STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA, AND THE SCHOOL BOARD OF ORANGE COUNTY, FLORIDA,

Petitioners,

vs. Case No. 21-2696RE

STATE OF FLORIDA, DEPARTMENT OF HEALTH,

Respondent.
_____/

SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA,

Petitioner,

vs. Case No. 21-2697RE

FLORIDA DEPARTMENT OF HEALTH,

Respondent.
_____/

FLORIDA STATE CONFERENCE OF NAACP; FLORIDA STUDENT POWER NETWORK; J. W. BY AND THROUGH HER NEXT FRIEND JOHN WALSH; S. W. BY AND THROUGH HER NEXT FRIEND JOHN WALSH; JOHN WALSH IN HIS INDIVIDUAL CAPACITY; Z. L. BY AND THROUGH HIS NEXT FRIEND TERA THADDIES,

Petitioners,

vs. Case No. 21-2707RE

FLORIDA DEPARTMENT OF HEALTH,

Respondent.
_____/

SCHOOL BOARD OF LEON COUNTY, FLORIDA, AND ROCKY HANNA, AS SUPERINTENDENT, LEON COUNTY SCHOOLS,

Petitioners,

vs. Case No. 21-2721RE

FLORIDA DEPARTMENT OF HEALTH,

Respondent.
_____/

FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS THE NAACP PETITIONERS' RULE CHALLENGE

This cause came before the undersigned on Respondent's Motion to Dismiss for Lack of Jurisdiction directed to Petitioners in NAACP, et al. (hereafter the NAACP Petitioners), filed September 14, 2021. Respondent contends that the NAACP Petitioners (consisting of two associations and individuals from five separate families) lack standing to challenge the emergency rule, and that the Division of Administrative Hearings lacks jurisdiction to consider their challenge to the subject emergency rule for this reason. Upon consideration of Respondent's motion and the NAACP Petitioners' response, and Respondent's reply, the undersigned concludes that the NAACP Petitioners lack standing to challenge emergency rule 64DER21-12.

The Law on Standing

To challenge a rule, a party must be "substantially affected" by it. § 120.56(1)(a), Fla. Stat. In *Jacoby v. Florida Board of Medicine*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005), the court explained that in order to establish that someone is "substantially affected" by a rule, the person or entity must demonstrate: "(1) that the rule or policy will result in a real and immediate injury in fact, and (2) that the alleged interest is within the zone of interest to be protected or regulated." A hypothetical future injury is insufficient to confer standing. *Fla. Dep't of Offender Rehab. v. Jerry*, 353 So. 2d 1230, 1236 (Fla. 1st DCA 1978), *cert denied*, 359 So. 2d 1215 (Fla. 1978) (*disapproved on other grounds by Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec.*, 412 So. 2d 351 (Fla. 1982)).

In *Jerry*, the court refused standing to a prison inmate to challenge a rule that placed inmates in disciplinary confinement for committing assault. *Id*. The inmate was previously found guilty of assault, placed in disciplinary confinement and then

released. *Id*. at 1231. The court rejected the inmate's argument that he would be injured by the rule in the future if he was charged with assault again, stating:

> Whether this will occur, however, is a matter of speculation and conjecture and we will not presume that Jerry, having once committed an assault while in custody, will do so again. To so presume would result only in illusory speculation which is hardly supportive of issues of "sufficient immediacy and reality" necessary to confer standing.

Id. at 1236.

In *Department of Health and Rehabilitative Services v. Alice P.*, 367 So. 2d 1045 (Fla. 1st DCA 1979), the agency proposed rules that denied Medicaid funding for elective abortions. The hearing officer below found women of child-bearing age who received Medicaid had standing to challenge the rules. The First District applied the standing test articulated in *Jerry* to deny standing to a woman who was not pregnant. The court stated that a pregnant Medicaid recipient and a physician whose practice would decline from reduced Medicaid funding of abortions were substantially affected. However, these rulings were dicta because the court dismissed their petitions as untimely filed. *Id*. at 1051.

In *Ward v. Board of Trustees of the Internal Improvement Trust Fund*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995), the court explained that a sufficient and immediate injury exists when a person or entity will be subject to a penalty by a proposed rule. In *Ward*, an engineer argued that complying with the rules relating to the construction of docks on aquatic preserves would create unsafe docks, which would subject him to discipline under the engineering licensing statutes. The court agreed that he would be subject to discipline and, thus, was substantially affected by the rule.

In *Lanoue v. Florida Department of Law Enforcement*, 751 So. 2d 94, 98 (Fla. 1st DCA 1999), the court found that the party who failed a breathalyzer test could challenge the rules providing specifications for the breathalyzer test because he had been charged with driving under the influence, and if he were to be found guilty, he would be subject to penalties.

In *NAACP v. Board of Regents*, 822 So. 2d 1 (Fla. 1st DCA 2002), the board proposed rule amendments restricting the use of affirmative action based on race and gender for certain university admissions. A civil rights organization, a tenth-grade African-American student, and the student's mother challenged the rule amendments. The student hoped to attend a university in the State University System and major in computer science or engineering. The Administrative Law Judge determined that the challengers were substantially affected. The First

District reversed on that ground, finding that the NAACP had failed to prove that the challenged rule amendments would cause a real and sufficiently immediate injury to any of its members. Focusing on the student, the court stated that, at his current rate of academic progress, he would qualify for university admission regardless of the impact of the challenged rule amendments. Because he had two more years until admission, in any event, any claimed injury could not be real and sufficiently immediate, but would rest on "rank speculation." *Id*. at 7. Judge Browning dissented, stating:

> [I]n my judgment, the crucial factor is how one weighs the impact of the proposed rules on African–Americans' admission rights to the SUS, as compared to their rights under the repealed affirmative action programs. My "scales" indicate African–American students' admission to the SUS under legally established affirmative action programs cannot be repealed by agency rules without giving those covered by such programs the right to challenge the repeal, because existing case law indicates they are "substantially affected" for rule challenge purposes. On the merits, Appellants might not be entitled to relief. However, they have the interest required as "substantially affected parties" to challenge the proposed rules' validity.

Id. at 14.

Upon rehearing, the First District certified the question of petitioners' standing as one of great public importance. *Id.* Ultimately, the Florida Supreme Court quashed the opinion of the First District and held that the NAACP, the student, and his mother were all substantially affected. *NAACP v. Board of Regents*, 863 So. 2d 294 (Fla. 2003). In so holding, the Florida Supreme Court stated that it agreed with Judge Browning's analysis in his dissent. *Id*. at 299. The court also stated that an association has standing to challenge a rule that substantially affects a substantial number of the association's members, citing *Florida Home Builders Association v. Department of Labor & Employment Security,* 412 So. 2d 351 (Fla.1982).

Respondent relies on *DeSantis v. Florida Education Association*, 306 So. 3d 1202, 1214 (Fla. 1st DCA 2020), wherein the First District addressed whether parents, students, teachers and related associations had standing to challenge an emergency order that they claimed required students and teachers to return to in-person school during the COVID-19 pandemic. The challengers' alleged injury was being forced to return to school where they had the possibility of contracting and transmitting COVID-19. *Id.* at 1208. *Florida Education Association* is not a rule challenge case, but it analyzes whether the challengers in that case alleged a

sufficient "injury in fact" to confer standing. The First District denied standing to all, noting that the challenged emergency order did not require teachers and students to return to the classroom. *Id*. at 1214. Significantly, the court also stated that "any injury to a student or teacher from being forced to return to the classroom [during the COVID-19 pandemic] is purely hypothetical." *Fla. Educ. Ass'n*, 306 So. 3d at 1214.

To say that it is a challenge to harmonize these standing cases would be an understatement. The First District has acknowledged as much:

> The federal law of standing is complex, inconsistent, and unreliable. 4 Davis, *Administrative Law Treatise,* § 24:1 (Second Edition, 1983). The Florida law of standing borrows much of its underpinnings from the federal law and thus arguably may be said to be subject to the same vagaries.

Montgomery v. Dep't of Health & Rehab. Servs., 468 So. 2d 1014, 1016 n.4 (Fla. 1st DCA 1985).

Analysis

Turning now to the controversy at hand, the emergency rule does not require a student or parent to do anything. Rather, the NAACP Petitioners challenge the rule because of the standards it imposes on other entities, Florida's school districts. The derivative injury the NAACP Petitioners claim here (the alleged increased risk of contracting and transmitting COVID-19 in schools) is not as concrete or certain as the injury that resulted from the affirmative action rules challenged in *NAACP*. That is, there was little doubt the rules restricting affirmative action would result in some African-Americans being denied admission to the state university of their choice.

The possibility that students will contract and transmit COVID-19 because of the emergency rule is a far more speculative, future injury. As Respondent points out, the NAACP Petitioners rely on a chain of logic and multiple inferences to get to an injury in fact: (1) that the school district would require masks without an unrestricted opt-out but for the emergency rule[1]; (2) that one or more students will opt out for non-medical reasons; (3) that one or more of the students who opted out for non-medical reasons will contract COVID-19 and attend school despite having contracted COVID-19; and (4) that the unmasked student who opted out will transmit COVID-19 to one or more of the student Petitioners (or in the case of the association Petitioners, to a substantial number of their members). The NAACP Petitioners have alleged that online learning is either unavailable to them or

[1] According to the NAACP Petition, two of the families identified as Petitioners have children who attend schools where masks are not required. *NAACP Petition*, ¶¶ 29 and 52.

inadequate. But, like the emergency order challenged in *Florida Education Association,* the emergency rule places no limitation on online learning.

Standing should not be determined preliminarily if it is dependent upon unresolved disputed issues of fact. *Anthony Abraham Chevrolet Co. v. Collection Chevrolet, Inc.*, 533 So. 2d 821, 824 (Fla. 1st DCA 1988). No evidence has been presented on whether the portions of the emergency rule challenged here make it more likely that the student Petitioners will contract and transmit COVID-19, and no such finding has been made. All well-pleaded facts in the NAACP Petition have been accepted as true. That said, all of the NAACP Petitioners' allegations can be distilled down to one alleged injury: that students are more likely to contract and transmit COVID-19 in school. The First District found this injury too speculative to confer standing in *Florida Education Association* as a matter of law. *Florida Education Association* is the most salient guidance on the subject at hand and is followed here for that reason.

The application of *Florida Education Association* here also strikes the right balance. The line on standing must be drawn somewhere. If standing requirements were relaxed to allow third parties to challenge the validity of rules that regulate others due to safety concerns—however legitimate and provable—there would be no logical basis to, for example, prohibit the public from challenging rules regulating the practice of medicine, dentistry, or engineering under the theory that the standards are insufficient to keep them safe. The "injury in fact" test, if applied properly in this context, would prevent a patient or client from initiating such a challenge because the prospect that the individual may become sick or injured because of an inadequate standard is too speculative. But that does not mean that rules establishing standards for the practice of medicine, dentistry, or engineering cannot be challenged; rather, the "injury in fact" test—while placing a reasonable limitation on standing—allows the professionals whose conduct is directly regulated by the rules to challenge them.

Likewise here, the decision to deny standing to the NAACP Petitioners does not shield the emergency rule from scrutiny. For the reasons explained in detail in the Order Denying Respondent's Motion to Dismiss the School Board Petitions for Lack of Jurisdiction, the school board Petitioners can move forward with their challenge over the standing objection raised by Respondent.

Conclusion

The individual NAACP Petitioners lack standing to challenge the emergency rule in this case as a matter of law because they cannot satisfy the injury in fact test. The associations lack standing for the same reason.

Based on the foregoing, it is

ORDERED that:

1. Case No. 21-2707RE is hereby severed from this consolidated proceeding.

2. Respondent's Motion to Dismiss for Lack of Jurisdiction directed to Petitioners in NAACP, et al., is GRANTED.

DONE AND ORDERED this 20th day of September, 2021, in Tallahassee, Leon County, Florida.

BRIAN A. NEWMAN
Deputy Chief Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of September, 2021.

COPIES FURNISHED:

Louise Wilhite-St Laurent, General Counsel
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

Wendy Lecker
Education Law Center
60 Park Place, Suite 300
Newark, New Jersey 07102

Bacardi Jackson, Esquire
Southern Poverty Law Center
Post Office Box 12463
Miami, Florida 33101

Samuel Boyd, Esquire
Southern Poverty Law Center
Post Office Box 12463
Miami, Florida 33101

David C. Ashburn, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301

Mark Herron, Esquire
Messer, Caparello, P.A.
2618 Centennial Place
Post Office Box 15579
Tallahassee, Florida 32317

Jessica Levin
Education Law Center
60 Park Place, Suite 300
Newark, New Jersey 07102

Joshua Byrne Spector, Esquire
Law Offices of Joshua Spector, P.A.
14 Northeast 1st Avenue, Suite 1100
Miami, Florida 33132

Jamie Alan Cole, Esquire
Weiss Serota Helfman
Cole & Bierman, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, Florida 33301

Richard Bradlee Rosengarten, Esquire
Weiss Serota
2525 Ponce de Leon Boulevard
Miami, Florida 33134

Eduardo S. Lombard, Esquire
Radey Law Firm, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

Melissa Hedrick, Esquire
Radey Law Firm, P.A.
301 South Bronough Street
Tallahassee, Florida 32310

Ken Plante, Coordinator
Joint Administrative Procedures
Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400

Joseph Brennan Donnelly, Esquire
Messer Caparello, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

Evian Lynn White De Leon, Esquire
Southern Poverty Law Center
Post Office Box 12463
Miami, Florida 33101

Edward George Guedes, Esquire
Weiss Serota Helfman
Cole & Bierman, P.L.
2525 Ponce de Leon Boulevard, Suite 700
Coral Gables, Florida 33134

John K. Londot, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302

Angela D. Miles, Esquire
Radey Thomas Yon & Clark, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

Anya Grosenbaugh, Program
Administrator
Margaret Swain
Florida Administrative Code & Register
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.