratory issues) (collectively, the "FEA Plaintiffs"). [A 223-28.] The National Association for the Advancement of Colored People ("NAACP") and NAACP Florida State Conference ("NAACP-FL")—both of which are long-recognized as leading civil rights organizations—were later added as FEA Plaintiffs by interlineation. [A 539-43.]

The FEA Plaintiffs asserted three counts: (**1**) a count for a declaratory judgment declaring "the Department of Education Emergency Order No. 2020-EO-06, and related actions or threatened actions to enforce it" violate the Florida Constitution's mandate that adequate provisions be made for "safe" public schools; (**2**) a count for a declaratory judgment declaring that the Emergency Order "is arbitrary and capricious and therefore violates the Florida Constitution"; and (**3**) a count for injunctive relief enjoining the State from forcing public school students and employees to report to brick and mortar schools unless and until it is safe to do so. [A 223-54.] They asserted counts I and II against Governor DeSantis,

Commissioner Corcoran, DOE, and the Florida Board of Education (collectively, the "State"). [A 244-49.] They asserted count III against the State and Miami-Dade County Mayor Carlos Gimenez ("Mayor Gimenez"). [A 249-53.]

Since some of the schools across Florida were set to reopen brick and mortar as early as August 10, the FEA Plaintiffs quickly moved to compel an expedited mediation, filed an Expedited Motion for Temporary Injunction, and otherwise attempted to have the matter decided as quickly as possible. [A 14-16.]

The State filed two motions to dismiss the FEA Plaintiffs' complaint. The first motion urged the Miami-Dade court to "apply the home venue privilege and dismiss [the] action" in favor of allowing the case to be re-filed and litigated in Leon County. [AB 230-40.] The second motion urged dismissal on the merits. [A 1614-31.] The court ultimately agreed with the State's venue arguments and transferred the case to the Second Judicial Circuit on an expedited basis. [*See* AB 15.] Mayor Gimenez was voluntarily dismissed from the suit without prejudice upon the case's transfer to Leon County. [AB 470.]

The Bellefleur Plaintiffs' Case

The day before the FEA Plaintiffs filed their case in Miami-Dade, Monique Bellefleur (individually and on behalf of her three school-age children, two of whom suffer from underlying health conditions); Kathryn Hammond (a pregnant middle school teacher and mother of a kindergarten student and an immunocompromised

two-year-old); Ashley Monroe (a high school teacher with severe asthma being forced to teach in-person despite her doctor's assessment that she would face high risk if she were to contract COVID-19), and James Lis (a high school biology teacher who lives with his elderly and high-risk mother-in-law) (collectively, the "Bellefleur Plaintiffs")[6] filed a similar case in Orange County. [A 57-142.] Like the FEA Plaintiffs, the Bellefleur Plaintiffs named as defendants the four parties comprising the "State," as defined above, and also included as "State" defendants Jacob Oliva in his capacity as Chancellor for the Division of Public Schools, and Andy Tuck in his capacity as chair of the State Board of Education. [A 62-64.]

They also named the School Board of Orange County ("SBOOC"), Teresa Jacobs in her capacity as chair of SBOOC, Orange County Public Schools ("OCPS"), and Barbara Jenkins in her capacity as Superintendent of OCPS (collectively, the "Orange County Defendants"). [*Id.*]

Like the FEA Plaintiffs, the Bellefleur Plaintiffs also challenged the constitutionality of the Emergency Order as abdicating the State's duty to provide "safe" and "secure" public schools; sought a judicial declaration that the Emergency Order is unconstitutional; and also sought to enjoin the State and Orange County Defendants from reopening schools brick and mortar until it became safe to do so.

[6] Ms. Monroe and Mr. Lis were not named in the Bellefleur Plaintiffs' original complaint but were added as plaintiffs in the Amended Complaint. [AB 528-35.]

[AB 57-82; 528-614.] The Bellefleur Plaintiffs accompanied their complaint with a Verified Emergency Motion for Temporary Injunction, detailing the irreparable harm they would face if forced to expose themselves to COVID-19 in brick and mortar schools, explaining why and how the Emergency Order effectively forced the Bellefleur Plaintiffs to be exposed to the virus, and arguing that such actions clearly violate Article IX, Section 1(a), of the Florida's Constitution requirement that public schools must be safe and secure. [AB 143-225.]

Just as it did in the FEA Plaintiffs' case, the State moved to dismiss or transfer venue to Leon County pursuant to the home venue privilege, and also moved to dismiss on the merits. [AB 268-310, 329-51.]

The Bellefleur Plaintiffs ultimately agreed to sever their claims against the State and to transfer those claims to Leon County for adjudication. [AB 473-75.] The remainder of the case (*i.e.*, the proceedings against the Orange County Defendants) was stayed pending further court order. [*Id.*]

Post-transfer, the Bellefleur Plaintiffs' case was assigned to Judge Charles W. Dodson (the same judge assigned to the FEA Plaintiffs' case), who consolidated the cases. [AB 525-27.]

Consolidated Case Proceedings

Once the two cases were transferred and consolidated, the Leon County court quickly set the State's pending motions to dismiss for hearing on August 14, 2020,

ordered the parties to mediate by midnight August 18, and set aside August 19 and 20 for a hearing on the Expedited Motion for Temporary Injunction. [*See* AB 16.]

After considering the parties' arguments related to the State's motion to dismiss—including the Plaintiffs' argument that the Emergency Order harmed FEA's members and the individual plaintiffs by forcing them to choose between their health or their career, thus giving them standing—the court denied the State's motion and allowed the case to proceed. [A 537-38.]

At the August 19-21, 2020, temporary injunction evidentiary hearing, the court heard from more than a dozen witnesses and considered volumes of lengthy and detailed exhibits related to the extent to which schools could—or could not—"safely" reopen brick and mortar. [A 1540.] Among the mountain of evidence considered by the trial court was: (**1**) testimony from a practicing physician, senior faculty member at the Harvard Medical School and Harvard School of Public Health, and frequent consultant to various government and non-governmental entities on safety issues surrounding the COVID-19 pandemic, who testified that there "[a]bsolutely" is no plan or situation in which it would be safe for students, teachers, or the public to return to brick-and-mortar schools if the COVID-19 positivity rate for infection does not remain below five percent for 14 days or longer [A 1131-32]; (**2**) testimony from a Hillsborough County School Board member who stated that six of seven medical professionals advised during an August 6 board meeting that

Hillsborough County schools were not safe to reopen at that time (with five of the seven stating that reopening still would not be safe by August 31), and that the seventh medical professional—a representative from DOH—refused to opine on the issue at all [A 953-54]; (**3**) a letter signed by Commissioner Corcoran in which he rejected the Hillsborough County School Board's reopening plan merely because it purported to delay brick and mortar reopening until September pursuant to the health experts' consensus [AB 1097-99]; (**4**) testimony from FEA's president who stated that FEA's members from across the state feared for their lives if they were forced to return to schools brick and mortar and were effectively being forced to choose between quitting/early retirement or placing themselves and their loved ones at risk [A 977-78]; and (**5**) testimony from various individuals who explained the difficulties with social distancing and other safety precautions in a brick and mortar school setting. [A 970, 1178.]

After weighing all of the evidence, the trial court ultimately found as a matter of fact that: (**1**) "school boards have no choice" but to reopen schools brick and mortar by August 31 under the Emergency Order, as doing so is the only way the school districts may ensure adequate funding for the school year [A 1544]; (**2**) despite the Emergency Order's contention that school reopening decisions should be subject to local and State health officials' opinions, the health officials were instructed not to opine on the topic of school reopening [A 1546]; (**3**) the State had

allowed three South Florida counties to delay school reopening "until September 30 or beyond" without financial penalty despite rejecting similar proposals from Hillsborough and Monroe Counties [A 1548]; (**4**) "opening schools [brick and mortar] will most likely increase COVID-19 cases in Florida" [A 1549]; (**5**) "there is no evidence in the record that in order to provide flexibility in funding or waivers of certain statutes, [the State] must require school districts to provide a brick and mortar option no later than August 31, 2020" [*Id.*]; (**6**) teachers are being forced back into classrooms in "extremely unsafe conditions" in which there is no room for social distancing and without adequate protective equipment [A 1550]; (**7**) the "standard for determining when the virus is under control and it is safe to reopen schools is a 5% [or less] positivity rate in the affected area"; and (**8**) the remedies available through Plaintiffs' collective bargaining agreements and elsewhere were inadequate. [A 1551-52.]

Based upon these factual findings, the court deemed the Emergency Order unconstitutional "to the extent 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." [A 1554.] The court struck the Emergency Order's language requiring brick and mortar reopening and deleted the requirement that reopening plans be submitted in order

for school districts to receive adequate funding. [A 1554-55.] The State immediately appealed.

SUMMARY OF THE ARGUMENT

This case comes to this Court following a full evidentiary hearing before the trial court. The trial court's findings are supported by competent substantial evidence and are binding here; but the State simply ignores almost all of those findings in its arguments.

The Emergency Order that is the subject of the temporary injunction provides funding for school districts by allowing school districts to add to their "seat" count those students who have opted for On-Line Learning during the COVID-19 pandemic. Normally school districts would receive no funding for such students.[7] The Emergency Order was designed to allow school districts to receive funding for both in-person students and On-Line Learning students. But, to obtain the funding, each school district was required to submit a plan for reopening, which included opening schools for five days per week for in-person instruction.

The Emergency Order contained only one criterion for those plans—schools had to have an in-person option for students "subject to advice and orders" of DOH

[7] As set forth in footnote 2, *supra,* "On-Line Learning" during COVID-19 is different from the pre-COVID-19 "Virtual" learning in which students learn from home at their own pace. Schools receive limited funding for Virtual learning students; but nothing for On-Line Learning students absent authorization from DOE.

and local health departments. In other words, only if DOH provided advice that a school should not reopen for in-person learning, could a school district submit a plan that did not contain an in-person learning component. Following the evidentiary hearing, however, the trial court found this condition to be meaningless because those public health authorities refused to give recommendations to school districts about whether to reopen the schools. As a result, when some schools submitted plans that did not contain an in-person component, those plans were rejected—even though those school districts received advice from other health experts that it was unsafe to open their schools. Thus, the trial court rightly found that the Emergency Order was being applied in an unconstitutional arbitrary and capricious manner because compliance was an impossibility and local school boards (with input from parents, teachers, staff, and other health experts) could not make school reopening decisions based on whether it was safe to do so in their districts.

Because the Emergency Order's reopening directives for in-person learning hinged on an impossible requirement—*i.e.,* advice DOH was unwilling to give—the trial court used its equitable powers to strike that requirement from the Order while leaving the funding mechanism in place. By doing so, the court left to each local school district the decision of whether to physically reopen, or remain open, on the basis of the best health evidence available to that district—which is what Governor

DeSantis and Commissioner Corcoran publicly promised and what the Emergency Order purported to do.

The doctrine of separation of powers does not immunize from judicial review arbitrary and capricious administrative acts by executive branch agencies and chief executives. On the contrary, the judicial branch routinely hears lawsuits challenging action by executive branch agencies.

Make no mistake. The Plaintiffs want Florida's schools to reopen for in-person learning. But, while few places are truly "safe" during this unprecedented pandemic, there is one place in which safety is constitutionally guaranteed—Florida's public schools. The State and the school boards are the entities that Floridians entrusted to carry out this safety guarantee. The factual record made below shows that there are judicially-manageable standards here as to when it is "safe" to reopen schools within a particular locality. The trial court found that generally accepted health safety standards do exist, as promulgated by the CDC, the Florida Chapter of the American Academy of Pediatrics, and the World Health Organization ("WHO")—and case law supports that there are indeed judicially-manageable standards for what is or is not "safe" under Article IX, section 1(a) of the Florida Constitution. The Florida Supreme Court has made clear that the

existence of judicially-manageable standards must be addressed case by case.[8] But, in this case, the State has ignored those standards—requiring reopening of some schools for in-person learning even when health experts have concluded it is unsafe to do so.

In addition, Plaintiffs have clearly shown standing, which merely requires a litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings. Plaintiffs include teachers, parents, and associations whose members are directly impacted by the Emergency Order. The Emergency Order is catastrophic for Florida's teachers and educational staff. In light of the in-person instruction mandate, teachers and educational staff across the state are being forced to decide between coming into the classroom—and potentially exposing themselves and others to COVID-19 in the process—or quitting their jobs. Further, because DOH has refused to give recommendations on school reopening plans, parents who have opted to send their children to school are doing so based on inadequate information. The evidence established that many schools are simply not set up for socially distancing and other protective measures, which, in turn, places many teachers, education staff and students at risk, especially those who are disabled and immunocompromised.

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[8] *See Citizens for Strong Schools, Inc. v. Florida State Board of Education, Inc.* 262 So. 3d 127, 137 (Fla. 2019).

This Court should reject the State's suggestion that this Court's August 31 order reinstating the automatic stay should govern the remainder of these proceedings. Stay motions arise on short notice and an incomplete record, as happened here. It is well settled that statements in an interlocutory stay order are not controlling on plenary review, once this Court has the complete record before it.

Based on the record presented, the trial court properly entered the temporary injunction, which this Court should affirm.

ARGUMENT

Standard of Review.

In this case, all of the trial court's decisions as to remedy, substantial likelihood of success, irreparable harm, and public interest arise from fact-finding regarding how the State implemented the Emergency Order. This Court is required to affirm a trial court's factual findings arising from an evidentiary hearing if there is any competent substantial evidence in the record to support such findings. *Teffeteller v. Dugger,* 734 So. 2d 1009, 1017 (Fla. 1999). An appellate court cannot substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. *Shaw v. Shaw,* 334 So. 2d 13, 16 (Fla. 1976).

In addition, this Court cannot disturb a trial court's decision to grant an injunction based on fact-finding unless the appellant demonstrates a clear abuse of

discretion. *Aaoep USA, Inc. v. Pex German OE Parts, LLC*, 202 So. 3d 470, 472 (Fla. 1st DCA 2016). If reasonable persons can differ as to the propriety of the trial court's action, then the action is not unreasonable and there can be no finding of an abuse of discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

Argument.

I. THE STATE'S FAILURE TO MAKE ADEQUATE PROVISION FOR SAFE PUBLIC SCHOOLS IRREPARABLY HARMS PLAINTIFFS.

Plaintiffs are being irreparably harmed by the State's abdication of its duty to provide "safe" and "secure" public schools—the precise harm the temporary injunction was designed to remedy. As the trial court found, the Emergency Order effectively forces teachers and educational staff to return to brick and mortar schools by ensuring that school districts that do not reopen their schools in compliance with the Emergency Order will not receive adequate funding. [A 1554 (finding "the school boards have no choice" but to force all schools within their districts to open brick and mortar in light of how the State was implementing the Emergency Order).] In addition, teachers are being forced to teach in schools where unsafe conditions exist and students are attending schools where unsafe conditions exist. [A 1550-51.]

The State argues the temporary injunction does not prevent irreparable harm because the Emergency Order does not require local school districts to reopen brick and mortar schools for in-person learning, and because Plaintiffs may resolve their "employment dispute[s]" with their local school districts. IB at 20-24. The State

largely relies on this Court's August 31, 2020, order reinstating the automatic stay, arguing that order "alone" warrants reversal here on the merits of the temporary injunction. IB at 20-21. But, it is well-established that an order on a stay motion is an interlocutory ruling made on a limited record, which the Court is free to revisit now that there has been plenary briefing on a full record. *See Parker Family Trust I v. City of Jacksonville*, 804 So. 2d 493, 498 (Fla. 1st DCA 2001); *Ladner v. Plaza del Prado Condo. Ass'n, Inc.*, 423 So. 2d 927, 929 (Fla. 3d DCA 1983). The transcript of the evidentiary hearing, which is now before this Court, confirms that the State's arguments are incorrect.

First, ample testimony supports the trial court's finding that the school districts had "no choice" but to require all schools to open brick and mortar for in-person learning—regardless of the COVID-19 incidence in any particular school district (or in any particular school for that matter based on the inability to socially distance in some schools)—which in turn required many teachers and educational staff to return for in-person instruction even if the local school districts had determined doing so was unsafe. [*See, e.g.*, A 965 (Hillsborough school board member saying that Commissioner Corcoran had effectively advised that "it was going to be his way or no way"); A 976 (FEA President describing the "punitive" manner in which the Emergency Order was being implemented, and its effect on teachers and others).]

While the Emergency Order does not expressly require teachers and educational staff to return for in-person instruction, it nevertheless does so. The State issued the Emergency Order in the midst of a teacher shortage such that numerous teachers around the state—including those like Andre Escobar and James Lis, who have extraordinarily compelling reasons to avoid brick and mortar schools—are being forced to return for in-person instruction. [A 966-69, 1165-68.]

The State-compelled exposure of Florida's public school teachers and educational staff to the deadliest pandemic in a century—in direct violation of constitutional guarantees—cannot be remedied by money damages. *Sun Elastic Corp. v. O.B. Indus.*, 603 So. 2d 516, 518 n.3 (Fla. 3d DCA 1992) (an injury is irreparable if it cannot "be adequately repaired or redressed in a court of law by an award of money damages") (citation omitted). Indeed, here, given the death toll caused by COVID-19, this is truly a choice between life and death in many instances.

Second, the existence of school board grievance procedures does not alter the "irreparable harm" analysis. As the trial court expressly found, those procedures are wholly inadequate to address the issues raised in this case. [*See* A 1551-52 ("Furthermore, the grievance process through the union's collective bargaining agreements only affords a teacher relief when due to a breach of the collective bargaining agreement. Collective bargaining arbitrators do not have jurisdiction or authority to decide constitutional questions like those pending before this Court.").]

Third, all Floridians are constitutionally entitled to "safe" and "secure" public schools, and it is a "paramount duty of the state" to provide for safe and secure schools for its citizens. Art. IX, § 1(a), Fla. Const. This entitlement was enshrined within our constitution precisely because it is a "fundamental value of the people of the State of Florida." *Bush v. Holmes*, 919 So. 2d 392, 403 (Fla. 2006). While the Florida Constitution stops short of describing Article IX as establishing a "fundamental right," it nonetheless establishes "a paramount duty" and ensures constitutionally protected "rights." *See id.* at 404 (discussing the history of Article IX and proposals to describe education rights as "fundamental rights"); *Scavella v. School Bd. of Dade Cty.*, 363 So. 2d 1095, 1098 (Fla. 1978) (describing the prior version of Article IX—which required only "adequate provision . . . for a uniform system of free public schools"—as establishing a "right to a free education"; "That such a right exists cannot be disputed even though there are no Florida cases holding such."). Since Florida Supreme Court precedent recognizes that Article IX establishes constitutional "rights" related to public schools, and since the current version of Article IX mandates that such schools be "safe," Plaintiffs have "constitutionally protected interests" in ensuring Florida's public schools are safe.

Because the State's withholding of funding denies "a benefit to a person [Plaintiffs] on a basis that infringes [their] constitutionally protected interests" in safe public schools, the State has violated the doctrine of unconstitutional conditions

by forcing local school districts to reopen for in-person learning without allowing those districts to determine whether it is safe to do so. *See Lebron v. Secretary, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1217 (11th Cir. 2013). The State's contention that Plaintiffs have no "constitutionally protected interests" is unsupported in either law or fact.

Fourth, while the State emphasizes the fact that "over 1.6 million students" have chosen to return for in-person instruction, it completely overlooks the fact that none of those students or their families were adequately informed by DOH of the unsafe nature of in-person instruction in some school districts. The evidence shows that DOH officials were directed not to opine on whether brick and mortar reopening was "safe" in the first place. [A 954, 1050, 1051.]

Because Floridians expect their state government to perform the duties with which it has been entrusted, many parents who chose to send their children to school in-person obviously believe those schools must be safe or the State would not allow them to open for in-person attendance. *See Holmes*, 919 So. 2d at 398 (recognizing that providing the public school education system contemplated by Article IX is a "paramount duty of the state"); *see also State v. Fla. State Imp. Comm'n*, 75 So. 2d 1, 3 (Fla. 1954) (recognizing that "administrative agencies" performing "governmental functions" have been "entrusted" with those functions). The fact parents "chose" to send 1.6 million students to brick and mortar schools in the midst

of a pandemic is not evidence that it is safe to reopen all schools for in-person learning—it is an indictment of the State for forcing its citizens to make this "choice" with inadequate to no information.

II. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Under the facts and law governing this case, Plaintiffs have established a substantial likelihood of success on the merits. The trial court's factual findings firmly establish that DOE's arbitrary and capricious implementation of the Emergency Order renders it unconstitutional. Those factual findings also establish that DOE's actions have put teachers, educational staff, and students at risk—which gives them standing under binding precedent.

In addition, "school safety" is not a "political" question—courts have routinely addressed when a school is or is not "safe." As established here, some schools are indeed "unsafe" or have not even been evaluated for safety. Teachers and educational staff with personal health issues are being forced to work in crowded, closed spaces without adequate ventilation. And, some schools have opened for in-person learning with extremely unsafe conditions that actually encourage the spread of COVID-19.

1. Plaintiffs Have Standing Because They Are Directly Impacted By The Emergency Order.

Standing is liberally afforded in Florida. *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v Chiles*, 680 So. 2d 400, 403 (Fla. 1996).

> Generally, standing "requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006); *see generally Brown v. Firestone,* 382 So. 2d 654, 662 (Fla. 1980) ("[T]his Court has long been committed to the rule that a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy."); *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005) ("Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation.").

Johnson v. State, 78 So. 3d 1305, 1314 (Fla. 2012) (emphasis added). Under this standard, Plaintiffs clearly have standing.

First, the Plaintiff teachers, as well as other Florida teachers and school employees as properly represented by the FEA,[9] are substantially affected by the Emergency Order—in fact, as shown above, they are irreparably harmed by the Emergency Order.

Second, all parents—whether they chose On-Line Learning or in-person learning—are affected by the Emergency Order because academics often suffer

[9] Any "assertion that the FEA lacks standing to assert the rights of its member employees who suffer the challenged [state action]—is contrary to settled law." *Fla. Educ. Ass'n v. Dep't of Educ.*, No. 17-cv-414, 2017 WL 11509774, at *2 (N.D. Fla. Nov. 20, 2017) (*citing Hunt v Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); *see also Hillsborough Cty. v. Fla. Rest. Ass'n, Inc.*, 603 So. 2d 587, 589 (Fla. 2d DCA 1992).

when teachers must teach both virtually and in person and when teachers, staff, parents, and students also are worried about contracting COVID-19 themselves. Parents also are impacted because they are not receiving the information from public health authorities needed to know whether their local schools are safe. *See Coalition*, 680 So. 2d at 403 n.4 (determining that students and their parents had standing where they alleged they were suffering a continuing injury as a result of being denied an adequate education; "There is no question that this case involves a controversy that would have a direct impact on Florida children.").

Testimony established that local districts might choose to partially reopen schools for in-person learning in some instances so as to protect certain student populations—such as providing in-person instruction for special needs students. [*See* A 1265.] Under those circumstances, forcing schools as a whole to reopen brick and mortar where it is not safe to do so would place those special needs students at risk, especially where the physical structure of the schools does not allow for appropriate social distancing and separation for those students from the general population of students. [*See id.*; *see also* A 1173-78 (example of a school in which social distancing is "almost impossible").]

Despite the fact the Emergency Order has a direct impact on all Plaintiffs or their members, the State asserts the Plaintiffs do not have standing. The State does not claim that Plaintiffs cannot demonstrate injury. Instead, it claims Plaintiffs lack

injury "caused by the State Defendants." IB at 25. However, as stated above, the trial court found that, under the way in which the Emergency Order has been implemented, "the school districts have no meaningful alternative. If an individual school district chooses safety, that is, delaying the start of schools until it individually determines it is safe to do so for its county, it risks losing state funding … ." [A 1544.] The trial court also found that, because of the order, "some teachers are being told they must go back to classrooms under extremely unsafe conditions." [A 1550.] These factual findings cannot be disturbed on appeal because they are supported by competent substantial evidence.

In addition, the State maintains that teachers lack standing because Article IX is concerned with children's rather than teacher's safety. IB at 26. This ignores that children cannot obtain a "high quality education" if the schools are not "safe" for those who teach and staff schools—which is a "fundamental value" for all Floridians. Art. IX, § 1(a).[10]

As to parents, the State argues they do not have a redressable injury because they can choose whether to send their children to in-person school. This argument ignores that, as shown above, even where parents have chosen On-Line Learning for

[10] Moreover, this argument is procedurally barred because the State did not make it below. *Abrams v. Paul*, 453 So. 2d 826, 827 (Fla. 1st DCA 1984) ("[I]t is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court.").

their children, they are substantially affected by the Emergency Order because the teachers (and staff) who carry out that On-Line Learning are directly impacted by unsafe conditions at schools and On-Line Learning students will not be "counted" for funding unless the Emergency Order is implemented in a constitutional manner—thus directly impacting the funds available to teach On-Line Learning students.

The State's argument that the Emergency Order does not force school districts to reopen brick and mortar classes because they could have just accepted funding under the "default statutory and regulatory provisions for school funding based on attendance and normal virtual coursework" [IB at 16], defies reality. Due to the nature of the ongoing pandemic, schools cannot realistically obtain funding under the "default" funding structure because that funding structure also requires a "seat" count in a brick and mortar context in the midst of a once-in-a-century pandemic—On-Line Learning students are not included in any such "seat" count absent the waiver in the Emergency Order.

Allowing school districts to choose between the Emergency Order or the default funding structure subjects them to a Hobson's choice—either: (**a**) reopen their brick and mortar schools even if unsafe to do so and receive guaranteed funding (under the Emergency Order); or (**b**) not reopen their brick and mortar schools if unsafe to do so without any funding guarantee (under the default statutory structure).

Because both funding options the State provided require schools to operate without regard to a local determination that it is safe to open a particular school for in-person learning, and because the Emergency Order option was the only one that any school district realistically could choose, the trial court properly found that school districts had "no choice" but to reopen brick and mortar pursuant to the Emergency Order—which directly impacted teachers, staff, parents, and students alike.

For all of the above reasons, Plaintiffs have standing to bring this action.

2. The Trial Court's Finding Of Unconstitutionality Upholds The Separation Of Powers.

The trial court acted well within its constitutional authority in reviewing the Emergency Order. DOE is an administrative agency, and Commissioner Corcoran serves as its chief executive. § 1001.20(1), (3), Fla. Stat. Florida law has long held that arbitrary and capricious administrative actions, such as those at issue here, are subject to judicial review, which in no way violates the separation of powers. *Adam Smith Enters., Inc. v. State Dep't of Envt'l Reg.*, 553 So. 2d 1260, 1272 (Fla. 1st DCA 1989) (the "arbitrary and capricious standard applie[s] to judicial review of an informal decision by the Secretary of Transportation") (citation omitted); *Arnold v. State Bd. of Educ*., 344 So. 2d 908, 910 (Fla. 1st DCA 1977) (analyzing whether State Board of Education's action was "arbitrary and capricious").

The fact that the executive branch is tasked with policy-making decisions related to Florida's education system does not change these bedrock principles or

otherwise insulate the State from judicial review. *See Fla. Parole Comm'n v. Padovano*, 554 So. 2d 1200, 1201 (Fla. 1st DCA 1989) (judicial review of the Florida Parole Commission's decisions "as to which inmates are to be released on parole" did not constitute "an encroachment of the judiciary upon the executive branch"; while the Commission exercised discretion when making parole decisions, courts nonetheless could review whether that discretion was exercised with "proper consideration").

In addition, the trial court's decision to excise the portions of the Emergency Order that led to DOE's arbitrary and capricious actions was within its judicial powers. By severing the Emergency Order's unconstitutional provisions while leaving the remainder of the order intact, the trial court fashioned a remedy that was as deferential as possible to the separation of powers. *See Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999) (the doctrine of severability "is derived from the respect of the judiciary for the separation of powers").

By assuming the State intended to enact an Emergency Order consistent with its constitutional obligation to provide "safe" public schools and the other safety goals recited in the order, the trial court severed the Emergency Order's unconstitutional portions while allowing its remaining portions to stand.

The fact that the trial court substituted (as opposed to merely deleted) two words within the order's "Full panoply of services" section is immaterial. One of

the substitutions—"boards" for "districts"—merely fixed an apparent typographical error made by DOE when the Emergency Order was issued. The second substitution—"may" for "must"—was necessary to make the revised Emergency Order internally consistent and to avoid striking the entire paragraph. Any error flowing from these *de minimis* edits is harmless, and in any event, can easily be remedied by making severance adjustments on remand while leaving the thrust of the severed Emergency Order intact.

3. Courts Frequently Address School Safety. It Is Not A Political Question.

Florida has a "paramount duty" and constitutional obligation under Article IX to make adequate provision for, among other things, a "safe, secure, and high quality system of free public schools." Matters of school "safety" in the context of health safety are subject to judicially-manageable standards. In this case, those standards were delineated and considered below. Multiple witnesses testified to the straightforward safety standards at issue, stating that schools can safely reopen for in-person learning when the local area's COVID-19 positivity rate remains below five percent for 14 days or longer.[11] The trial court relied on this standard in the

[11] [A 1061 (pediatrician testifying that the positivity rate should be less than five percent); A 1123, 1128 (Dr. Thomas Burke testifying that there must be "at least two weeks of a downward trend" in community spread, "and then certainly less than 5 percent positive rate, that's – that's clear. That's become fairly standard." further describing the WHO's five percent positivity standard as "the gold standard"); A 954 (Hillsborough County School Board member testifying that the public health

temporary injunction. [A 1551 (injunction order discussing the five percent positivity rate standard used by "the World Health Organization and the Florida Chapter of the American Academy of Pediatrics").] In fact, this test is so obviously the "gold standard" for determining school safety that the State "did not present an alternative standard." [*Id.* (emphasis added).]

The State nevertheless argues that its constitutional obligation to ensure that Florida's public schools are "safe" and "secure" is not subject to judicial review because safety and security are "elusive and debatable concepts" for which there are no "judicially discoverable and manageable standards." IB at 33 (citing *Coalition*, 680 So. 2d at 408). While that may be true for some terms within Article IX, it is not true when it comes to the term "safe" in the context of health safety.

In addition, as discussed above, the State failed to present any evidence showing that it even considered the potential safety risks to teachers and staff in preparing and executing the Emergency Order. To follow the State's logic, the purported lack of any judicially-manageable standards for school safety would excuse the State's failure to even consider the safety risks to teachers and staff if schools were to reopen prematurely. The State's position—*i.e.,* that it may willfully ignore a constitutional mandate so long as the courts are not looking—is a testament

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officials she consulted advised that "the positivity rate needed to be south of 5 percent" for school buildings to be reopened for in-person learning).]

to the need for judicial review, particularly where, as here, the health and safety of Florida's teachers, staff, and students are in the balance.

The Florida Supreme Court has refused to promulgate a blanket rule that Article IX has no judicially manageable standards. The Court instead stopped "short of saying 'never,'" *Citizens for Strong Schools, Inc. v. Fla. State Bd. of Education, Inc.* 262 So. 3d 127, 137 (Fla. 2019) (*quoting Coalition,* 680 So. 2d at 408), and made clear that the existence of judicially-manageable standards must be addressed case by case.

The facts of this case show, as stated above, that manageable health safety standards do exist and are appropriately applied in this case. In fact, courts regularly opine on matters related to school safety.

In *Martinez v. School Board of Hillsborough Cty.,* 711 F. Supp. 1066 (S.D. Fla 1989), an HIV-positive special needs child sued the Hillsborough County School Board for violating her right to a free and appropriate education when it placed her in a homebound instruction program. *Id.* at 1066-67. In determining whether the student should be allowed to attend school, the court balanced her rights to an appropriate education with the relative safety of the other students in the event they were exposed to her. *Id.* at 1067. The court performed its safety analysis based on conflicting and "polariz[ing]" evidence—including CDC guidelines and recommendations from the American Academy of Pediatrics—and ultimately

allowed the student to attend school. *Id.* at 1070-72. That the court could make this "safety" determination was entirely uncontroversial. *See id.*

Governor DeSantis himself recognized last year that courts are perfectly capable of managing school health safety standards. *See In re Statewide Grand Jury #20*, No. SC19-240, 2019 WL 908518, at *1 (Fla. Feb. 25, 2019). In that case, Governor DeSantis petitioned the Florida Supreme Court to impanel a statewide grand jury for purposes of assessing school safety matters in the wake of the mass shooting at Marjory Stoneman Douglas High School that occurred in 2018. *See id.* The Court granted his petition and directed the grand jury to analyze, among other things, "whether refusal or failure to follow the mandates of school-related safety laws . . . results in unnecessary and avoidable risk to students across the state." *Id.* Having previously asked for judicial clarification on school safety matters, the State's present contention that school safety is somehow beyond judicial interpretation should be rejected.

As the trial court noted in the temporary injunction here, the trial court in *Citizens* concluded that "[t]he terms in Article IX relating to 'safe' and 'secure' are subject to judicially manageable standards. . . . Florida's trial courts deal with issues relating to safety and security all day long." [A 1547.] Although this Court declined to "opine on the trial court's conclusion in this regard" in light of its decision "that the overarching question of adequacy is not justiciable," it certainly did not disagree.

See Citizens for Strong Schools, Inc. v. Fla. State Bd. of Educ., Inc. 232 So. 3d 1163, 1167 n.3 (Fla. 1st DCA 2017).

Since matters of school safety are subject to judicially-manageable standards, and since those standards were delineated and considered below, the State is wrong in contending that safety is some "elusive" concept that courts are incapable of analyzing without running afoul of the separation of powers. Indeed, this case is a perfect example of a safety matter being subject to judicially-manageable standards.

4. Competent Substantial Evidence Proves The Emergency Order Is Arbitrary And Capricious.

The trial court properly found the Emergency Order is unconstitutionally arbitrary and capricious. The State's assertions to the contrary all rest on the theory that the Emergency Order has a "rational basis" and "reflects a policy preference for reopening schools for in-person instruction after considering health and safety issues." IB at 40. The States' position misapprehends the basis for the trial court's conclusion that the Emergency Order is arbitrary and capricious and applies an improper test.

Unconstitutional arbitrary and capricious government action is not limited to merely being reviewed for whether that action is "rationally based." Government-imposed regulations and directives must be standardized and contain reasonably certain criteria. *ABC Liquors, Inc. v. City of Ocala*, 366 So. 2d 146, 149 (Fla. 1st DCA 1979). Those seeking approval under such regulations and/or directives "must

be in a position to determine the requirements and must be afforded an opportunity comply with them." *Id.* Any standards, criteria, or requirements that are subject to whimsical or capricious application or unbridled discretion cannot meet the test of constitutionality. *Id.*; *see also Bennett v. Walton Cty.,* 174 So. 3d 386, 398 (Fla. 1st DCA 2015) (imposing criteria not mentioned in code or official policy implicates constitutional issues regarding arbitrary application and unbridled discretion); *State v. Jenkins,* 454 So. 2d 79, 80 (Fla. 1st DCA 1984) (law cannot be overly broad or vague; otherwise, it is unconstitutional because it is susceptible to arbitrary application). Equally as important, the requirements must be of uniform application. *ABC Liquors*, 366 So. 2d at 149. Once the requirements are met, the governing body may not refuse an application. *Id.*

In this case, under the guise of the need for "flexibility," the Emergency Order directs that "all school boards and charter school governing boards must open brick and mortar schools at least five days per week for all students, subject to advice and orders of [DOH], local departments of health, and [prior and subsequent executive orders]" and must submit and have approved a "reopening plan" for in-person learning to continue to receive funding. [A 133-36.] The Emergency Order contains no other standards and gives DOE unbridled discretion to approve or disapprove reopening plans. For this reason alone, it is unconstitutionally arbitrary and capricious.

In addition, as the trial court found, the evidence established that the Emergency Order is being administered in an arbitrary and capricious manner.

First, the only guidance in the Emergency Order is to obtain advice from DOH and its local offices, yet—as the evidence established and the trial court found—DOH and local health officials were directed not to provide any advice on reopening for in-person learning. [A 1546.] DOH representatives refused to provide such advice despite DOH's own records demonstrating that it originally was planning to do so. [AB 1501 (DOH call notes dated July 20, 2020 stating "[w]ill be issuing guidance soon regarding when to close schools vs. classrooms"); A 1046 (DOH chief of staff discussing those call notes but not directly answering when asked whether she knew whether such guidance ever issued).] Thus, the Emergency Order's only criterion for reopening brick and mortar could not be met.

Second, DOE is making determinations by imposing criteria not included in the Emergency Order. The trial court made factual findings that DOE approved Miami-Dade, Broward, and Palm Beach Counties' plans to remain closed but did not allow other school districts (Hillsborough and Monroe) to do the same. [A 1548.] DOE asserts Miami-Dade, Broward, and Palm Beach were allowed to remain closed for in-person learning because they were in "Phase 1" of Florida reopening. But the Order makes no mention of Phase 1 (or any other phases), and, without input from DOH, school districts could not determine the requisite criteria and distinctions

between Phase 1 and other reopening brick and mortar phases as they pertain to schools. Further, the standards established by the CDC, the Florida Chapter of the American Academy of Pediatrics, and the World Health Organization have established when it is safe for certain schools, such as those in Hillsborough County, to reopen for in-person learning at this time. Thus, the Emergency Order arbitrarily and capriciously usurped school districts' statutory authority to "[a]dopt policies for the opening and closing of schools," and to provide for their students' attendance, health, safety and welfare. §§ 1001.42(4)(f), (8)(a), Fla. Stat.

Third, DOE continued to impose additional criteria in the reopening plans after they were submitted—denying Hillsborough's plan and instructing Hillsborough to go back to the drawing board and do a school-by-school, grade-by-grade, class-by-class analysis to justify why it was choosing not to reopen for in-person learning. [AB 1098.] Constantly changing and imposing additional requirements during the approval process is the very essence of arbitrary and capricious action. *See, e.g., Bayonet Pt. Reg. Med. Ctr. v. Dep't of Health & Reh. Servs.,* 516 So. 2d 995, 997 (Fla. 1987) (requiring applicant to "bootstrap" an application by imposing additional criteria not included in a rule is arbitrary and capricious). Moreover, this was an impossible task due not only due to the fact DOH officials refused to participate in the decision-making process but also due to the short time given for plan submissions.

Fourth, even under a "rational basis" test, the State's arguments fail. The State did not demonstrate that it had a "rational basis" for the Emergency Order. In fact, it failed to present any evidence that DOE considered any criteria to determine whether it was safe to open schools based on the level of community spread of the virus. As a result, the trial court correctly found the State failed to "present an alternative standard" to determine when schools can safely reopen [A 1551], because the State never attempted to formulate such a standard in the first place.

DOE's unconstitutional arbitrary and capricious actions are putting teachers, educational staff, and students at risk—especially since parents cannot make informed decisions because DOH will not take a position. The fact DOH remains silent speaks volumes—why would DOH not make recommendations if those recommendations were consistent with DOE's actions? The inference is obvious—the State harbors concern about what the health advice would be, so it precluded DOH from giving any such recommendations.

III. COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT INJUNCTIVE RELIEF SERVES THE PUBLIC INTEREST.

After a full evidentiary hearing, the trial court weighed the benefits and the potential harm of in-person instruction and concluded that "[r]easoned and data-driven decisions based on local conditions will minimize further community spread of COVID-19, severe illness, and possible death of children, teachers and school

staff, their families, and the community at large. Such local decisions unequivocally serve the public interest." [A 1552.]

That these health and safety concerns outweigh the benefits of in-person instruction is amply supported by the evidence. [*See, e.g.*, A 1139-42 (Dr. Burke explaining that "[e]ven given all of those other associated concerns [including increased risk of domestic violence for remote students, concerns of children receiving an inferior education when learning remotely, etc.], it does not make sense to open brick-and-mortar schools [until it is safe to do so].").] The "public interest" evidence weighed by the trial court cannot be reweighed on appeal. *City of Gainesville v. Watson Const. Co., Inc*., 815 So. 2d 785, 785 (Fla. 1st DCA 2002) (trial court applied the law correctly based on the factual findings arising from conflicting evidence); *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 571 (Fla. 4th DCA 2000) (recognizing that "the trial court resolves conflicts in the evidence"); *Old Equity Life Ins. Co. v. Levenson*, 177 So. 2d 50, 50-51 (Fla. 3d DCA 1965) (indicating where trial court's findings of fact are reasonably supported by competent, substantial evidence in the record, as they are here, appellate court cannot re-weigh the evidence or substitute its judgment).

The State ignores these findings and asserts that the temporary injunction "caused confusion and uncertainty for students, parents, and teachers." IB at 41. In fact, the injunction did not cause any confusion but merely restored the status quo to

school governance and allowed school boards to make local decisions based on local conditions, as always. Parents may go to the school board with their concerns, as they always do.

In any event, the State cites no record evidence properly before the trial court suggesting that the temporary injunction will cause "confusion [or] uncertainty." This is because no such evidence exists. To the extent the State intended to rely on any evidence it submitted in support of maintaining or reinstating the automatic stay, its intentions were misguided as any such "evidence" was not before the trial court when it entered the injunction on appeal. Because the trial court did not consider it when entering the injunction, this Court may not consider it now. *Thornber v. City of Ft. Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988) ("An appellate court will not consider evidence that was not presented to the lower tribunal because the function of an appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it."); *see also Servedio v. U.S. Bank Nat'l Ass'n*, 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010) (appellate court refusing to base its decision on evidence which was "not part of the record at the time the motion for summary judgment was granted" because it was unclear "whether the trial court considered those documents in rendering its decision").

The State further maintains that "allowing local school districts to abandon classroom instruction altogether . . . would threaten to deprive schoolchildren of the

myriad benefits of in-person instruction[.]" IB at 41. While Plaintiffs all recognize that in-person education has many benefits, and while Plaintiffs all want and encourage schools to reopen for in-person learning when it is safe to do so, the evidence established that it was not safe to do so in some circumstances and the trial court determined that the safety factors weighed more heavily than the "benefits of in-person instruction" in the public interest analysis.

In addition, to the extent any "confusion [or] uncertainty" exists, it does not result from the temporary injunction. It originated from DOE's issuance of the Emergency Order, which promised that reopening of schools for in-person learning would be subject to advice from state and local public health authorities, but those entities were then directed not to give that advice. When physically-reopened schools confront the dangers of COVID-19 head on, many of them inevitably will be forced to close their brick and mortar facilities—putting those students attending school in person in a constant state of flux.[12] In fact, some schools are already having to close due to COVID-19 since the temporary injunction was issued. Therefore, it is the Emergency Order—not the temporary injunction—which sows chaos and confusion for those attending unsafe brick and mortar schools.

[12] *See, e.g.*, Lisa Maria Garza, *Olympia High School Closes Campus After 6 COVID-19 Cases, Orange District Says*, Orlando Sentinel, Sep. 6, 2020, https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-olympia-high-school-campus-closed-20200906-xndpxitxvjgyderdkym6wedtia-story.html.

CONCLUSION

The Emergency Order provides that all decisions as to school in-person reopening will be made by local school districts subject to DOH's advice. But the evidence showed that DOH authorities were instructed not to give that advice—and that advice is essential for any decision to re-open for in-person learning, or remain open as circumstances may change. On these facts, it was appropriate for the trial court to issue the ruling it did—which was targeted at eliminating arbitrary and capricious enforcement of the Emergency Order. Alternatively, if this Court concludes there is any flaw in the trial court's carefully-crafted remedy, the correct procedure would be to remand to develop an alternative remedy—not to invalidate the injunction and allow the unconstitutional Emergency Order to stand.

Respectfully submitted,

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