

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 21-cv-22863-KMM

JUDITH ANNE HAYES, individually and on behalf of W.H., a minor,
ROBYN MCCARTHY and JOHN MCCARTHY, individually
and on behalf of L.M., a minor, AMANDA BANEK, individually
and on behalf of D.B. and B.B, minor children, KAS ARONE-
MILLER, individually and on behalf of R.M. and L.M.,
Minor children, ALISHA TODD, individually and on behalf
of J.T, a minor, JAMIE KINDER, individually and on
behalf of R.K., a minor, CHRIS RODRIGUEZ, individually
and on behalf of J.D.-F., a minor, JACK KOCH, individually
and on behalf of R.K, B.K., and A.K., minor children,
KRISTEN THOMPSON, individually and on behalf of P.T., a
minor, EREN DOOLEY, individually and on behalf of G.D.,
a minor, TOM COLLINS, individually and on behalf of Q.C., a minor,

Plaintiffs,

vs.

GOVERNOR RONALD DION DESANTIS, in his official
Capacity as Governor of the State of Florida; FLORIDA
DEPARTMENT OF EDUCATION, RICHARD CORCORAN,
in his official capacity as Commissioner of the Florida Department
of Education, ORANGE COUNTY SCHOOL BOARD, MIAMI
DADE COUNTY SCHOOL BOARD, HILLSBOROUGH
COUNTY SCHOOL BOARD, PALM BEACH SCHOOL BOARD,
BROWARD COUNTY SCHOOL BOARD, PASCO COUNTY
SCHOOL BOARD, ALACHUA COUNTY SCHOOL BOARD and
VOLUSIA COUNTY SCHOOL BOARD,

Defendants.

**DEFENDANT SCHOOL BOARD OF BROWARD COUNTY'S RESPONSE
TO PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION**

The Defendant, School Board of Broward County ("Broward School Board"), by and through its undersigned attorneys and pursuant to the Court's August 10, 2021 order, files its response to Plaintiff's Amended Motion for Preliminary Injunction (ECF No. 17), and states as follows:

Introduction

This action arises from Florida Governor Ron DeSantis’s issuance of Executive Order 21-175 entitled “Ensuring Parents Freedom to Choose - Masks in School”. [ECF ¶42] The complaint alleges that the Governor ordered the Florida Department of Health to issue rules which protect parents right to make decisions regarding masking of their children in relation to COVID-19, and that the executive order further directed the Commissioner of Education to withhold state funds from non-compliant school boards. [ECF No. 1 at ¶42-44] The complaint alleges:

The Governor’s most recent executive order (21-175) preventing School District’s from putting protections in place for students, such as mask mandate or testing requirements, combined with the refusal to extend funding for distanced learning, has tied the hands of school districts from acting and made it impossible to provide students with disabilities a free, appropriate public education in the least restrictive environment. [ECF No. 1 at ¶56]

The complaint asserts that the “implementation of the executive order of Governor DeSantis to deny these children the protection they need to attend school in a safe environment, the Defendants have violated the regulations and provisions of the ADA...” [ECF No. 1 at ¶184] Specifically, the complaint alleges that as a result of the implementation of Executive Order 21-175, the Defendant Broward School Board is failing to make reasonable modifications where required, excluding Plaintiffs from participation in public education, failing to make its services and programs readily accessible to disabled individuals, administering a policy that has the effect of defeating or substantially impairing accomplishment of the objectives of the public entities program with respect to individuals with disabilities and fails to permit public entities to administer services and programs in the most integrative setting appropriate for the needs of

qualified individuals with disabilities. [ECF No. 1 at ¶¶172 and 184]

With respect to the Broward School Board, the complaint seeks relief on behalf of a four-year old child named J.D.-F., who has chronic kidney disease and receives exceptional student education services in the Broward Public School District. The complaint alleges that J.D.-F.'s - "treating doctors and specialists have informed his parents that, it is too dangerous to return to brick-and-mortar school without precautions such as following the recommended CDC guidelines of mandatory masking and regular testing in schools." [ECF No. 1 at ¶¶134-135] Relief is sought against the Defendant Broward School Board for claimed violations of the Americans with Disabilities Act [ECF No. 1 at ¶¶166-178], Section 504 of the Rehabilitation Act [ECF No. 1 at ¶¶179-187] and the Florida Educational Equity Act [ECF No. 1 at ¶¶188-192].

On August 23, 2021, Plaintiffs filed a notice of submitting additional declarations in support of the pending motion for preliminary injunction. [ECF No. 31] Three of these declarations were filed regarding disabled students who attend public school in Broward County [ECF No. 31-1 at pgs. 4-9] Plaintiff's notice of filing states that in order for these students to receive a free and appropriate public education in the least restrictive environment, these students must return to school in person. The notice asserts that parents of these children are choosing not to send their children to school until CDC guidance is followed. [ECF No. 31 at ¶4]

Plaintiff's Amended Motion for Preliminary Injunction requests that this:

Court **immediately enjoin enforcement** of Defendant Governor DeSantis Executive Order 21-175 and allow the School Districts to implement these children's IEP and 504 Plans to ensure that each child receives a free and appropriate education in the least restrictive and the most integrated environment - without jeopardizing their lives or safety. [ECF No. 17 at pg. 21] (emphasis in original).

Response

In an effort to ensure the health and safety of employees, students and visitors at Broward School District facilities, the Broward School Board has adopted Emergency Policy 2170 (face coverings). Emergency Policy 2170 was last revised on August 17, 2021 and a copy is attached as Exhibit “1”. Emergency Policy 2170 provides that subject to stated exceptions, every person must properly wear a face covering while at or inside a district facility or vehicle.¹

On August 20, 2021, the Florida Department of Education (DOE) issued DOE Order No.: 2021-4024 (Broward County School Board Student Opt-Out Requirements) which found that Broward School Board Policy 2170 did not comply with Florida Department of Health Emergency Rule 64 DER 21-12, in that the rule requires public schools to “allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.” The DOE order further provided that if the Broward School Board did not allow a parent or legal guardian of a student to opt-out the student from wearing a face covering or mask, without requiring a medical reason, approval from a medical professional or any additional requirement to support the request, that the DOE would withhold state funds from the Broward School Board.

Pursuant to the order, state funds would be withheld based upon the amount of compensation provided to elected members of the Broward School Board, and that:

In complying with this order, the School District of Broward County may not reduce any expenditures other than those related to compensation for school board members. Further, the School District of Broward County may not permit the reduction of funds based upon this order to impact student services or teacher pay.

¹ The Centers for Disease Control and Prevention (CDC) current guidelines state “given new evidence on the B.1.617.2 (Delta) variant, CDC has updated the guidance for fully vaccinated people. CDC recommends universal indoor masking for all teachers, staff, students and visitors to K-12 schools, regardless of vaccination status. Children should return to full time in-person learning in the fall with layered prevention strategies in place. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

A copy of DOE Order No: 2021-4024 is attached hereto as Exhibit “2”.

At this time the Broward School Board is in compliance with its obligations under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and the Florida Educational Equity Act by providing a safe and accessible public education to qualified persons with disabilities. See Broward School Board Emergency Policy 2170 attached hereto as Exhibit “1”.

Plaintiff’s Amended Motion for Preliminary Injunction does not seek injunctive relief with respect to Broward School Board Policy 2170, nor does it seek such relief with respect to any Broward School Board policy or actions with respect to Plaintiff J.D.-F.² A response as to whether Governor Desantis’s Executive Order 21-75 and the orders and actions of the Florida Department of Education comply with the ADA and/or Section 504 of the Rehabilitation Act of 1973 should come from Governor DeSantis and the Florida DOE.

Dated: August 24, 2021

Respectfully submitted,

/s/Michael T. Burke

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² Similarly, Plaintiff’s amended motion does not seek relief with respect to Broward School Board policies or actions with respect to the three additional students referred to in Plaintiff’s August 23, 2021 notice of filing. [ECF No. 31 at p. 3] Indeed, Broward School Board policy 2170 establishes a universal indoor mask policy consistent with the CDC guidelines Plaintiffs assert are necessary to provide them with a free and appropriate public education.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th of August, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of records or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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