IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

FLORIDA EDUCATION ASSOCIATION; STEFANIE BETH MILLER; LADARA ROYAL; MINDY FESTGE; VICTORIA DUBLINO-HENJES; and, ANDRES HENJES, Plaintiffs, vs. RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; FLORIDA BOARD OF EDUCATION; CARLOS GIMENEZ, in his official capacity as Mayor of Miami-Dade County, Defendants.	Case No. 2020-015211 CA (31)

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR TRANSFER VENUE

The Defendants, Richard Corcoran as Commissioner of Education and the Florida Department of Education, on July 6, 2020, issued Emergency Order 2020-E0-06 ("Order") which, *inter alia*, compels the Miami-Dade School District to take steps for the express purpose of "reopening brick and mortar schools with the full panoply of services" in the month of August, 2020. Plaintiffs have brought this declaratory action to challenge this Emergency Order as a violation of the Florida Constitution's mandate that "[a]dequate provision shall be made by law for a uniform, efficient, **safe, secure**, and high quality system of free public schools." Fla. Const. Art. IX, § 1. By effectively commanding all school districts – including Miami-Dade's – to open their school facilities this month, despite the fact that Miami-Dade is one of the nation's hot

spots for COVID-19, with more than 124,000 total cases reported in the county through today, the state of Florida has disregarded its constitutional obligations to ensure safe and secure public schools.[1] Moreover, by adopting this Emergency Order arbitrarily and capriciously, without sufficient data or a rational basis, the state violated due process.

Since the Complaint was filed in this action, the Miami-Dade County School District has submitted its plan to begin the school year with online-only instruction for students for at least the first few weeks of the school year, in light of the dangerous conditions present in the County. While Plaintiffs applaud the school district's decision, this short-term reprieve in no way changes the venue analysis, as will be shown below.

In their Motions to Dismiss, as in their Response to Plaintiff's Motion to Compel Mediation, the State Defendants now argue that the Education Commissioner's Order does not require school districts to provide in-person instruction this month (despite what the Order actually says) and further assert that the Order allows local school districts to determine when and how to open schools – though even with this seemingly softer position, the State Defendants clearly anticipate that *some* teachers and students will be attending brick and mortar school facilities in the coming weeks.[2] Moreover, by its terms, the Order further provides that the State may withhold funding from school districts whose reopening plans do not meet with approval

[1] *See* Fla. Dep't of Health County Report, http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/county_reports_latest.pdf.

[2] In the Motion, the State Defendants assert that the Emergency Order "very clearly confirms" that local school districts may determine "*which* students and teachers are physically present when school opens." (Motion at 5.) This is a far cry from allowing school districts to determine for themselves if it is safe to have *any* students and teachers physically attend schools – which is the point of this suit, and further confirmation that the State Defendants do indeed view the Emergency Order as a command to local school districts to physically open schools.

from the Department of Education – with no express exception for school districts following local health guidelines.

No matter how the State Defendants now seek to reframe the Education Commissioner's Emergency Order through their pleadings, they cannot rewrite the Order itself, and as written the Order plainly runs afoul of the Florida Constitution by compelling local school districts to open and staff their facilities – perhaps within days. This directive clearly impacts the health and safety of Plaintiff Mindy Festge, a parent, educator, and resident of Miami-Dade County as well as tens of thousands of other Miami-Dade County educators, parents and residents. Her husband, Don Festge, is also a Miami-Dade public school teacher and they have both been employed by Miami-Dade County Public Schools for over 28 years. Her son is an incoming senior attending a Miami-Dade high school; he was diagnosed with a chronic digestive disorder and has a compromised immune system—it is not safe for him to return to school amid the spike of COVID-19. (Compl. ¶ 10). Thus, the Complaint plainly states a particularized, constitutional injury to a plaintiff in Miami-Dade County. This alone should end the inquiry and defeat the State Defendants' Motion to Dismiss Based Upon Improper Venue.

MEMORANDUM OF LAW

It is well established that the plaintiff has the right to choose venue, and the burden of pleading and proving that venue is improper is on the defendant. *Eclectic Source Network, Inc. v. Value Rent-A-Car, Inc.*, 611 So. 2d 585, 585 (Fla. 3d DCA 1993). Moreover, "venue is determined by the facts at the time that the lawsuit is filed." *Air South, Inc. v. Spaziano*, 547 So.2d 314, 315 (Fla. 4th DCA 1989); *Gates v. Stucco Corp.,* 112 So. 2d 36, 38 (Fla. 3d DCA 1959) ("The statute as to venue applies as of the time of the filing of the suit, and not as of the time of the accrual of the cause of action."). Here, the State Defendants seek dismissal based

solely on the general home venue privilege, which the State may in appropriate circumstances invoke. (Motion at 6-9.) However, the home venue privilege is not applicable in this action.

When, as here, the State reaches into a jurisdiction with a directive compelling action, persons who are adversely affected by such action have the right to seek judicial protection from the State's incursion in the county in which the action is being taken. Commonly referred to as the "sword-wielder" exception to the home venue privilege, the right to maintain an action pursuant to this exception requires "official action (which is) performed in the county where the suit is filed." *Carlile v. Game and Fresh Water Fish Commission*, 354 So.2d 362, 365-66 (Fla. 1977) (emphasis added). Here, the issuance of the Order compelling school districts, including the Miami-Dade School District, to reopen schools without regard to the health and safety of persons who will be affected by the action is such an official action and requires that the issues in the Complaint be decided in Miami-Dade County. At the time of the filing of this lawsuit, the relevant time to consider, Miami-Dade County had nearly *half* of all Florida's COVID-19 cases and a decision regarding the schools had not been made. Thus, Defendants' actions would cause the most harm in Miami-Dade County.

The basic test for whether the sword-wielder doctrine can be successfully invoked is set out in *Jacksonville Elec. Auth. v. Clay County Util. Auth*., 802 So.2d 1190, 1192 (Fla. 1st DCA 2002) as follows:

> [W]hether the state is the initial sword-wielder in the matter and whether the plaintiff's action is in the nature of a shield against the state's thrust. If so, then the suit may be maintained in the county wherein the blow has been or is imminently about to be laid on.

When a plaintiff seeks judicial protection from a real or imminent danger of invasion of constitutional rights by a state agency, the exception applies. *PSC v. Triple "A",* 387 So. 2d 940, 942 (Fla. 1980); *Graham v. Vann,* 394 So.2d 178, 179 (Fla. 1st DCA 1981); *State, Dep't of*

Labor and Employment Security v. Summit Consulting, Inc., 594 So. 2d 862, 863 (Fla. 2d DCA 1992). *See also* Trawick, *Florida Practice and Procedure,* § 5–2 (1993 ed.). In the matter before the Court, the constitutional right of Ms. Festge, the other Plaintiffs and other Miami-Dade County residents to expect public schools which are safe and which do not pose a risk of transmission of COVID-19 throughout the county is the type of circumstance which permits invocation of the sword-wielder venue defense against home privilege.

As discussed above, it is an established rule of venue that it is a plaintiff's prerogative to select the venue and as long as that selection is one of the alternatives permitted by law, the plaintiff's selection will not be disturbed. The plaintiff's decision regarding venue is presumptively correct, and the party challenging venue has the burden to demonstrate any impropriety in the plaintiff's choice. *Barry Cook Ford, Inc. v. Ford Motor Co.,* 571 So.2d 61 (Fla. 1st DCA 1990); *accord*, *Williams v. Union Nat'l Ins. Co.*, 528 So.2d 454, 456 (Fla. 1st DCA 1988); *Premier Cruise Lines, Ltd. V. Gavrilis,* 554 So.2d 569 (Fla. 3d DCA 1990); *Schecter v. Fisman*, 525 So.2d 502 (Fla. 5th DCA 1988). In *Barry Cook Ford* and in *Williams,* changes of venue granted by the respective trial courts were reversed, because defendants failed to show any impropriety in the statutory alternative selected by the plaintiffs.

The sword-wielder exception has been applied often in circumstances similar to those presented by this action. For example, in *Dep't of Transp. v. Morehouse*, 350 So.2d 529 (Fla. 3d DCA 1977) *cert. denied,* 358 So. 2d 129 (Fla. 1978), the trial court's change of venue to Leon County was reversed because Dade County was the situs of the alleged violations of plaintiff's constitutional rights. The Court also found that venue was proper in Miami-Dade County when the State Department of Transportation sought to terminate a state employee's employment when he filed to run for public office in the county. *See also Pinellas Cty. v. Baldwin*, 80 So.3d 366,

369 (Fla. 2d DCA 2012) (governmental taking of property in violation of the Florida Constitution is an unlawful invasion of constitutional rights and the sword-wielder exception applied); *Dep't of Labor & Emp't Sec. v. Lindquist*, 698 So.2d 299, 303-05 (Fla. 2d DCA 1997) (affirming venue in plaintiff's county where Department of Labor physically seized fishing nets there without procedural due process); *Dep't of Revenue v. Arvida Corp.*, 315 So.2d 235 (Fla. 2d DCA 1975)(alleged delivery of tax warrant in taxpayer plaintiff's home county satisfied sword-wielder doctrine); *Rehman v. Fla. Dep't of Law Enforcement,* 681 So.2d 854 (Fla. 5th DCA 1996)(holding sword-wielder venue lay in Orange County to which FDLE employee claimed FDLE transferred him in retaliation for exposing financial waste at his previous FDLE job in Leon County); *Barr v. The Fla. Bd. of Regents*, 644 So.2d 333 (Fla. 1st DCA 1994)(reversing transfer of venue to Leon County for university instructor's suit for retaliatory discharge in Alachua County where Board of Regents terminated her employment); *Bd. of Med. Exam'rs v. Kadivar*, 482 So.2d 501 (Fla. 4th DCA 1986)(affirming venue in St. Lucie County for suit alleging deprivation of physician's right to practice medicine there); *Swinscoe v. State*, 320 So.2d 11 (Fla. 4th DCA 1975)(reversing order transferring venue to Leon County where taxpayers sued in Broward County where Department of Revenue executed and recorded a tax warrant against them); *Hancock v. Wilkinson*, 407 So.2d 969, 970 (Fla. 2d DCA 1981)(in which a boarding home operator and occupants alleged state agency harassment against them in Highlands County, in which the court described the plaintiffs' allegations necessary to apply the sword-wielder exception as those that "reflect an attempt on their part to shield themselves against what they claim are unconstitutional blows which the Department has directed towards them in Highlands County").

In this matter before the Court, the State Defendants have delivered unconstitutional blows to the plaintiffs and the Miami-Dade County school district and community. In disregard for the Article IX, Section 1(a), Florida Constitution, mandate that one of the State's "paramount" duties is to ensure safe and secure public schools, the State Defendants have directed the Miami-Dade School District to reopen schools without regard for the pandemic. This directive creates an imminent risk to Ms. Festge if she were compelled to return to the classroom – and risks her property interest in her job if the State were to withhold funding from the Miami-Dade School District. The plaintiffs are entitled to have their defense against such incursion heard and decided in the location where the threatened harm will occur—Miami-Dade County in this Court.

Finally, the State Defendants' Motion improperly asks that the Court dismiss this action based on improper venue. (Motion at 1,9.) It is well-established under Florida law that transfer, not dismissal, is the appropriate remedy when a case has been found to be filed in the incorrect venue. *See, e.g., Bush v. State*, 945 So.2d 1207, 1214 (Fla. 2006) ("transfer, rather than dismissal, is the preferred remedy in such a case"); *Gross v. Franklin*, 387 So.2d 1046, 1049 (Fla. 3d DCA 1980) (same); *Russomano v. Maresca*, 220 So.3d 1269, 1271 (Fla. 4th DCA 2017) (same). Thus, if the Court were to find that Miami-Dade County is not the proper venue for this action, irrespective of Ms. Festge's constitutional claim, this matter should not be dismissed; rather, the matter should then be transferred to the Second Judicial Circuit in Leon County. However, because the allegations of the Complaint plainly bring this action within the sword-wielder exception to the home venue privilege, neither dismissal nor transfer is appropriate.

For the foregoing reasons, the State Defendants' effort to dismiss that action or transfer this matter to Leon County should be rejected and denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished by the Florida Courts e-filing Portal pursuant to Fla. R. Jud. Admin. 2.516(b)(1), this 4th day of August, 2020, to the following:

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