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September 1, 2021

*Via Email [Richard.Corcoran@fldoe.org](mailto:Richard.Corcoran@fldoe.org)  
and U.S. First Class Mail*

The Honorable Commissioner Richard Corcoran  
Florida Department of Education  
325 W. Gaines St.  
Tallahassee, FL 32399-0400

**Re: Your letter dated August 27, 2021**

Dear Commissioner Corcoran:

We are in receipt of your letter dated August 27, 2021, regarding the School Board of Orange County, Florida's ("School Board") direction to Superintendent Barbara M. Jenkins on August 24, 2021, to require masks in its schools, and only allowing those students with a medical note to opt out of wearing a mask. The School Board feels this action was necessary in order to protect the health, safety and welfare of its students, employees and visitors and for continuity of instruction.

The School Board had three primary tools by which to control the spread of the Covid-19 virus:

1. **Social distancing:** The Centers for Disease Control and Prevention ("CDC") recommends at least three feet of social distancing between students within the classroom to reduce transmission risk.

"In addition to universal indoor masking, CDC recommends schools maintain at least 3 feet of physical distance between students within classrooms to reduce transmission risk. When it is not possible to maintain a physical distance of at least 3 feet, such as when schools cannot fully re-open while maintaining these distances, it is especially important to layer multiple other prevention strategies, such as screening testing." [Guidance for COVID-19 Prevention in K-12 Schools | CDC](#)

As the State recognized in the June 11, 2020 document titled "Reopening Florida's Schools and the CARES Act", "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." [See Page 36 of the linked document.](#) Also, last year the

Department of Education (“DOE”) allowed Districts to have an innovative plan by allowing Districts to be fully compensated for teaching students online, thereby reducing the crowding in school buildings. This year, since all students are back on campus and no innovative option has been approved by DOE, the School Board cannot socially distance students to control the spread of Covid-19, thereby losing this crucial layer of prevention.

2. **Covid-19 vaccines:** According to the CDC, vaccines help control the spread of the virus and help prevent severe outcomes from the virus: “COVID-19 vaccines are effective at protecting you from COVID-19, especially severe illness and death. COVID-19 vaccines reduce the risk of people spreading the virus that causes COVID-19” [See this link](#). However, students under the age of 12 are not currently eligible for the vaccine, meaning control of the virus is especially difficult in elementary schools. Additionally, Districts are prohibited from requiring students to be vaccinated for Covid-19 for enrollment or attendance, or to gain access to, entry upon or service from such educational institution:

“An educational institution as defined in s. 768.38 may not require students or residents to provide any documentation certifying COVID-19 vaccination or post-infection recovery for attendance or enrollment, or to gain access to, entry upon, or service from such educational institution in this state. This subsection does not otherwise restrict educational institutions from instituting screening protocols consistent with authoritative or controlling government-issued guidance to protect public health.” Section 381.00316(3), Florida Statutes.

Further, unlike the original variant of the virus in 2020, this year’s Delta variant has broken through the existing vaccines, making control of the virus more difficult. Therefore, the second layer of protection is non-existent for approximately 52 percent of our student population and not fully effective for our entire student population.

3. **Masks:** The School Board is relying upon the August 5, 2021 guidance of the CDC: “Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.” [See the CDC mask guidance here](#). The CDC was held by Judge John Cooper in the case of McCarthy v. DeSantis, Case No. 2021-CA-1382 to be the preeminent disease control organization in the United States and that reliance upon the CDC’s recommendations regarding mask wearing by School Boards is reasonable. The School Board, based upon the CDC guidance, determined mandatory masking for all persons except for those with medical exemptions was the best way for controlling the spread of Covid-19 in schools, especially in light of the highly contagious Delta variant. This is especially so when the other two tools to control the spread of the virus (social distancing and vaccines) have been rendered unavailable to the School Board by State actions and by the lack of an approved vaccine for students under 12 years of age.

The state of Florida and Orange County, Florida in particular are suffering from negative affects based upon the Delta variant. The School Board began the 2021-2022 school year on August 10, 2021. Initially, it allowed parents to opt out of wearing masks. After two weeks of reviewing Covid-19 positivity data, on August 24, 2021, the School Board directed the Superintendent to

require masks of all students and only allow parents to opt their students out of wearing masks based upon medical documentation.

As of August 26, 2021, the positivity rate in Orange County is 17.6 percent, with 9048 cases in the last week, and the number of new cases per 100,000 residents is 620.8. Additionally, in the 2020-2021 school year, Orange County Public Schools had 7,397 total positive cases for students, employees and vendors. As of September 1, 2021, Orange County Public Schools has 3,909 positive cases for students, employees, and vendors. This means Orange County Public Schools exceeded 52.8 percent of its total cases from 2020-2021 school year in the first 17 out of 180 days in the 2021-2022 school year. A link to the dashboard may be found [here](#).

Moreover, on August 23, 2021, the day before the School Board directed the Superintendent to change the mask mandate to only allow opt outs with medical documentation, the Florida Department of Health in Orange County reported that children ages 5 to 14 made up roughly 20% of all new Covid-19 cases in Orange County. [See the news report confirming these facts here](#).

The School Board determined, based on the prevalence of cases in the first 17 days of school, that it has a compelling interest in protecting the health, safety and welfare of students based upon the highly contagious Delta variant. See also, Section 1001.42(8), Florida Statutes, where the School Board is authorized to, “in accordance with the provisions of chapters 1003 and 1006, provide for the proper accounting for all students of school age, for the attendance and control of students at school, and for proper attention to health, safety, and other matters relating to the welfare of students.”

This response also relies upon the ruling of Judge Cooper in the case of McCarthy v. DeSantis, from Friday, August 27, 2021, for its mask requirement. Judge Cooper ruled that, based upon Section 1014.03, Florida Statutes, the School Board is entitled to enact regulations, including mask mandates when “such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means.” Judge Cooper determined that DOE could not enforce Department of Health Emergency Rule 64DER21-12(1)(d) cited in your letter, nor could the Department of Education penalize School Boards for not following the Rule because the Rule violated the above statute.


The School Board’s action is narrowly tailored because it protects the students with health conditions making it difficult or impossible to wear a mask by allowing them to opt out, while requiring those who can wear the mask safely to do so in order to slow down the community spread of Covid-19. The policy is also narrowly tailored because it is limited in duration through October 30, 2021, at which time the School Board hopes that community transmission has decreased to the point where the School Board could safely allow mask wearing to be optional again.

The School Board did not provide its direction on August 24, 2021 lightly – it did so in light of the uncontrolled community spread of Covid-19 in Orange County. The School Board shares the goals of DOE to have students attend school in person as much as possible. Given the community spread at this time, mandatory masking is the only remaining tool for the School Board to ensure students stay in school as much as possible. Without such mitigations, an escalation of quarantines will be likely, and school closures inevitable, detracting from student learning time.

Please do not hesitate to contact us should you have any further questions or concerns.

Sincerely,

  
Teresa Jacobs, Chair  
School Board of Orange County, Florida

  
Barbara M. Jenkins, Ed. D.  
Superintendent