

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FLORIDA STATE CONFERENCE
OF NAACP; J.W. by and
through her next of friend John
Walsh; S.W. by and through her
next of friend John Walsh;
JOHN WALSH in his individual
capacity; Z.L. by and through
his next of friend Tera Thaddies;
and, TERA THADDIES in her
individual capacity,

Petitioners,

vs.

FLORIDA DEPARTMENT OF
HEALTH,

Respondent.

CIVIL C.:

Emergency Rule 64DER21-12

Pursuant to sections 120.54(4) and 120.68(9), Florida Statutes, Petitioners, the Florida State Conference of NAACP ("FL NAACP"); J.W. by and through her next of friend John Walsh; S.W. by and through her next of friend John Walsh; John Walsh in his individual capacity; Z.L. by and through his next of friend Tera Thaddies; and, Tera Thaddies in her individual capacity, petition this court for review of Emergency Rule 64DER21-12 (the "Emergency Rule") published

in this District because Petitioners J.W., S.W., John Walsh, Z.L., and Tera Thaddies reside in it. § 120.68(2)(b), Fla. Stat.

mask." A.011. Sections (6)(a)-(c) of the Emergency Rule purport to address "non-discrimination" and "harassment" against "students whose parents have opted them out of a mask or face covering requirement." A.011.

DOH's stated justification for issuing the Emergency Rule and "for finding an immediate danger to the public health, safety, or welfare" is that "a recent increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, coincides with the imminent start of the

reaching others.”⁵ Thus, a decision not to wear a mask has the primary risk of directly putting others at risk.

In addition, masks “help reduce inhalation of these droplets by the wearer (“filtration for wearer protection”).”⁶ But it is the combination of these two that is most effective: “The community benefit of masking for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly.” As this Court has put it, “requiring individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer).”

Experience and research have shown that, with proper precautions, schools

later that year and in the 2020-21 school year. Indeed, in this school year, many schools are no longer able to provide the synchronous remote instruction that was authorized last school year by a now-expired emergency order.¹⁰ As such, there was no indication that Districts intended to rescind their COVID-19 safety precautions in the 2021-22 school year, especially in light of surging COVID-19 rates, the Delta variant, increased numbers of students on campus and because children under 12 years old remain ineligible for COVID-19 vaccines.

The SARS-CoV-2 Delta variant is now the predominant form of the virus in the United States.¹¹ It is more than two times as

children presently cannot be vaccinated for COVID-19 and pediatric intensive care beds are filling up across areas most impacted by the variant, with pediatric ICU beds hitting 100 percent capacity in some locations.¹³



Petitioner FL NAACP is the state affiliate of the national NAACP, the nation's oldest and largest civil rights organization. FL NAACP is a membership organization dedicated to securing political, educational, social, and economic equality rights in order to eliminate race-based discrimination and its adverse effects and to ensure the health and well-being of all persons. As part of this mission, FL NAACP is committed to eliminating discrimination on the basis of race in healthcare and public education. FL NAACP has standing to bring this action on behalf of its individual members in families wit

children of color, is one of the FL NAACP's core missions. It also has advocated to protect communities of color, who have suffered disproportionately from the ravages of COVID-19, through comprehensive public health policies.

them more at risk of getting sick and dying from COVID-19."¹⁴

those with medical reasons that prevent them from wearing masks, there is a reasonable probability that, if the rule remains in effect, the district will be compelled to comply with it. Governor DeSantis has described the school board as “violating the law” and warned of “consequences” for the Board’s actions.¹⁸ The State Board of Education is investigating other school districts that have taken the same position, threatening financial sanctions and even the removal from office of school board members who vote for mask mandates.¹⁹

While masks were not required, in the first five days of school 1,412 students were ordered to quarantine at home because they had been in close proximity to someone diagnosed with COVID-19.²⁰ Dr.

¹⁸ Sooji Nam, “Disappointing’: Governor’s office responds to Palm Beach County School Board’s mandatory mask mandate,” *wpbf.com* (Aug. 19, 2021), <https://www.wpbf.com/article/florida-governor-desantis-palm-beach-county-school-mask-mandate/37347679>.

¹⁹ Andrew Atterbury, “Florida threatens to remove school officials who disobey DeSantis,” *Politico* (Aug. 17, 2021), <https://www.politico.com/states/florida/story/2021/08/17/florida-threatens-to-remove-school-officials-who-disobey-desantis-1390160>.

²⁰ Sonja Isgar, “As PBC COVID cases rise, county’s top health official says spread not in classrooms — yet,” *Palm Beach Post* (Aug. 16, 2021), <https://www.palmbeachpost.com/story/news/education/2021/08>

Alina Alonso, Palm Beach County's top health official, has warned that the risk of in-school transmissions could drastically increase due to "unvaccinated children, fuller classrooms, and wiggle room in the mandate to wear masks."²¹ As of August 18, 2021, the number of students in quarantine skyrocketed to about 3,000, and more than 11,000 students, or 6.6% of the school district's students, had already opted out of wearing masks.²² The sheer number of people who attended school unmasked and who were exposed to unmasked people while the Emergency Rule was followed significantly increased the level of danger for the individual child Petitioners.

Petitioner John Walsh is J.W.'s father and guardian. He brings this suit as next of friend to J.W. and S.W. and on his own behalf.

Petitioner J.W. is a nine-year-old student enrolled in the District of Palm Beach County. She is a student with disabilities and

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qualifies for Exceptional Student Education ("ESE") under the exceptionalities of language impairment, occupational therapy, speech impairment, and other health impairment. J.W. is a child with Down syndrome and is under the care of multiple physicians: her pediatrician, cardiologist, hematologist, endocrinologist, ENT, and neurologist. According to J.W.'s pediatrician, due to J.W.'s "high risk medical condition, she cannot be in a situation with other unvaccinated and unmasked persons, because contracting COVID would be potentially deadly to her." The pandemic comes on the heels of J.W. recovering from double pneumonia in late 2019, where she was hospitalized in the PICU for twelve days and barely managed to avoid being put on a ventilator. Throughout the pandemic in the 2020-21 school year, J.W. attended synchronous remote classes and received speech therapy, language therapy, and occupational therapy on Zoom. In the 2021-22 school year that just started, J.W. is unable to return to school because of her complex medical conditions and the steady rise of COVID-19 cases in Palm Beach County,²³ yet she

²³ n. 20, above.

behalf. Petitioner Z.L. is 11 years old

Petitioner Tera Thaddies has an interest in her right to make health and education decisions for her son, including the decision to send Z.L. to a free and safe public school as guaranteed by the Florida Constitution, which has been infringed upon by the Emergency Rule.

Petitioners John Walsh, J.W., S.W., Tera Thaddies, and Z.L. all have standing under Florida's Administrative Procedure Act because each of them is a "party who is adversely affected by final agency action is entitled to judicial review." § 120.68(1)(a), Fla. Stat. "In order to meet the substantially affected test ..., the petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated." _____, 751 So. 2d 94,

96 (Fla. 1st DCA 1999) (quoting

_____ 651 So.2d 1236, 1237 (Fla. 4th DCA 1995)). Here, the Emergency Rule gives Petitioners J.W., S.W., and Z.L., a "choice" between being held out of school without services or a quality education and going to school and risking COVID-19 infection to themselves and their families. Either way, the fact that J.W.'s older sister, S.W., has attended public school where masks have not been mandatory or enforced continues to expose them and

their family to severe illness and death. Likewise, the fact that Z.L. has attended public school where masks have not been mandatory or enforced continues to expose his widowed mother and sole caregiver, Petitioner Tera Thaddies, to even more severe illness and death.

The fact that their District has temporarily chosen to defy the

and education authorities provide emergency guidance to school districts.”

At no point in the Emergency Rule does the DOH even suggest that the fact that public schools would be requiring masks in the fall was unexpected or unknown to the DOH in sufficient time to issue this Emergency Rule through ordinary rulemaking. Indeed, the mask requirement in some districts was merely a continuation of a practice that existed before the surge in cases. In responding to this indisputable fact, the DOH may not now add to that statement of its reasons.

See [redacted], 252 So. 3d 313, 316 (Fla. 1st DCA 2018) (“the record on appeal is limited to the four corners of the emergency rules

, 586 So. 2d 429, 431 (Fla. 1st DCA 1991)

mask mandates are an unexpected “emergency,” other than the surge in Delta variant cases, is the Governor’s own signature of a bill creating a “Parents’ Bill of Rights” on June 29, 2021. HB 241 (2021).²⁴ That law, though, was passed and ordered enrolled on April 22, 2021. At that point, DOH knew that it would become law if Governor DeSantis signed it. If delays in signing a bill could justify issuing emergency rules implementing it, the executive would have an easy method of temporarily evading the APA on all new legislation.

Further, the Parents’ Bill of Rights, which is cited in the

children to wear helmets when riding bicycles, and school rules requiring students to use eye-protection when performing experiments in chemistry class, banning vaping, imposing school dress code requirements in the interest of student safety, or requiring students to wash their hands after using the bathroom.²⁵

Even if public schools' requirement that students wear masks had been a response to some truly unexpected situation, the Emergency Rule would still fail because it is not "necessary" to address "immediate danger to the public health, safety, or welfare." § 120.54(4), Fla. Stat. On its face, it makes the public less safe by limiting the ability of schools to protect their students and staff from COVID-19. The Emergency Rule states that its purpose is "to encourage a safe and effective in-person learning environment for

²⁵ Unlike Federal courts, those in Florida may not give deference to an agency's interpretation of a statute. Art. V., § 21, Fla. Const. ("In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.").

assert that either of these supposed risks is certain or even probable. More importantly, the fact that the DOH—the state agency with actual expertise in medical matters—chose not to repeat these assertions, while repeating others—and hence we do not know if it agrees with them—shows the wisdom of the APA in compelling to state with particularity

Emergency Rule because thousands of opt-out children such
disabilities or health conditions are permitted to more easily infect

Parents' Bill of Rights. Courts across the country have upheld the

and, even if it did, nothing in the Parents' Bill of Rights gives DOH any role in a local government's judgment on that score.

For the foregoing reasons, Petitioners respectfully request: an order quashing the sections (1)(d) and (6)(a)-(d) of DOH Emergency Rule 64DER21-12, which prohibit public schools from implementing meaningful mask mandates; Petitioners' costs and reasonable attorneys' fees pursuant to § 120.595, Fla. Stat.; and, all other relief as this Court deems just and proper.

WE HEREBY CERTIFY that this brief complies with the font requirements of [Florida Rule of Appellate Procedure 9.045\(b\)](#) and the word limitation requirements of [Florida Rule of Appellate Procedure 9.210\(a\)\(2\)\(B\)](#). This brief contains 6,361 words.

Undersigned counsel hereby certify the existence of an

Dated this 20th day of August, 2021.

Respectfully submitted,

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