

**STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION
SPECIAL MAGISTRATE, NICHOLAS TALDONE**

In the Matter of Impasse
between

Orange County Classroom Teachers
Association,

Union/Petitioner

and

Case No.: SM-2021-015

School District of Orange County, FL,
Employer/Respondent

Amended Discussion and Recommended Decision¹

Appearances:

For the Union: Mark Richard, Esq.; Lucia Piva, Esq.;
 Phillips, Richard & Rin, P.A.
 Wendy Doromal, President
 Orange County Classroom Teachers Association

For the Employer: John C. Palmerini, B.S.C., Esq.
 James Preusser, Senior Executive Director,
 Orange County Public Schools

Date of Impasse: August 4, 2021

Date of Virtual Hearing: October 21-22, 2021

In accordance with Section 447.201 and 447.403 of the Florida Statutes and Florida Administrative Code Rule 60CC-3, Nicholas Taldone was appointed as Special Magistrate to hear the facts of the impasse described herein, then to offer his Recommended Decision pursuant

¹ The Special Magistrate issued his Discussion and Recommended Decision on November 22, 2021. In a conference call with counsel for the parties on November 23, 2021, counsel agreed that the Special Magistrate had the authority to issue an Amended Discussion and Recommended Decision to clarify any issues raised during the conference call to the extent he deemed appropriate.

to the authority granted to special magistrates by the Florida Statutes. The hearing took place on October 21 and 22, 2021. The hearing commenced on October 21, 2021 at 9:30 am and continued to 6:00 pm. The second hearing day commenced at 9:00 am and continued to 11:00 am. A transcript was made of the parties' arguments and submissions. The hearing was deemed closed upon the exchange and receipt of the post-hearing briefs.

Issue

Whether the Orange County Classroom Teachers Association (OCCTA or CTA) "Issue at Impasse", as amended at the hearing, should be the Recommended Decision of the Special Magistrate². The CTA stated the impasse as: Memorandum of Understanding (MOU) regarding safely reopening schools for the 2021-2022 school year. Orange County Public Schools (OCPS) is governed by the School Board of Orange County (SDOC). The parties agreed the MOU is proper under impact bargaining during the existing Collective Bargaining Agreement (CBA) ratified December 6, 2019. Impact bargaining is well accepted in Florida. Sch. Dist. of Indian River County v. Florida Pub. Employees Relations Com'n, 64 So. 3d 723 (Fla. 4th DCA 2011). Teachers' health and safety is a significant term and condition of employment requiring impact bargaining under the Florida Statutes. See, City of Cocoa, 14 FPER 19311; City of Boca Raton, 12 FPER 17051.

Objective

The objective of the Special Magistrate is to recommend a decision to the parties that would be acceptable in free collective bargaining, that meets the parties' realistic expectations and that the recommendations are justified under Florida Statutes criteria for such decisions. The Recommended Decision is a careful and conscientious balancing of various factors in public employment, the current economic climate, and the reality of other public employment contracts with generally accepted labor practices. The goal is quick ratification by both parties pursuant to the statutory scheme.

² The CTA proposed during the summer 2021 negotiations that ended in impasse on August 4, 2021 that the duration of the MOU they proposed be through December 31, 2021. As will be discussed herein, the CTA amended this proposal at the hearing by seeking that the duration of the MOU be through the end of the school year in June 2022.

Background

The SDOC employs approximately 14,000 instructional personnel in the bargaining unit, represented by Orange County Classroom Teachers Association (Union). The County has grown to the fourth largest school district in Florida and eight largest school district in the United States. The SDOC receives its tax revenue funding from two main sources. The state also sets conditions and standards that must be met by SDOC. Further, Orange County property taxes are a major source of revenue. The State of Florida school funding known as Florida Education Finance Program, provides the basis of revenue for the County public schools. Accordingly, the SDOC must abide by the obligations and conditions set forth by the State.

Statutory Provisions for Impasse

A Special Magistrate is a neutral or arbitrator with broad labor experience that the parties mutually select. Per Section 447.201 and 447.403, Florida Statutes, the Special Magistrate is similar to a fact finder or judge who conducts a hearing and issues a Recommended Decision (“Recommended Decision”). Public employees and employers who bargain to impasse and then utilize the impasse procedure expect a fair and reasonable outcome to their dispute. It has long been held, in the private sector, that arbitration between employers and unions brings “industrial peace” and is *quid pro quo* for no strike provision in a collective bargaining agreement. Textile workers. Union v. Lincoln Mills, 353 U.S. 443-55 (1957). In Florida, the Recommended Decision is a public tool to test the reasonableness of the parties’ impasse position. The value in the magistrate’s Recommended Decision is the scrutiny of the parties’ positions and the public pressure to accept a neutral’s recommendation that results from the impartial evaluation and analysis of each party’s position. A special magistrate’s Recommended Decision must be afforded true deference by the parties and legislative body for the statutory scheme to work.

The public accepts that teachers are fundamental to public services and that teachers control our nation’s future. Interest arbitration, throughout the majority of the United States, utilizes a standard or criteria that are essentially the same as used in the Florida Statutes, “*Factors to be considered by the Special Magistrate*”. See Section 447.405, Fla. Stat. Arbitrator James Sherman stated that the Florida statutory standards in his opinion “...are intended to be applied only

selectively depending upon the circumstances of each case 'that standards' are not to be given equal weight in every case...” and *“Indeed in some cases particular standards probably have no applicability and should not even influence the decision”*. City of Winter Haven, 65 LA 557 (1975). Accordingly, this Special Magistrate will consider and give weight to the factors in section 447.405 only as relevant to the issues discussed herein. Further, the statutory language, “The factors, among others, to be given weight by the Special Magistrate”, is recognition that the Special Magistrate may also consider other factors. The five statutory factors in 447.405 are:

447.405 Factors to be considered by the special magistrate.- The special magistrate shall conduct the hearings and render recommended decisions with the objective of achieving a prompt, peaceful, and just settlement of disputes between the public employee organization and the public employers. The factors, among others, to be given weight by the special magistrate in arriving at a recommended decision shall include:

(1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating are involved.

(2) Comparison of the annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the State.

(3) The interest and welfare of the public.

(4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:

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|----------------------------------|-----------------------------|
| (a) Hazard of employment. | (e) Job training and skills |
| (b) Physical qualifications. | (f) Retirement plans. |
| (c) Educational qualifications. | (g) Sick leave. |
| (d) Intellectual qualifications. | (h) Job security. |

(5) Availability of funds.

In interest arbitration situations, special magistrates are confronted with conflicting arguments raising divergent issues, which must ultimately be resolved, Allegheny County, 120 LA 432 (Wagner, 2004), through the application of generally applied arbitration principles. Berkeley

Unified School Dist., 122 LA 1034 (Staudohar, 2006). Here, the employees are teachers. Their passion and dedication are directly related to the future of our children. Their knowledge, skills and abilities include special training for the gifted students as well as the impaired student. A local government has a fiscal interest in maintaining the quality and morale of its teachers because property values and the local economy are affected by the quality of the school district. A superior school district will encourage commercial businesses, building and property values. Therefore, school districts are very much a concern of the public as well as its students.

Also, this public sector dispute is different than in the private sector. The private sector is bilateral, employer and employees, but the public sector is trilateral. The employees, governmental unit as the employer and the public as the taxpayer make the process different. While the profit motive is absent in public services, the taxpayers' vote is the ultimate decider of the level of public services.

In State of Florida v Florida Police Benevolent Association, the Florida Supreme Court noted public employees' bargaining is not same as private bargaining. 613 So.2d 415, 142 LRRM 2224 (Fla. 1993). The Court explained that while the private sector experience could serve as a reference, the private sector is not an infallible basis for public employment. Id. Notably the Court reasoned that public sector employees in Florida require legislative approval and discretion that cannot be bargained away. Id. Nevertheless, the County and legislative body must recognize that the significant purpose of the Florida Statute and its statutory scheme should not be discarded. A legislative body's easiest political choice may be to refuse any Union proposal, but the Florida Statute mandates collective bargaining with a recognized bargaining union. Sch. Dist. of Indian River County v Florida Pub. Employees Relations Com'n, 64 So. 3d 723 (Fla. 4th DCA 2011) The following Finding of Facts and Recommended Decision reflected in the Memorandum of Understanding attached as Exhibit A ("Recommended Decision") is a product of that statutory scheme.

FINDINGS OF FACT AND DISCUSSION

- a) The Status of the COVID Pandemic

The COVID Pandemic has had more impact on life on this planet than anyone could have imagined two years ago. Currently, the United States is experiencing lower hospitalizations and deaths while in Europe, after declining over the summer, infection rates and hospitalization rates have spiked significantly prompting lockdowns in Austria and other countries. There are two antiviral pills presently being considered by the FDA under Emergency Use Authorization that can be taken at home orally. These pills have been called “game-changers” by the medical and scientific community because the individual experiencing symptoms can have his/her physician electronically prescribe the pill and within 24 hours or so the patient can self-treat by taking the pill comfortably at home and prevent the virus from taking hold.³

On the other hand, while the Pandemic may have become an endemic⁴, the health crisis is likely to continue for some time into the future.⁵ Although vaccinations will bring the Pandemic under control in terms of serious illness and death, the Delta variant’s surprising efficiency will spread the virus through populations at unabated rates. In the United States, for example, the infection rate has persisted at over 70,000 cases a day for over two months despite rapidly increasing vaccination rates⁶. A primary reason is that the Delta variant is transmitted efficiently by asymptomatic individuals regardless of whether they have been vaccinated.⁷ The immunity response produced by the vaccines is more robust in the lower respiratory area of the body while less robust in the upper respiratory area(nose). This means that while vaccinated individuals will not become seriously ill in their lungs, they will transmit the virus via their nose.⁸ Moreover, the

³ See former FDA Commissioner Dr. Scott Gottlieb speaking on CNBC. <https://www.cnbc.com/video/2021/10/01/mercks-oral-covid-19-pill-is-a-profound-game-changer-gottlieb.html>, and Dr. Ralph Baric, M.D., a microbiologist at the University of North Carolina, Chapel Hill, lauded as the “Cononavirus Hunter”, speaking on the November 21, 2021 People’s Pharmacy podcast, <https://www.npr.org/podcasts/381444414/the-people-s-pharmacy-radio-program>

⁴ A pandemic is an epidemic that's spread over multiple countries or continents. An endemic is an epidemic that belongs to a particular people or country.

⁵ See Baric presentation in footnote one above.

⁶ See Baric presentation at footnote one above.

⁷ Id.

⁸ Id. Also, those infected with the Delta variant carry around **1200 times more virus** in their noses compared with the original versions of the coronavirus.

<https://www.reuters.com/business/healthcare-pharmaceuticals/delta-dominates-world-scientists-watch-worrisome-offspring-2021-11-15/>

evidence is now clear the vaccinations' efficacy wanes over time requiring "boosters".⁹ Finally, the ability of the virus to mutate in the future and thwart vaccinations' efficacy is still uncertain.¹⁰

b) The Status of Florida Law

On November 18, 2021, Governor DeSanctis signed legislation produced by a special legislative session he called into action ("Legislation"). In connection with the issues in this proceeding, the relevant provisions include that school districts may not 1) require masks of staff or students or require vaccinations of students or staff; or 2) quarantine students who have had an exposure to a COVID-19 person so long as the student is asymptomatic or has not tested positive for the virus.¹¹ The law provides that students and parents may sue violating school districts and recover costs and attorneys fees.¹² In the Legislation, there is no mention of the status of the Pandemic in the United States, or in Florida, or any mention of medical or scientific data, or any mention of the impact of the Legislation on the safety of students and teachers.

According to the media, in response to the Legislation, Orange County revised its policies so that masks are optional in schools, and students no longer need an opt out form.¹³ Prior to this change, masks were required and students needed to bring in an opt out form signed by their parents.

c) The SDOC and Union Bargain to Impasse in August 2021

In August 2020, the Union declared an impasse over a memorandum of understanding for the safe reopening of schools, for the school year beginning in August. After hearings in October 2020, Special Magistrate Martin Holland issued a Discussion and Recommended Decision on November 12, 2020. His Recommended Decision contained a proposed memorandum of understanding, effective through the end of the 2020-2021 school year, that was approved and

⁹ Id.

¹⁰ Id.

¹¹ <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=74089>

¹² Id.

¹³ <https://www.clickorlando.com/news/local/2021/11/18/masks-to-be-optional-for-everyone-at-orange-county-schools/>

accepted by the Union, the SDOC, and Orange County. The undersigned Special Magistrate has considered Magistrate Holland's thoughtful analysis.

In August 2021, the parties held several bargaining sessions. At an August 4, 2021 bargaining session, the Union declared an impasse over its memorandum of understanding proposed at that session (MOU). The 2021 MOU that the Union proposed, which was unsuccessfully negotiated, and for which impasse was declared, is justified under Florida Statute section 407.405 as an "interest and welfare" subject over which the SDOC must bargain. The Recommended Decision by the Special Magistrate here is fair and reasonable when compared to other large Florida school districts that have adopted a similar MOU during the pandemic, including Dade and Broward county districts.

d) Discussion of Issues and Basis of Recommendations by the Special Magistrate (SM)

i) The Special Magistrate's Overall Approach to Fashioning Recommendations

The Union's proposed MOU that went to impasse is materially affected by the Legislation. Under the Legislation, the SDOC is statutorily prohibited from 1) Requiring students to wear masks or other face coverings; and 2) Requiring asymptomatic students from quarantining. These prohibitions are in conflict with the Union's proposed MOU. (See in the MOU paragraph 12 for masks for students and see paragraph 4 for quarantining all students who had direct contact with a Covid-19 positive individual.) The SDOC specifically requested the SM consider the impact of the Legislation on the issues discussed herein. The Union's position on the Legislation is that it is not relevant to this impasse proceeding because as specified in their proposed MOU, the "law" will prevail over the MOU in the event of a conflict. It must be noted initially that the Union proposed language in Section 1 is that the procedures in the MOU be implemented in accord with Center for Disease Control and Preservation (CDC) guidelines, and to the extent these conflict with the law, the law will prevail. Thus, the issue is whether the Union's proposed language that the law will prevail over the CDC guidelines should be recommended by the SM. However, that the "law" will prevail over the MOU is itself a thorny issue. The determination of the "law" has changed dramatically just in the two weeks since the hearing in this matter concluded, and it may change again as the Legislation is litigated.

It cannot be disputed that as a result of the Legislation, students' and teachers' safety has not improved. It also is undisputed that there is a difficulty in retaining teachers and hiring new teachers.¹⁴ If teachers are out sick, education will be compromised¹⁵. The Union argues that its approach in the MOU has been to have it reflect a "layered" mitigation strategy to maintain low case count of the virus in schools and decrease the risk of teachers becoming ill.¹⁶ The evidence presented is that the SDOC also believes such a mitigation strategy is effective. However, the SDOC argues that because of the rapidly changing landscape, which did not contemplate the Legislation at the time of the hearing, the SDOC needs as much managerial flexibility as possible. The SDOC has recognized the need to keep teachers and students safe by implementing the prior MOU recommended by Special Magistrate Holland. The SDOC is faced with a Scylla versus Charybdis choice in determining how to keep teachers and students safe versus legal compliance with the Legislation, and teachers are faced with the same choice in trying to do their jobs effectively and safely.¹⁷ The Special Magistrate's approach, as discussed below, is to continue the safeguards for students' and teachers' safety that the Union proposes in the MOU to the extent operationally and practically possible in view of this shifting landscape and the new Legislation, parts of which will most certainly be litigated for years to come.

ii) The Special Magistrate's Specific Recommendations

The SM initially had to determine the duration of the MOU to give context to the MOU's other provisions. The SDOC argued that the Union's proposal to extend through the end of the 2021-2022 school year was "regressive" as the Union's final proposal pre impasse was to extend only through December 2021, and that a longer extension beyond December 2021 would "hamstring" the SDOC. However, the timetable is such that the Special Magistrate's Recommended Decision will issue just before the Thanksgiving Holidays, and the Recommended Decision would not be

¹⁴ See testimony of Wendy Doromal, CTA President, at the hearing in this matter.

¹⁵ Id. In addition to becoming ill, infected teachers are subject to "long haul" COVID or even death.

¹⁶ See testimony of Union's expert witness at the hearing, Dr. Candace Jones, M.D., who advocated a "layered" mitigation strategy approach.

¹⁷ These two rocks were regarded by Odysseus as maritime hazards located close enough to each other that they posed an inescapable threat to his ship; avoiding Charybdis meant passing too close to Scylla and vice versa.

deemed approved until 20 days later. If either party rejects any part of the recommendation the Superintendent has 10 additional days to submit her recommendation to the School Board who must subsequently conduct a public hearing. See section 447.403, Florida Statutes. The statutory procedure will essentially encompass the period until the 2021 Christmas break for students. The Special Magistrate is concerned that with the advent of 2022, the same cycle of impasse followed by submission to a special magistrate will reoccur in the winter/spring of 2022. Therefore, the SM determined that the duration should be the end of the 2021-2022 school year.

One related issue to the above and one which affects the entire MOU is the enforceability of the MOU. The MOU must be clear and enforceable. In addition to the Preamble, the MOU's Terms and Conditions clause affects its enforceability. The language as proposed by the Union in both was previously agreed to in the expired memorandum of understanding. Initially, we must undertake an analysis of the Union's proposed first sentence in the Preamble that the SDOC's "COVID-19 Health and Safety Procedures Manual latest version as of the date of execution of this agreement is hereby adopted and incorporated to this MOU as if fully set forth herein." The SDOC proposes to strike this sentence of the Preamble because the Union is improperly attempting to bypass Article II, section M(6)(b)(2)'s provisions that the Joint Safety Committee is the contractual vehicle to resolve safety complaints¹⁸ and that the references in the collective bargaining agreement to the Board maintaining a safe workplace constitutes a waiver by the Union.¹⁹ The SDOC argued that the Union's 79 grievances filed since the expired memorandum of understanding as well as the testimony of Ms. Doromal at the hearing establish that the only reason for the first sentence is for the Union to file grievances bypassing the Joint Safety Committee. The Special Magistrate does not agree with the SDOC's argument that the Union was abusing the situation by filing an inordinate number of grievances. Regarding the issue of waiver, the Special Magistrate does not find the Union waived its right to bargain over safety conditions. General references to the employer maintaining a safe workplace in the parties' collective bargaining agreement does not establish a waiver. *United Faculty of Florida v.*

¹⁸ Article II, section M(6)(b)(2) states the Joint Safety Committee is empowered to "review current safety rules and practices at the various worksites, to provide a vehicle for the handling of complaints, and to determine additional ways for enhancing safety conditions..."

¹⁹ Article VI, Section K states that the "Board agrees to maintain safe and healthful working conditions....."

University of Central Florida Board of Trustees, 36 FPER ¶ 1160(“(a) waiver of this type must be stated with such precision that simply by reading the pertinent contract provision employees will be reasonably alerted that the employer has the power to change certain terms and conditions of employment unilaterally”).) The Special Magistrate acknowledges the SDOC’s frustration with the Union’s bypass of the Joint Safety Committee. On the other hand, it is undisputed the Union does not need the first sentence of the Preamble because it already files grievances over safety issues by citing Article VI, section K of the collective bargaining agreement. Therefore, the Special Master finds that in view of the lack of a nexus between the alleged inordinate number of grievances and the expired memorandum of understanding and considering the Union’s need to have an enforceable agreement, the Special Magistrate recommends the Union’s proposed first sentence of the Preamble be adopted. As an aside, the Special Master trusts the parties will utilize the Joint Safety Committee in the future for its intended purpose.

The SDOC also proposes to strike the Union’s proposed second sentence, which was in the expired memorandum of understanding, that provides, “In the event of a conflict between this Memorandum of Understanding and the COVID-19 Health and Safety Procedures Manual²⁰, this Memorandum of Understanding shall prevail.” The SDOC argues that by Article VI, section L of the collective bargaining agreement²¹, the Union waived their rights with respect to the creation and enforcement of the Emergency Procedures Manual. Regarding the second sentence, the issue of waiver is certainly a “close call” by any judge. However, without resolving the waiver issue, the Special Magistrate nevertheless recommends the second sentence of the Preamble state that in the event of conflict, the Manual shall control for the following reasons. First, such language reflects the intent of Article VI, section L. Second, because the Preamble also states that the

²⁰ Nomenclature needs to be explained. The actual title of the “manual” referred to in the second sentence of the Preamble is “COVID-19 Health and Safety Procedures Guide” which states therein that it is a “supplement to the Injury/Illness section of the Emergency Procedures Manual for Schools etc.”. The manual/guide is therefore a “supplement” to the Article VI, section L Manual.

²¹ Article VI, section L states, “In the case of an infectious disease outbreak that affects the district’s workforce, the procedures in the ...Manual shall be followed.”

Manual may be amended at any time, this also reflects the parties' intent that SDOC be granted wide discretion in its management rights regarding the Manual.

Another overarching issue is whether the School District Health and Safety procedures are to be implemented in accord with Center for Disease Control and Prevention guidelines ("Guidelines"), including any updates. The SDOC argues that although the Guidelines are helpful, they cannot be binding on the SDOC because the CDC's recommendations may conflict with FDOH regulations and cite as an example what the Special Magistrate will refer to as the "mask battle" between the State of Florida Department of Education, certain school districts and the CDC Guidelines on whether parents have the ultimate decision to have their children opt out of masking. The SDOC also notes that according to the CDC, its Guidelines are not meant to be binding as against contrary laws, rules or regulations from the State of Florida with which the District must comply. The Union argues that the proposed MOU language allows flexibility to the SDOC where the Guidelines are contrary to the law and in some places define that expansively as "any Emergency Order issued by the Commissioner of Education, any Executive Order issued by the Governor of Florida, or any rule or regulation of the State of Florida." However, the recent litigation over the "mask battle" indicates that whether the Guidelines are contrary to the law is not a clear issue in many cases. Also, the Guidelines' recommendation of universal masking of students and teachers is now in conflict with the Legislation's prohibition of requiring same.²² Therefore, the Special Magistrate has determined to recommend only that the SDOC consider the Guidelines, but they are not binding on the SDOC. Therefore, regarding Section 1 of the MOU, the Special Magistrate does not recommend the Union's proposed language in the MOU that in the event of conflict, the law prevails over the CDC guidelines because the SM found that the CDC guidelines should not be viewed as binding.

²² CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status The CDC guidelines <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html#:~:text=CDC%20recommends%20universal%20indoor%20masking,layered%20prevention%20strategies%20in%20place>.

As to Section 2, the SM found that the provisions proposed by the Union regarding vendors, visitors and volunteers were restrictive and not supported by any evidence produced at the hearing and proposed revised language on compliance with safety protocols.

Section 3 of the MOU concerns updating emergency plans and contact lists and establishing procedures for COVID-19 positive students and staff. Regarding Section 3(a) of the MOU, the SDOC argued on the one hand that it had already implemented the triage and extra room for symptomatic or COVID-19 students and on the other hand, that such space was at a premium. However, because there was no evidence produced about problems with triage and extra room for symptomatic or COVID-19 students, the Special Magistrate recommends the Union's language except with reference to "medically fragile students" which is an ambiguous term that may cause problems in continued implementation. The parties are encouraged to better define the term "medically fragile students".

Regarding section 3(c) of the MOU, the issues involve the adequacy, transparency, and timing of communications from the SDOC to parents, and staff and other stakeholders ("school community") about students who test positive. The SDOC argues that its current procedure of using Connect Orange²³ to make phone calls, texts and emails to the student and school community and the SDOC's online Dashboard timely provide all the relevant information including in which classes the student tested positive. The Union's proposed language also states that the SDOC must inform the Union "with a weekly update."

The Dashboard lists by the number of positive cases overall and per day per students, employees, and vendors/ visitors overall. The Union argues that the Dashboard is inaccurate and dependent on information from the Florida Department of Health. The SDOC also argues that the Union is entitled by law to access to information via the Florida Public Records law, Chapter 119, Florida statutes and that it should not have to provide information or answer questions by creating new

²³ Via a Connect Orange text, email and/or phone call, the school principal notifies parents, teachers, staff etc. of necessary information affecting the school. As relevant to this proceeding, the information concerns students and staff testing positive to COVID-19.

documents about the public records it provides via the Dashboard. The SDOC also argued that the Union besieged the SDOC with unnecessary requests for information per the language in the expired memorandum of understanding. There is no perfect communication system for the objectives sought and the Dashboard appears to be better than similar online sites in other school districts. It is unclear whether the SDOC is creating a new or separate public record, and whether the Union abused its role by asking unnecessary follow-ups to the weekly updates, but the fact that the Union is a special, partner-like, stakeholder militates in favor of the Union's proposal. Therefore, the Special Magistrate recommends the Union's language.

The remaining disputed paragraphs of Section 3 are 3(e), 3(g) and 3(h). Regarding section 3(e), the SM recommends that instead of the proposed Union language that the school close areas "used by symptomatic persons", the language provide that the areas be "cleaned and disinfected".²⁴ The SM recommends the deletion of Paragraph 3(g) as proposed by the SDOC.

Paragraphs 3(h) and 4 of the MOU deal with exposure or possible exposure to someone with COVID-19. The Union's proposed Paragraph 3(h) provides that "if there has been a confirmed COVID-19 case at a school, the District shall dismiss the room or building of students and most staff for an initial consultation with local health officials..." The Legislation provides that a school district shall not

Prohibit a student from attending school or school sponsored activities, prohibit a student from being on school property, or subject a student to restrictions or disparate treatment, based on an exposure to COVID-19, so long as the student remains asymptomatic and has not received a positive test for COVID-19 as defined in s. 381.00317(1).

See Florida Senate - 2021 SB 2-B 20-00004-21B 20212B. Page 14 of 14. Because the Legislation also prohibits required masking, the ability of the SDOC to prevent transmission has changed with the result that asymptomatic students with COVID-19 are now more likely to

²⁴ The Union proposed language requiring that areas be closed may also violate the Legislation.

transmit the disease.²⁵ The Legislation does not prohibit testing of students for COVID-19. In view of the Legislation, COVID-19 testing of students is one option for the SDOC going forward. This is the approach implemented in August 2021 by the Boston school district's Test and Stay program explained as follows.

The Test and Stay program is a testing initiative intended for asymptomatic close contacts of individuals with confirmed COVID-19. This testing program will allow asymptomatic close contacts to remain in school if they receive an individual rapid antigen test (e.g. BinaxNOW) each school day and test negative, as well as follow other guidelines as noted later in this document.

See <https://www.doe.mass.edu/covid19/on-desktop/protocols/protocols.pdf> . The SM has recommended language in Paragraph 3(h) that schools within the district be given the option to test students on whatever frequency they believe appropriate, and especially in situations where there has been reported students with positive COVID-19 cases. The Special Magistrate acknowledges the difficulties of implementing such a program in view of the Legislation but suggests testing be considered as an optional "tool" going forward.

Paragraphs 4(staying at home after COVID-19 exposure) and 12(masking) as proposed by the Union conflict with the Legislation. The SM recommends the SDOC language in Paragraph 4 with a slight revision by the SM and adopts the deletion of Paragraph 12 as proposed by the SDOC.

²⁵ In a November 19, 2021, posting, Harvard Health Publishing, operated by Harvard Medical School states,"In July 2021, the CDC recommended that anyone who is fully vaccinated and comes into contact with someone who has, or is suspected of having, COVID-19 should get tested three to five days after exposure. In addition, you should wear a mask in public indoor settings for 14 days or until you receive a negative test result. If you are vaccinated, you do not need to quarantine, but you should isolate if you develop symptoms or receive a positive test result. Previously, the CDC had said that someone who was fully vaccinated only needed to get tested after exposure if they were experiencing symptoms. The change follows new evidence regarding the Delta variant, which shows that people who are vaccinated and then get infected (breakthrough infections) can spread the virus to others, perhaps to the same extent as those who are unvaccinated." See <https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus>

Regarding Paragraph 8, the Union proposes that employees have the option to virtually attend all meetings including faculty meetings, parent -teacher meetings etc. where possible. The SDOC proposes that “where possible, large-scale meetings will be virtual.” The SM recommends the Union’s language because there was no evidence presented that virtual meeting in the past 20 months hindered the employer-employee or student-teacher relationships.

Regarding Paragraph 10, the Union proposed language that when conducting home visits, employees may not be required to enter homes. The SM recommends the Union’s language because there was no evidence presented that not having to go into a home hindered the effectiveness of these home visits during the more than one year this has been done.

Regarding Paragraph 18, the Special Magistrate recommends the Union’s proposed language that teachers will not be responsible for adverse consequences of face coverings and curriculum requirements that cannot be followed due to social distancing and class closures. Mask requirements are prohibited by the Legislation. The Union proposed in paragraph 22 of its MOU that hybrid instruction be prohibited and the SDOC rejected that language. The SM recommends as a compromise that because hybrid instruction is permitted, this additional burden on teachers incurred by hybrid instruction be mitigated to some extent by teachers not being responsible for adverse consequences due to social distancing and class closures.

Regarding Paragraph 21, the Union notes that Article X (c)(3)(e) of the collective bargaining agreement prohibits audiovisual monitoring in the classroom and that the permission to “livestream” in the expired memorandum of understanding was to address the situation of students learning from home that existed at the time. However, the Special Magistrate recommends the SDOC’s language as revised by the SM to ensure that teachers who voluntarily choose to allow “livestream” on one occasion are free to not “livestream” in the future.

Finally, regarding Paragraph 27, the SM recommends his own proposed language that would be applicable regardless of how Florida law evolves.

CONCLUSION

For the reasons discussed herein, the undersigned Special Magistrate recommends the Memorandum of Understanding attached as Exhibit A.

Certificate of Service

I hereby certify that on November 24, 2021, a true and correct signed copy of the within document has been served by email and USPS regular mail to:

Mark Richard, Esquire
mrichard@phillipsrichard.com

Lucia Piva, Esquire
lpiva@phillipsrichard.com
9360 SW 72nd Street, Suite 283
Miami, FL 33173 and

John Palmerini, Esquire
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445 West Amelia Street
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Nicholas Taldone, Special Magistrate

EXHIBIT A

**MEMORANDUM OF UNDERSTANDING BETWEEN THE SCHOOL BOARD OF
ORANGE COUNTY, FLORIDA**

AND

THE ORANGE COUNTY CLASROOM TEACHERS' ASSOCIATION

This Memorandum of Understanding (MOU) is made on this ____ day of _____, 20____ by and between the School Board of Orange County, Florida (District) and the Orange County Classroom Teachers Association (OCCTA). This Memorandum of Understanding relates to safely operating schools through June _____, 2022. Any agreed upon changes must be in writing and signed by both parties.

The parties agree as follows:

The COVID-19 Health and Safety Procedures Manual latest version as of the date of execution of this agreement, is hereby adopted and incorporated to this MOU as if fully set forth herein. In the event of a conflict between this Memorandum of Understanding and the COVID-19 Health and Safety Procedures Manual, the COVID-19 Health and Safety Procedures Manual shall prevail. The parties understand the COVID-19 Health and Safety Procedures Manual may be amended as needed for legitimate operational needs by the School Board. The OCCTA will be given prior notice for a meet and confer opportunity. The OCCTA will have five (5) days for input prior to any amendment to the Health and Safety Procedures Manual.

Health and Safety

1. The procedures contained herein apply to all OCPS facilities wherein bargaining unit employees work. The District will consider the recommendations of Center of Disease Control and Prevention "(CDC)" and /or local health officials and industry guidance and best practices as appropriate to Florida and Orange County. Nothing herein shall act as a waiver of any of OCCTA's rights, including but not limited to filing a legal action against the State to challenge any Emergency Order, Executive Order, or law, rule or regulation of the State of Florida.
2. The District may consider the CDC guidelines for visits by school or classroom visitors or volunteers. Vendors or classroom visitors or volunteers must comply with all other safety protocols, including those established by this MOU.
3. The District will update emergency plans and contact lists, and establish procedures for students and staff who have come to school with COVID-19 symptoms, or who have tested positive for COVID-19, including but not limited to the following:

- a) Continuing procedures to separate symptomatic and/or COVID-19 positive individuals from the school population. Each school shall expand school clinic capabilities with triage and have at least one separate isolation room that can be used to isolate symptomatic and/or COVID-19 positive individuals.
- b) Continuing to ensure symptomatic and/or COVID-19 positive individuals are sent home as soon as possible and developing a parent or guardian communication and pick up plan.
- c) Informing OCTTA and all employees at the worksite whenever a student, employee, or visitor at a worksite has tested positive for COVID-19. OCTTA will be provided with a weekly update of these worksites. The OCPS "dashboard" may be utilized for this purpose provided the OCPS uses reasonable efforts to immediately update all incidents.
- d) Continuing to disinfect the portions and/or all of the buildings as necessary if someone is COVID-19 positive.
- e) Cleaning/disinfecting areas used by the person who is symptomatic and/or COVID-19 positive.
- f) Identification and contact tracing in conjunction with Florida Department of Health (FDOH) in Orange County.
- g) Intentionally left blank.
- h) Where there has been an exposure of COVID-19 to students in a school, that school may require COVID -19 testing of all students who are reasonably believed to have been exposed.

Said procedures will be developed in collaboration with local health officials.

4. Symptomatic and/or COVID-19 positive employees and students, and/or those who have had direct contact with someone with COVID-19 will be required to stay at home to the extent prescribed by FDOH.
5. [intentionally left blank]
6. [intentionally left blank]
7. The District shall not ask or require any bargaining unit employees to sign any waiver agreement(s) requiring the employee to waive any rights, hold the District harmless, or to agree to free the District of any liability associated with contracting COVID-19 at work.
8. Bargaining unit employees will have the option to virtually attend any and all meetings, including but not limited to, faculty meetings, PLCs, team meetings, pre-planning meetings, IEP meetings, Meet the Teacher, and Open House where legal and possible.

Provided parents may request face to face meetings if possible. Virtual meetings may be recorded. Any other administrator communications will be conducted via email.

9. The District will ensure adequate equipment and supplies are provided to support hygiene practices, use of Personal Protective Equipment, and sanitation. There must be proper and sufficient supply an equitable distribution of face coverings, gloves, disinfectant wipes and/or cleaner, hand sanitizer with at least 60% alcohol, soap, paper towels, tissues, physical barriers to the extent necessary when other Personal Protective Equipment cannot be used, handwashing and sanitizing stations, and sanitizing materials that will not damage sensitive equipment (e.g. instruments and books). Teachers and schools will have access to said supplies and equipment as needed. Bargaining unit employees are not required to clean or sanitize classrooms; however, these supplies will be available for their use.

The District will ensure that bargaining unit employees whose job description requires increased interaction with students (e.g. elective teachers, nurses, social workers, psychologists, counselors, employees who may be required to implement student restraints, and employees who work with younger students, ESE students, and students with physical conditions) are provided with supplies and equipment commensurate with their exposure level including face shields, physical/plexiglass barriers, masks, gloves, and additional supplies as needed.

Nurses and ESE teachers including those who work in self-contained classrooms will be provided with protective gowns upon request.

The District will provide, if requested, face shields and plexiglass barriers for Deans, Psychologists, Social Workers, Counselors, and Staffing Specialists. The District will provide plexiglass barriers in their offices in the event that a student meeting must be conducted.

10. When conducting home visits, bargaining unit employees, including Social Workers, may not be required to enter homes unless entering the home has a legitimate operational need. Home visits will be made utilizing all protective measures.
11. Bargaining unit employees, including Social Workers, Psychologists Counselors, Deans, Behavioral Specialists, and Staffing Specialists may conduct and participate in IEP meeting, 504 plans, and parent-teacher conferences virtually or by conference call, if agreed to by the parent(s)/guardian(s).

12. Upon request by any person at the school, face covering will be provided to that person (including clear face coverings at the request of the employee).
13. The District will schedule routine cleaning and disinfection. Use of shared objects (e.g., gym or physical education equipment, art supplies, toys, games) should be limited when possible, or cleaned between use.
14. Teachers will be allowed to have air purifiers in their classrooms or office.
15. The District will make all reasonable efforts to ensure physical distancing guidelines at schools and worksites are observed where feasible. Appropriate signage will be distributed to, and displayed in, schools.
16. [intentionally left blank]
17. The District will encourage and communicate health and safety practices to parents, students, and employees. District-wide hygiene practices, social distancing, and other safety protocols will be taught to students and embedded in daily routines.
18. Employees may, but will not be required to, enforce student adherence hygiene practices, social distancing, and other safety protocols. Employees shall not be disciplined or held responsible when students refuse to follow instructions to practice safety protocols unless the employee is grossly negligent and takes no actions to correct the noncompliance. Teachers will also not be held responsible for any adverse consequences of face coverings; COVID-19 cases traced to their classroom; or curriculum requirements that cannot be followed due to social distancing requirements or class closures.
19. School administrators will promptly take action to correct any student non-compliance with health and safety protocols of which they have been made aware to protect the safety of all students and staff.
20. [intentionally left blank]
21. Live stream instruction and cameras in the classroom are permitted only if the teacher volunteers to grant “listen only” opportunities for students absent due to illness. That a

teacher has granted “listen only” opportunities to students on one occasion shall not affect the discretion of that teacher to choose whether or not to grant “listen only” opportunities in the future.

22. **(Intentionally left blank)**

23. **[intentionally left blank]**

24. **[intentionally left blank]**

25. **[intentionally left blank]**

26. **[intentionally left blank]**

27. Teachers will not be penalized for choosing to maintain any distancing prescribed by FDOH and will not be marked down in their evaluation for not walking around the classroom if doing so would violate such distancing.

Terms and Conditions:

The parties agree to further establish, in writing, best practices and mechanisms to monitor and enforce established safety protocols, and to revisit the subjects addressed herein, as necessitated by parent, student, and employee feedback; FDOH updates; recommendations from health authorities; changes in the law; changes of the course or severity of the Pandemic; and the evolving needs of parents, students, and employees.

This Agreement sets forth an entire agreement between the parties hereto and shall supersede any and all prior agreements or understandings between the parties; except that all other provisions of the Collective Bargaining Agreement remain in full effect and in event of a conflict between this Memorandum of Understanding and the Collective Bargaining Agreement, the Collective Bargaining Agreement shall prevail unless mutually agreed by the parties in writing.

This Agreement may be executed in counterparts, and each counterpart will have the effect of an original. Electronic and facsimile copies will be considered originals for all purposes, including enforcement.

This Agreement may not be amended except by a written agreement signed by the parties.

Duration:

This Memorandum shall commence effective upon execution of this Memorandum and shall sunset on June _____, 2022, unless otherwise mutually agree to by the parties in writing.

For School Board of Orange County, Florida:

For Orange County Classroom
Teachers Association:

James Preusser
Senior Executive Director, Human Resources

Wendy L. Doromal
President