IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

KEVIN LEVONAS and ANGELINA AUCELLO; MATT and PRISCILLA POAGE; JUSTIN and GRACE WARNIMENT; ELIZABETH HAGAN; MIKE MILLER; ROBERT and EVELYN GRIFFITH,
Plaintiffs,

v.

HILLSBOROUGH COUNTY SCHOOL BOARD, FLORIDA, and SUPERINTENDENT ADDISON DAVIS,
Defendants.
_____/

Case No: 20-CA-6452
Div.: G

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING COMPLAINT WITH PREJUDICE

THIS CAUSE came before the Court for electronic hearing on December 8, 2020, on Defendants', Hillsborough County School Board, Florida (hereinafter "School Board") and Superintendent Addison Davis (hereinafter "Superintendent") (collectively referred to as "Defendants") *Motion to Dismiss Plaintiffs' Amended Complaint*, filed September 8, 2020. On September 11, 2020, Plaintiffs filed a *Response*. Plaintiffs additionally filed *Notices of Supplemental Authority* on September 15, 2020, September 30, 2020, and December 10, 2020. Defendants also filed a *Notice of Supplemental Authorities* on November 30, 2020.[1] Having thoughtfully and carefully considered the Motion, the Response, attachments and additional supplemental authority, along with the court file and arguments of counsel, and being duly advised in the premises, the Court finds as follows:

[1] The Court notes that both parties filed motions seeking judicial notice. Defendants filed such Notice along with its Motion on September 8, 2020. One day before the hearing, on December 7, 2020, Plaintiffs filed a *Motion for Judicial Notice*. The Court declines to take judicial notice of materials outside the four corners of the Amended Complaint.

BACKGROUND

In the midst of the COVID-19 global pandemic, like other school boards, municipalities, and governing bodies in Florida and this country, Defendants were responsible for instituting a plan to safely and effectively reopen public schools. On July 23, 2020, the School Board formalized a plan to safely reopen public schools, which included a requirement that all children attending school in person to wear face coverings at all times while on campus where social distancing is not possible and when exemptions do not apply (the "Reopening Plan"). After holding a public meeting, the Reopening Plan was approved by the School Board and the Florida Department of Education on August 6, 2020.

On August 14, 2020, Plaintiffs filed a *Verified Emergency Complaint for Declaratory Relief and Injunctive Relief with Incorporated Motion for Temporary Restraining Order* against the School Board and Superintendent. Plaintiffs filed the Amended Complaint at issue on August 17, 2020. On August 18, 2020, the Court denied Plaintiffs' Motion for Temporary Injunction without hearing and found that Plaintiffs failed to demonstrate a legally sufficient basis for temporary injunctive relief.

Plaintiffs' allegations are primarily based on the argument that the Reopening Plan is unconstitutional under Article IX, Section 1 of the Florida Constitution. (Amended Complaint, ¶ 15.) Plaintiffs allege the Reopening Plan violates their purported "fundamental right" to a free public education, creates a separate and unequal education system by offering virtual learning, violates the right to privacy, interferes with the parental right to determine medical treatment for their child, treats different classes of students differently, and deprives students of due process. (Amended Complaint, ¶¶ 21-24.) Additionally, Plaintiffs contend that Defendants lacked authority and did not follow the proper procedures in instituting its Reopening Plan. (Amended Complaint, ¶ 25.) Finally, Plaintiffs contend Defendants violated the Florida Constitution by commencing a virtual-only program for the first week of school. (Amended Complaint, ¶ 26.)

As such, Plaintiffs argue strict scrutiny is the proper standard of review because they claim that a free public education is a fundamental right under the Florida Constitution. (Amended Complaint, ¶¶ 27-28.) In response, Defendants contend rational basis review is the proper legal standard because the Reopening Plan does not infringe upon any constitutionally-protected, fundamental right, does not target a suspect class, and applies to students and staff equally.

Once again, this Court acknowledges that this is a tender matter of significant public importance and that parents and educators alike are making difficult decisions with regard to education in the wake of the global pandemic. However, the Court is bound by the applicable law, and upon review of the applicable legal authority, and for the reasons set forth below, the Court agrees with the Defendants and grants the Motion to Dismiss. Because the Court finds that there are no legally sufficient facts which Plaintiffs can allege to support their claims, the Court finds that further amendment would futile, and therefore; dismisses Plaintiffs' Amended Complaint with prejudice.

ANALYSIS

I. Plaintiffs Fail to State a Claim Against the Superintendent.

Defendants argue the Superintendent is not a proper defendant to this action. *See* Motion, p. 1, n.1 (citing Fla. Stat. § 1001.40 (stating the governing body of each school district is the School Board); § 1001.41 (stating the School Board shall be the entity to "sue, and be sued")). Plaintiffs conceded this point for all claims except their Fifth Claim for Relief. *See* Response, p. 1, n.2. Because this Court dismisses the Fifth Claim for Relief, as set forth below, and because Plaintiffs concede the Superintendent is not a proper defendant to any other claim in this action, the Court dismisses the Superintendent as a party from this action.

II. Free Public Education is Not a Fundamental Right Under the Florida Constitution, Therefore; Rational Basis Review is the Appropriate Standard of Review.

To determine whether the challenged conduct (*i.e.,* the face covering requirement) is constitutional, the Court must first decide the proper standard of review. This determination centers

on whether public education constitutes a "fundamental right" under the Florida Constitution. If education is a "fundamental right," as Plaintiffs contend, then the constitutionality of the challenged conduct must be evaluated under the strict scrutiny standard of review. If education is not a "fundamental right," then the conduct is evaluated under the rational basis standard.

Free public education is not a "fundamental right." Indeed, Article IX, Section 1(a) states that education is a "fundamental *value*." The Florida Supreme Court has confirmed that education is not a "fundamental right" under the Florida Constitution. *See Bush v. Holmes*, 919 So. 2d 392, 404 (Fla. 2006) ("In response to concerns of commissioners that the state might become liable for every individual's dissatisfaction with the education system, the term 'fundamental value' was substituted."). As such, the Court finds that Plaintiffs' alleged constitutional violations must be analyzed under rational basis review. *See generally Connor v. Brevard County School Board*, No. 2020-CA-038111-XXXX-XX (Fla. 18th Cir. Ct. Oct. 9, 2020) (rejecting the same argument advanced here and determining rational basis review is the proper standard of review for alleged constitutional violations for a face mask requirement at school).

III. The Face Covering Requirement within the Reopening Plan is Constitutional Under Rational Basis Review.

The rational basis test adopted by the Florida Supreme Court requires that a "state statute must be upheld . . . if there is *any* reasonable relationship between the act and the furtherance of a valid governmental objective." *Haire v. Fla. Dep't of Agric. & Consumer Servs*., 870 So. 2d 774, 782 (Fla. 2004) (internal citations omitted) (emphasis added). When considering rational basis review, courts "must remain cognizant of the legislature's broad range of discretion in its choice of means and methods by which it will enhance the public good and welfare." *Id*. (internal citations omitted). In doing so, the Court acknowledges the inherent authority afforded to the School Board to enact policies and procedures necessary to protect the health, safety, and welfare of students. *See* Fla. Stat. § 1001.42(8)(a); *see also Ferrara v. Hendry Cty. Sch. Bd.*, 362 So. 2d 371, 374 (Fla. 2d DCA 1978)

(conducting a rational basis review of the school board's dress code, court stated "we feel compelled to recognize and give weight to the very strong policy considerations in favor of giving local school boards the widest possible latitude in the management of school affairs").

Accordingly, the Court finds that the face covering requirement within the Reopening Plan bears at least some "real or substantial relation" to the current public health crisis caused by the COVID-19 pandemic. *See Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 25 (1905). While Plaintiffs take issue with the medical guidance and science relied upon by the School Board to develop and implement the face mask requirement, there is no dispute that such guidance and science exist and the School Board relied upon it to develop the face mask requirement. The Court need not evaluate the correctness of that guidance and science to determine that the School Board had a rational basis for implementing the face covering requirement and that the School Board's face mask requirement bears a reasonable relationship to a valid governmental objective. Plaintiffs' allegations do not and cannot demonstrate that the face covering requirement fails under the rational basis test because Plaintiffs cannot negate every conceivable basis in support of the face covering requirement. *See Haire*, 870 So. 2d at 782.

With regard to Plaintiffs' purported unfettered "right to be let alone and free from governmental intrusion," such "right" simply does not exist, especially within the context of public schools. In the wake of the current pandemic, Florida courts have repeatedly held that requiring individuals to wear face coverings in a public location is not a constitutional violation. The Court finds these opinions persuasive. *See Machovec, et al., v. Palm Beach Cnty.*, Case No. 2020-CA-006920 (Fla. 15th Cir. Ct. Jul. 27, 2020) ("There is no reasonable expectation of privacy as to whether one covers their nose and mouth in public places."); *see Green v. Alachua Cnty.*, Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020) ("There is no recognized constitutional right not to wear a facial covering in public locations or to expose other citizens of the county to a contagious and

potentially lethal virus during a declared pandemic emergency."); *Dolata v. City of Deland*, Case No. 2020-10900-CIDL (Fla. 7th Cir. Ct. Aug. 31, 2020) ("Even if the instant [p]laintiff had a recognized right to privacy here, which he does not, it is clear that the City's interest in reducing the spread of COVID-19 is a compelling state interest"); *Carroll v. Gadsden Cnty.*, Case No. 20-542-CA (Fla. 2nd Cir. Ct. May 26, 2020) ("[C]ommissioners were asked to choose between sparing residents the miniscule inconvenience of wearing a mask and saving lives. They chose saving lives. And they did so in conformity with the Florida Constitution."); *Jackson v. Orange Cnty.*, Case No: 48-2020-CA-006427-O (Fla. 9th Cir. Ct. Aug. 31, 2020) ("Plaintiff is unable to show he has a recognized constitutional right not to wear a facial covering in public locations or to expose other persons to a contagious and potentially lethal virus during a declared pandemic."). As such, the Court finds as a matter of law that there is no violation of the right to privacy.

Moreover, the Reopening Plan does not target a suspect class, but instead applies to students and staff equally. The Reopening Plan includes various exceptions to wearing face coverings for all students, such as while eating or drinking, or for students with special needs or certain medical conditions. These exceptions are reasonably related to the legitimate governmental interest in protecting the health and safety of students, particularly during a global pandemic. Likewise, the virtual learning option does not create a "separate and unequal" education system. Instead, the Reopening Plan affords students and parents the option of choosing the preferred method of education, which is reasonably related to the legitimate governmental interest in protecting the health and safety of students, in the midst of the COVID-19 pandemic.

Similarly, the Reopening Plan does not infringe on a parent's right to determine the medical treatment for their child. Florida courts have recently rejected Plaintiffs' argument on this point, and this Court finds those rulings persuasive. *See Green*, Case. No. 2020-CA-001249 ("This Court additionally finds that the facial covering requirement contained in the County's emergency order is

neither a medical treatment, compelled or otherwise, nor compelled speech."); *Machovec*, Case No. 2020-CA-006920 (rejecting the argument that "the wearing of a mask is a medical treatment or medical procedure . . . A mask is no more a 'medical procedure' than putting a Band-Aid on an open wound. It is also not close to being analogous to the consequential or invasive procedures at issue in other cases addressing the right to medical privacy."); *Jackson*, Case No: 48-2020-CA-006427-O ("The court rejects the premise that a face mask is a medical device').

Accordingly, given the foregoing, the Court finds that the Reopening Plan is constitutional under the rational basis standard of review. The Court finds that the School Board had a rational basis for implementing the face covering requirement and that the School Board's face mask requirement bears a reasonable relationship to a valid governmental objective. As such, the Court further finds as a matter of law that Plaintiffs have failed to state a cause of action. The Court, therefore, dismisses Plaintiffs' First, Second, Third, and Fourth Claims for Relief for failure to state a cause of action.

IV. Plaintiffs Fail to State a Claim for Violation of the Florida Sunshine Act.

Plaintiffs claim Defendants violated the Florida Sunshine Act when the School Board approved the Reopening Plan, allegedly without public notice or comment. (Amended Complaint, ¶¶ 25, 126-141.) Plaintiffs claim that the School Board lacked the authority to issue the Reopening Plan and that proper notice and hearing procedures were not followed. (*Id.*) This Court finds that Plaintiffs' allegations are not well-pled and are otherwise legally insufficient. The Florida Constitution created the School Board and the Superintendent, and deemed them the proper parties to achieve a uniform, efficient, and safe school system. Defendants acted within their general, supplemental, and inherent powers when it created and implemented the Reopening Plan for the purpose of ensuring the health and safety of its students.

Plaintiffs other allegations are not well-pled as they fail to clearly allege what action was allegedly taken in violation of the Florida Sunshine Act. The Reopening Plan was properly approved

by the School Board (where a public meeting was held) and the Florida Department of Education on or around July 23, 2020. Subsequently, a public hearing, where public comments were heard, was held on August 6, 2020. All procedures were followed. Moreover, Plaintiffs appeared to have abandoned this claim by not articulating any further support for this claim during the December 8, 2020, hearing. The Court finds that Plaintiffs have not and cannot allege any legally sufficient facts that would support their Fifth Claim for Relief, and therefore, dismisses such claim with prejudice.

V. Plaintiffs Fail to State a Claim for Failure to Open.

Plaintiffs claim Defendants violated the Florida Constitution when Defendants required all students to attend eLearning for the first week of the semester. (Amended Complaint, ¶¶ 144-151.) Plaintiffs fail to allege how this action – which applied to all students equally and which was in compliance with the Reopening Plan approved by the Florida Department of Education – violated the Florida Constitution. The Court finds that Plaintiffs cannot do so because the Florida Legislature has determined that virtual education is a viable educational model, as evidenced by Section 1000.04(4), *Florida Statutes.* The Court finds that Plaintiffs cannot allege any legally sufficient facts which would support their Sixth Claim for Relief, and therefore, dismisses such claim with prejudice.

Given the foregoing, the Court finds that Plaintiffs' Amended Complaint fails to state any legally sufficient claim upon which relief may be granted. The Court further finds that Plaintiffs cannot allege any set of facts or circumstances which would entitle them to relief; therefore, further amendment is futile. As such, the Court finds dismissal with prejudice is warranted.

It is therefore **ORDERED** and **ADJUDGED** that Defendants' *Motion to Dismiss the Amended Complaint* is **GRANTED**. Plaintiffs' Amended Complaint is **DISMISSED WITH PREJUDICE**.

Should any party choose to file a timely motion pursuant to Florida Rule of Civil Procedure 1.530(b), the Court reminds the parties of the undersigned's impending retirement, and **DIRECTS**

that upon the filing of such a motion, counsel shall immediately provide via electronic communication a copy of any such motion to the undersigned's judicial assistant, with proper copy to all parties.

DONE AND ORDERED and effective as of the date and time imprinted below with the Judge's signature.

Electronically Conformed 12/15/2020
Martha J. Cook

MARTHA J. COOK,
Circuit Court Judge

Electronic Copies via JAWS