

**STATE OF FLORIDA
PUBLIC EMPLOYEE RELATIONS COMMISSION**

ORANGE COUNTY CLASSROOM
TEACHERS ASSOCIATION, INC.,

Case No. SM-2020-013

Employee Organization,

vs.

SCHOOL DISTRICT OF ORANGE
COUNTY, FLORIDA,

Employer,

_____ /

**SCHOOL DISTRICT OF ORANGE COUNTY, FLORIDA’S NOTICE OF PARTIAL
REJECTION OF RECOMMENDATIONS OF THE SPECIAL MAGISTRATE**

The Employer, The School District of Orange County, Florida (“SDOC”), through counsel, files this partial rejection of the recommendations of the Special Magistrate issued November 12, 2020, pursuant to §447,403(3)(c), Fl. Stat. and states in support as follows.

1. SDOC rejects paragraph 1 of the MOU as recommended (see page 11 of the Magistrate’s Discussion and Recommended Decision). The recommendation recommends that SDOC’s procedures “shall be implemented in accordance with Center for Disease Control and Prevention (“CDC”) guidelines, including any updates, unless otherwise mutually agreed to by the parties.” The recommendation also states that SDOC will consider the recommendations of local health officials and industry guidance and best practices as appropriate to Florida and Orange County “to the extent they do not conflict with the CDC.”

The District clearly relies upon various guidance documents from the Centers for Disease Control in developing its COVID-19 Health and Safety Procedures Manual. See Employer Exhibit 21, page 82 which lists: 1. CDC – Coronavirus 2019 (COVID-19) Considerations for Schools; 2:

Considerations for K-12 Schools: Readiness and Planning Tool; 3. Coronavirus Disease 2019 (COVID-19) Schools and Childcare Program; and 4. The Importance of Reopening America's Schools this fall.

However, future guidance from the CDC could conflict with direction given by the Florida Department of Health in Orange County on how SDOC deals with any outbreak of COVID-19. More importantly, future guidance from the CDC could require the closure of schools based upon certain community transmission data of the virus. Any such directive to close schools coming from the CDC in the future would require SDOC to violate the Emergency Order issued by the Florida Commissioner of Education dated on November 30, 2020. That Emergency Order requires that school districts such as SDOC must do the following: "All school boards and charter school governing boards must continue to open brick and mortar schools at least five days per week for all students, subject to advice and orders of the Florida Department of Health, local departments of health, and subsequent executive orders."

As recognized by the First District Court of Appeal under the previous Emergency Order issued by the Commissioner of Education on July 7, 2020, utilizing the identical language above, SDOC has to remain open brick and mortar five days a week in order to receive full funding¹ for its children attending LaunchED@Home innovative platform:

"Soon after, the Commissioner issued Emergency Order 2020- EO-06 (Emergency Order). The order addressed the school districts' expected funding shortfalls by waiving strict compliance with certain statutes and rules. See Fla. Dep't of Educ. Order No. 2020-EO-6 at 6–7 (July 6, 2020). The waivers allowed school districts to report a student for funding purposes as a brick-and-mortar student, even if the

¹ If SDOC does not stay open five days a week for brick and mortar instruction, it would result in approximately 25 percent in funding reductions for those students utilizing the LaunchED@Home platform: "Because the costs of online instruction are lower than the costs of in-person instruction, per student funding for online instruction is about twenty-five percent less than funding for in-person classes. See §§ 1011.62(1)(s), (11), Fla. Stat. (2019). So the greater the number of students enrolling in online classes, the greater the loss in funding to school districts." DeSantis, -- So.3d --, 2020 WL 5988207 at page 3.

student enrolled in online classes. Id. **But to obtain the waivers, school districts needed to submit a reopening plan to DOE for approval. Id. And for DOE to approve the plans, school districts had to offer students the choice of in person instruction or online instruction with classes beginning in August.** DeSantis, et al. v. Florida Education Association, et al., 2020 WL 5988207 -- So. 3d --, page 3 (Fla. 1st DCA October 9, 2020). (Emphasis added)

Given that SDOC cannot be hamstrung into compliance with CDC guidelines which may conflict with the Emergency Order issued by the Commissioner of Education on November 30, 2020, SDOC is rejecting the recommendation and instead proposes the following language for paragraph 1 of the MOU:

“The procedures contained herein apply to all facilities wherein bargaining unit employees work and shall be implemented in accordance with the recommendations of local health officials and industry guidance and best practices as appropriate to Florida and Orange County.”²

2. SDOC rejects the second sentence of Paragraph 5 as recommended. With respect to the second sentence, Article XVIII, Section A(11) states: “An employee granted a long-term leave of absence may be employed while on leave upon approval by the Superintendent.” The effect of the second sentence would essentially nullify superintendent approval of work while on leave as required by Article XVIII, Section A(11). A memorandum of understanding may not modify a contractual provision under Florida law. City of Tampa, 18 FPER ¶ 23164 (Fla. PERC 1992) “A

² As an example of why CDC guidelines should not be placed into the MOU, the recommendation made in paragraph 6 of the MOU contains outdated CDC guidelines of how long symptomatic and/or COVID-19 positive persons should be required to stay home from work or school. Specifically, subparagraphs (a)-(c) of paragraph 6 are outdated. Dr. Annette Nielsen so testified. (Hearing Transcript: Page 115, Lines 1-17.) The CDC has updated its guidance for those who tested positive for COVID-19, they should isolate for 10 days and must be fever free without medication for 24 hours. The recommendation in subparagraph 6(a) states employees must be fever free for three days. In subparagraph (b), the recommendation requires two negative tests before a COVID-19 positive person may return to school. Current CDC guidelines do not require negative COVID-19 tests to return to school. Additionally, on December 2, 2020, the CDC changed its guidance on how long persons should quarantine. The CDC now states quarantines can be 10 days if no COVID-19 test is taken or seven days if the quarantine is coupled with a negative COVID-19 test. <https://www.cnn.com/2020/12/01/health/cdc-changing-quarantine-guidelines/index.html>. This conflicts with subparagraph 6(c), requiring persons with close contact to quarantine for 14 days.

letter of understanding which amends a contract also must be ratified to be effective.” As for the substance of the second sentence, the Superintendent needs to retain the ability to decline to allow employees on leave to work, especially if the work proposed is outside of the home interacting with other members of the public. If an employee is not comfortable coming to SDOC’s facilities, they should not be permitted to work outside of their home for someone other than SDOC without giving the Superintendent meaningful ability to call the person back to work for SDOC.

SDOC recommends that paragraph 5 of the MOU read as follows: “The District will grant members of the bargaining unit personal leave without pay up to one school year upon request.”

3. SDOC rejects paragraph 18 of the MOU as recommended in its entirety. This recommendation states that all class sizes (including VPK, electives and special area classes) will comply with CDC and State Guidelines and “will be reduced in a manner that will facilitate physical distancing.” The recommendation also states that classrooms and workspaces must be reconfigured and space seating “must be at least six feet apart, as possible, to comply with same.”

As stated in Hillsborough Classroom Teachers Association v. School Board of Hillsborough County, 423 So.2d 969, 970 (Fla. 1st DCA 1982),

“We agree with the Commission’s view that setting of class size and minimum staffing levels are policy decisions which are incorporated in the term ‘standards of service to be offered to the public’ **which are to be unilaterally set by the public employer pursuant to §447.409, Florida Statutes and are thus not mandatorily bargainable.**” (Emphasis added).

The recommendation as written also imposes class size limits on classes such as electives and special area classes which are not subject to the class size amendment caps of 18 in grades prekindergarten-3, 22 in grades 4-8 and 25 in grades 9-12. See §1003.03(1)(a)-(c), Fl. Stat., which establishes these caps for teachers teaching in “core-curricula courses” See also §1003.01(14), Fl. Stat., which defines “core-curricula courses” as “excluding extracurricular courses as defined

in subsection (15).” See further §1003.01(15), Fl. Stat., defining “extracurricular courses to include but not be limited to **physical education, fine arts, performing fine arts**, career education, and courses that may result in college credit. The term is limited in meaning and used for the sole purpose of designating classes that are not subject to the maximum class size requirements established in s. 1, Art. IX of the State Constitution.” (Emphasis added)

As for six feet between seating in classes, as identified during the hearing through the testimony of Dr. Nielsen, there are some classrooms where physical distancing of six feet is not possible based upon the number of students attending class face-to-face and the size of the facilities not being built with social distancing in mind. (Hearing Transcript: Page 146, Line 22 – Page 147, Line 17) The COVID -19 Health and Safety Procedures Manual requires that: “Arrange desks or seating so that students are as physically distanced **as possible**.” (Employer Exhibit 21, Bates 000247) The Manual also states: “Students will be seated in a physically distant layout in classrooms with all chairs, desks and other workstations properly spaced to achieve maximum distance as possible.” (Employer Exhibit 21, Bates OCSB 000257).

The Manual also identifies as a resource upon which SDOC relied the Florida Department of Education’s Reopening Florida’s Schools and the CARES Act publication. (Employer Exhibit 21, slide 82). The FDOE’s Reopening Florida’s Schools document states:

“K-12 schools, college campuses and child care programs are inherently high-contact settings, not built conveniently for social distancing. Schools are designed to bring people together, creating shared learning spaces, enabling teachers to connect with students in-person, empowering students to collaborate and maximizing the value of a shared educational journey. **While educational programs should maintain maximum distance between students’ desks, this distance may often not reach 6 feet.**”

<http://www.fldoe.org/core/fileparse.php/19861/urlt/FLDOEReopeningCARESAct.pdf> See slide 36 (Emphasis added).³

² On the electronic version of the Manual posted on ocps.net, Page 82 contains links to the FDOE Reopening Florida’s Schools and the American Academy of Pediatrics documents. Those documents are incorporated into the Manual online as if fully set forth therein.

SDOC also relied upon the American Academy of Pediatrics COVID-19 Planning Considerations: Guidance for School Reopening. (Employer Exhibit 21, slide 82). That document states:

“Physical distance between desks should follow current public health guidance. In the absence of specific guidance, desks should be placed at least 3 feet apart, and ideally 6 feet apart. If desks are spaced less than 6 feet apart, face coverings should be strongly encouraged and adhere to public health guidance. In many jurisdictions, face coverings are mandatory for children in public settings, including schools. **Schools should weigh the benefits of strict adherence to a 6-foot spacing rule between students with the potential downside if remote learning is the only alternative.**” <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/> (Emphasis in original)

Adoption of this recommendation would hamstring SDOC’s limited facilities resources, which were not designed for social distancing. Additionally, adoption of this recommendation would necessitate bringing back more teachers currently teaching LaunchED@Home to meet the challenge of students being spread out among more classrooms than is currently the case. It would defeat SDOC’s desire to accommodate as many teachers as possible with LaunchED@Home assignments.

Further, adopting this recommendation would necessarily require students to change classes in the middle of the year and to be assigned to different instructional personnel. This would halt instructional momentum for the students, thereby resulting in a reduction of services provided to the public SDOC serves, i.e. children

Based upon the foregoing, SDOC recommends that paragraph 18 be deleted in its entirety.

4. SDOC rejects paragraph 44 of the MOU in its entirety. This paragraph states that “preferably” teachers should not be assigned to teach both LaunchED@Home and face-to-face students at the same time. This paragraph requires SDOC and CTA to negotiate a procedure by

which to determine of assignment of teachers to on-campus face-to-face instruction or LaunchED@Home that allows for teacher preference. This paragraph requires preference should be given to high-risk teachers and teachers caring for those who are high-risk when assigning LaunchED@Home positions. Finally, the paragraph states that the parties acknowledge external circumstances and changing preferences of parents must be considered.

As stated previously, assignment of teachers to positions and classes and how many students are assigned to classes is the quintessential management right. “We agree with the Commission’s view that setting of class size and **minimum staffing levels** are policy decisions which are incorporated in the term ‘standards of service to be offered to the public’ **which are to be unilaterally set by the public employer pursuant to §447.409, Florida Statutes and are thus not mandatorily bargainable.**” Hillsborough Classroom Teachers Association, 423 So.2d at 970.

Additionally, teachers are being assigned to perform standard duties. Assignment of teachers to normal duties is also within management’s rights: “The assignment and reassignment of employees to perform tasks that are within the scope of the basic employment duties they were hired to perform are management decisions which lie at the core of a public employer’s right of control set forth in Section 447.209, Florida Statutes.” Palm Beach County Classroom Teachers Association, Inc., 42 FPER ¶ 222, citing Manatee Education Association, 12 FPER ¶12017, at 32.

Setting up a requirement that SDOC negotiate with CTA on how it assigns teachers usurps SDOC’s basic management function. SDOC has reserved management rights through both §447.209, Fl. Stat., as well as through Article XXI of the Contract between the School Board of Orange County, Florida and the Orange County Classroom Teachers Association. Further, Article IX, Section A of the Contract allows the Superintendent to assign teachers to classes which fit their

preparation, certification, experience and aptitude. This recommendation would also usurp the power the Superintendent possesses to assign teachers to classes.

The Emergency Order requires SDOC to be open for all students who choose to come to brick and mortar five days a week. Some classes will not neatly break down for all LaunchED@Home and all face-to-face. Preusser so testified. (Hearing Transcript: Page 441, Line 23 – Page 443, Line 1) Management has the right to require that the method of instruction be completed both face-to-face and online for students by its teachers. While SDOC acknowledges that teaching both face-to-face and LaunchED@Home students is challenging logistically in toggling back and forth between the students online and students live, blended classes are a necessity in order to serve the students who have showed up for in-person instruction and to keep class sizes as low as possible.

Finally, considerations of the Special Magistrate include the interest and welfare of the public. See §447.405(3), Fl. Stat. The elimination of blended classes more than three months into the school year will require schedule changes for students and teachers. It will halt instructional momentum and leave students behind academically. That is not in the interest or welfare of the public.

Based upon the foregoing, paragraph 44 should be deleted in its entirety.

CONCLUSION

Other than the rejections of paragraphs 1, 5, 18 and 44, SDOC agrees to the rest of the MOU as recommended by the Special Magistrate. The School Board of Orange County, Florida, sitting as the legislative body, should reject paragraphs 1, 5, 18 and 44 in the manner stated by SDOC above.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via email to Mark Richard, Esq. mrichard@phillipsrichard.com and Lucia Piva, Esq. lpiva@phillipsrichard.com, Phillips, Richard & Rind, P.A., 9360 SW 72 Street, Suite 283, Miami, FL 33173 on this 2nd day of December, 2020.

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