STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA; LEON COUNTY SCHOOL BOARD; ROCKY HANNA, AS SUPERINTENDENT OF LEON COUNTY SCHOOLS; DUVAL COUNTY SCHOOL BOARD; ORANGE COUNTY SCHOOL BOARD; SCHOOL BOARD OF BROWARD COUNTY, FLORIDA; AND SCHOOL BOARD OF ALACHUA COUNTY,

Case No. 21-3066RE

Petitioners,

vs.

DEPARTMENT OF HEALTH,

Respondent.
_______________________________________/

FINAL ORDER

The final hearing in this matter was conducted before Deputy Chief Judge Brian A. Newman of the Division of Administrative Hearings ("DOAH"), pursuant to sections 120.569, 120.57(1) and 120.56(5), Florida Statutes (2021), on October 21 and 22, 2021, in Tallahassee, Florida.

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STATEMENT OF THE ISSUE

The issues to be determined are whether certain provisions of Emergency Rule 64DER21-15 (the "Emergency Rule") are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On October 6, 2021, Petitioners filed a petition to challenge two provisions of the Emergency Rule (collectively referred to herein after as the "Opt-Out" provisions). Specifically, Petitioners challenge the second phrase of subsection (1)(d) of the Emergency Rule: "however, the school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian's sole discretion" (the "Mask Opt-Out" provision). Petitioners also challenge subsection (3)(a)1. of the Emergency Rule, which provides that "[p]arents or legal guardians of students who are known to have been in direct contact with an individual

who received a positive diagnostic test for COVID-19" are given the sole discretion to allow their child (without any quarantine period or consultation with the school) "to attend school, school-sponsored activities, or be on school property, without restrictions or disparate treatment, so long as the student remains asymptomatic ... " (the "Quarantine Opt-Out" provision).

The parties filed a Second Amended Joint Pre-hearing Stipulation in which they stipulated to certain facts and law. To the extent relevant, the parties' stipulated facts and law have been incorporated below.

At the final hearing, Petitioners presented testimony from Cassandra Gail Pasley (deposition excerpts), Lisa Gwynn, D.O., and Dr. Aileen Marty. Respondent presented testimony from Ms. Pasley, Jacob Oliva, and Dr. Jayanta Bhattacharya. Joint Exhibits 1 through 26, 33 through 43, and 45 through 53 were admitted into evidence. Petitioners' Exhibits 3 through 8, 9 (pages 9.5 through 9.94) and 10.1 were admitted into evidence. Respondent's Exhibits 9, 10, and 11.3 through 11.5, and 11.7 through 11.9 were admitted into evidence.

The parties timely filed Proposed Final Orders, which have been considered in preparing this Final Order.

FINDINGS OF FACT

Parties

1. The Petitioner School Boards are the governing bodies of the school districts of Miami-Dade, Leon, Duval, Orange, Broward, and Alachua Counties. Petitioner Rocky Hanna is the Superintendent of the Leon County School Board. Petitioners are subject to and must comply with the Emergency Rule.

2. The Department of Education has taken enforcement action against the Petitioner School Boards for non-compliance with the Emergency Rule. The Department of Education has imposed financial penalties for non-compliance with the Emergency Rule.

3. Respondent Florida Department of Health is the state agency with the authority to adopt rules governing the control of preventable communicable diseases in public schools pursuant to section 1003.22, Florida Statutes (2021). Section 1003.22 provides in pertinent part:

> 1003.22. School-entry health examinations; immunization against communicable diseases; exemptions; duties of Department of Health.
>
> * * *
>
> (3) The Department of Health may adopt rules necessary to administer and enforce this section. *The Department of Health, after consultation with the Department of Education, shall adopt rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases.* The rules must include procedures for exempting a child from immunization requirements. Immunizations shall be required for poliomyelitis, diphtheria, rubeola, rubella, pertussis, mumps, tetanus, and other communicable diseases as determined by the rules of the Department of Health. The manner and frequency of administration of the immunization or testing shall conform to recognized standards of medical practice. The Department of Health shall supervise and secure the enforcement of the required immunization. Immunizations required by this section shall be available at no cost from the county health departments. (emphasis added).

4. The Emergency Rule—adopted by Respondent on September 22, 2021—provides:

> **64DER21-15 Protocols for Controlling COVID-19 in School Settings**
>
> (1) GENERAL PROTOCOLS AND DEFINITION. The following procedures shall be instituted to govern the control of COVID-19 in public schools:
>
> (a) Schools will encourage routine cleaning of classrooms and high-traffic areas.
>
> (b) Students will be encouraged to practice routine handwashing throughout the day.
>
> (c) Students will stay home if they are sick.
>
> (d) Schools may adopt requirements for students to wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian's sole discretion.
>
> (e) For purposes of this rule, "direct contact" means cumulative exposure for at least 15 minutes, within six feet.
>
> (2) PROTOCOLS FOR SYMPTOMATIC OR COVID-19 POSITIVE STUDENTS. Schools will ensure students experiencing any symptoms consistent with COVID-19 or who have received a positive diagnostic test for COVID-19 shall not attend school, school-sponsored activities, or be on school property until:
>
> (a) The student receives a negative diagnostic COVID-19 test and is asymptomatic; or
>
> (b) Ten days have passed since the onset of symptoms or positive test result, the student has had no fever for 24 hours and the student's other symptoms are improving; or

> (c) The student receives written permission to return to school from a medical doctor licensed under chapter 458, an osteopathic physician licensed under chapter 459, or an advanced registered nurse practitioner licensed under chapter 464.
>
> (3) PROTOCOLS FOR STUDENTS WITH EXPOSURE TO COVID-19. Schools shall allow parents or legal guardians the authority to choose how their child receives education after having direct contact with an individual that is positive for COVID-19:
>
> (a) Parents or legal guardians of students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19 may choose one of the following options:
>
> 1. Allow the student to attend school, school-sponsored activities, or be on school property, without restrictions or disparate treatment, so long as the student remains asymptomatic; or
>
> 2. Quarantine the student for a period of time not to exceed seven days from the date of last direct contact with an individual that is positive for COVID-19.
>
> (b) If a student becomes symptomatic following direct contact with an individual that has tested positive for COVID-19, or tests positive for COVID-19, the procedures set forth in subsection (2), above shall apply.
>
> Rulemaking Authority 1003.22(3) FS. Law Implemented 1003.22(3) FS. History–New 9-22-21.

5. The Emergency Rule was adopted pursuant to the emergency rulemaking procedures found in section 120.54(4). The Emergency Rule was filed with the Department of State on September 22, 2021, and became

effective that same day. The Emergency Rule superseded and repealed emergency rule 64DER21-12 that had been adopted on August 6, 2021.

6. Section 120.54(4) provides in pertinent part:

> (4) Emergency rules.--
>
> (a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:
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> 1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.
>
> 2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
>
> 3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Register and provided to the committee along with any material incorporated by reference in the rules. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

7. Respondent cited the following facts in the preamble to the Emergency Rule to justify emergency adoption:

> SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: Because of an increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, prior to the beginning of the 2021-2022 school year, it is imperative that state health and education authorities continue to provide emergency guidance to school districts concerning the governance of COVID-19 protocols in schools. In August 2021, all public schools in Florida began the 2021-2022 school year with in-person learning available for all students. The Department of Health adopted Emergency Rule 64DER21-12 on August 6, 2021. Since that time the Department has conducted a review of data for cases of COVID-19 positive school-aged children and data for school-aged children who have been in direct contact with a COVID-19 positive person. The Department observed a large number of students who have been required to quarantine for long periods of time, resulting in the loss of hundreds of thousands of days of in-person learning. In addition, the Department observed no meaningful difference in the number of COVID-19 cases in school-aged children in counties where school districts have imposed mask mandates. It is necessary to minimize the amount of time students are removed from in-person learning based solely on direct contact with an individual that is positive for COVID-19, to ensure parents and legal guardians are allowed the flexibility to control the education and health care decisions of their own children, and to protect the fundamental rights of parents guaranteed under Florida law.
>
> In order to permit students to continue in-person learning, to minimize the detriment to students and school personnel from the added burden of recurrent removal of students, and to benefit the

overall welfare of students in Florida, it is necessary to provide updated emergency guidance to school districts concerning the governance of COVID-19 protocols in schools. This emergency rule conforms to Executive Order Number 21-175, which ordered the Florida Department of Health and the Florida Department of Education to ensure safety protocols for controlling the spread of COVID-19 in schools that (1) do not violate Floridians' constitutional freedoms; (2) do not violate parents' rights under Florida law to make health care decisions for their minor children; and (3) protect children with disabilities or health conditions who would be harmed by certain protocols, such as face masking requirements. The order directs that any COVID-19 mitigation actions taken by school districts comply with the Parents' Bill of Rights, and "protect parents' right to make decisions regarding masking of their children in relation to COVID-19."

Because of the importance of in-person learning to educational, social, emotional and mental health, and welfare, removing healthy students from the classroom for lengthy quarantines should be limited. Under Florida law, parents and legal guardians have a fundamental right to direct the upbringing, education, health care, and mental health of their minor children and have the right to make health care decisions for their minor children. HB 241, Ch. 2021-199, Laws of Fla. Parents and legal guardians are uniquely situated to understand the health care, emotional, and education needs of their minor children. In furtherance of the Florida Department of Health's authority to adopt rules governing the control of preventable communicable diseases—and because students benefit from in-person learning—it is necessary to immediately promulgate a rule regarding COVID-19 safety protocols that protects parents' rights and to maximize the allowance of in-person education for their children. Unnecessarily removing students from in-person learning poses a threat to the welfare of children,

> including their social, emotional, and educational developmental [sic], and is not necessary absent illness.
>
> REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES: This emergency rule is necessary in light of the unnecessary exclusion of healthy students from in-person learning and the urgent need to provide updated COVID-19 guidance to school districts. Given the evolving nature of this novel disease and the potential for adverse impacts on school children resulting from the unnecessary exclusion of healthy children from in-person learning, there is a need to issue an immediately effective rule while the department promulgates a permanent rule through the non-emergency process.

<u>Emergency rulemaking is justified</u>.

8. At the final hearing, Cassandra Pasley, Chief of Staff for the Florida Department of Health, testified that the immediate dangers to the public health, safety, and welfare on September 22, 2021, were the level of COVID-19 circulating, the percentage of those COVID-19 cases that were the Delta variant, and a high level of student absenteeism. According to Ms. Pasley, there were 100,000 COVID-19 cases in circulation in August and September, the highest number of cases Florida has seen. The vast majority of those cases were caused by the Delta variant of the virus, which is more transmissible. Ms. Pasley added that the goal of the Emergency Rule was to do no more than what is required to protect the public health and that Respondent continually reviewed COVID-19 case data to ensure the COVID-19 protocols adopted by the Emergency Rule met that objective. Ms. Pasley's testimony was credible and is accepted.

9. The statute authorizing the Emergency Rule requires Respondent to consult with the Department of Education before adopting protocols

governing the control of preventable communicable diseases. Respondent complied with this requirement.

10. Department of Education Chancellor Jacob Oliva testified that students learn best in school. Scholastic performance during the pandemic has declined statewide and excessive absenteeism due to COVID-19 quarantine protocols contributed to this decline. This concern prompted Chancellor Oliva to send a letter to Ms. Pasley on September 21, 2021, urging Respondent to consider adopting COVID-19 protocols that reduce the number of students who miss school because of quarantine. Chancellor Oliva's testimony was credible and is accepted.

11. Petitioners argue that no immediate public health emergency exists to justify the Emergency Rule while simultaneously maintaining that the Emergency Rule prevents them from implementing more restrictive protocols that are necessary to keep children safe. They also argue that any threat from COVID-19 was expected, so Respondent's protocols should have been adopted months ago using non-emergency rulemaking procedures.

12. COVID-19 presents an immediate danger to the public health, safety and welfare. The parties stipulate that COVID-19 is an infectious disease caused by the SARS-CoV-2 virus. COVID-19 infections are preventable, communicable diseases and, therefore, section 1003.22 requires Respondent to adopt rules to establish protocols governing the control of COVID-19. Although the COVID-19 pandemic has been with us since early 2020, the protocols governing the control of COVID-19 must be regularly reexamined and modified to adapt to ever changing COVID-19 case data. The record evidence is that Petitioners have done precisely that when adopting their own school district COVID-19 protocols.

13. The Leon County School Board started the school year with a mandatory mask requirement with parental opt-outs. But after a week and a half of school, Leon County changed its COVID-19 protocols to eliminate the parental opt-out for masks in grades K-8. Superintendent Rocky Hanna

testified that this change was made due to an uptick in COVID-19 cases after the start of the school year. More recently, the Leon County School Board changed its protocols again to reinstate the parental opt-out for masks for grades K-8 and to add a parental opt-out for quarantine. That protocol change was effective on October 19, 2021. Mr. Hanna explained that these policy shifts were dictated by changing COVID-19 data:

> We are constantly updating our website, sending information out to parents to keep them abreast of the changes, because there has been a lot of changes as we have adopted and adjusted to this virus and how it affected our community here in Leon County, we have pivoted and adjusted based on data and information from the CDC and the Department of Health.

14. The Duval County School Board started this school year with an "emergency rule" that strongly encouraged masks indoors with a parental opt-out, but the parental opt-out was later removed by another "emergency rule" that was adopted on August 23, 2021. The Superintendent has been authorized to suspend the emergency mask mandate the "minute" certain COVID-19 metrics are achieved.

15. The Alachua County School Board started this school year requiring masks with no parental opt-out, but that policy was recently changed to add an exemption for high school students.

16. The School Board of Broward County implemented a mandatory mask requirement by "emergency rule," but will revisit that policy as soon as the vaccine percentage of Broward residents is above 67% (a metric already achieved) and the COVID-19 positivity rate is 3% or less for three consecutive weeks.

17. The School Board of Miami-Dade's COVID-19 policy empowers the Superintendent to adjust procedures and protocols based on conditions in their community. The School Board of Miami-Dade revised one or more of its

COVID-19 policies on September 17, 2021, September 22, 2021, and again on October 11, 2021.

18. The Orange County School Board adopted an "emergency" K-12 face-covering requirement with no parental opt-out for this school year. The policy states that the school board will review the policy every 30 days and that the Superintendent can end the face-covering requirement if levels of community transmission drop to moderate transmission as defined by the CDC to be less than 50 new cases per 100,000 people in the preceding seven days.

19. These policy pivots are not recited to criticize the school boards; COVID-19 policies should be revisited frequently and adapted to the latest COVID-19 case data. But Respondent must be just as nimble when adopting statewide COVID-19 protocols. The non-emergency rulemaking procedures found in section 120.54 would prevent Respondent from doing that by rule.

20. At a minimum, a proposed rule must be published at least 28 days before it becomes effective. § 120.54(3)(a)2., Fla. Stat. If the validity of the proposed rule is challenged at DOAH, it cannot be adopted until the Administrative Law Judge ("ALJ") rules that it is valid. § 120.56(2)(b), Fla. Stat. Although rule challenge proceedings at DOAH are expedited, a rule challenge will typically add a two-month delay to the adoption of a rule that is found to be valid. *See* § 120.56(1)(c) and (d), Fla. Stat. (requiring the final hearing on a proposed rule challenge to commence within 30 days of assignment of the ALJ and a final order to be issued within 30 days of the conclusion of the final hearing).

21. One to three months is too long to adopt COVID-19 protocols that are informed by changing COVID-19 case data. Adoption of the Emergency Rule, pursuant to section 120.54(4), is justified because COVID-19 is an immediate danger to the public health, safety, or welfare. For the reasons that follow, the action taken pursuant to the Emergency Rule was only that action necessary to protect the public interest (that is to keep children safe and learning in school). Although there was no hearing on the Emergency Rule

before it was adopted, the process is fair under the circumstances because COVID-19 presents an immediate danger to the public health, safety and welfare and because COVID-19 protocols must adapt to changing COVID-19 case data.

The Emergency Rule is not unsafe for children.

22. COVID-19 infections can be extremely dangerous, but the risk of death and serious illness lies overwhelming with older people.

23. According to Respondent's COVID-19 Weekly Situation Report for October 8, 2021, through October 14, 2021 (the "COVID-19 Situation Report"), the COVID-19 case fatality rate in Florida for people aged 65 and older is 9.3%. For people aged 60 to 64, the case fatality is 2.4%.

24. Children have died from COVID-19, but that outcome is extremely rare. The COVID-19 Situation Report case fatality rate for people under 16, and for people aged 16 to 29, is 0.0%. This data was submitted jointly by Petitioners and Respondent and its accuracy was not questioned. Experts called by both sides support the obvious conclusion to be drawn from this data.

25. Dr. Lisa Gwynn, a pediatrician called by Petitioners, acknowledged that COVID-19 infection poses less of a mortality risk for children than seasonal influenza.

26. Respondent presented expert opinion testimony from Jayanta Bhattacharya, M.D., Professor of Health Policy at the Stanford University School of Medicine. Dr. Bhattacharya earned his M.D. and Ph.D. in economics from Stanford University. Dr. Bhattacharya is not a practicing physician, he is a researcher. He has published 154 peer-reviewed articles on infectious disease epidemiology and health policy. Six of his peer-reviewed articles relate to COVID-19 research. Dr. Bhattacharya testified that for children up to 19 years old, "a child infected with COVID survives 99.997% of the time." This testimony is credible and is consistent with the Florida COVID-19 case fatality rate data jointly offered by the parties.

27. The following additional opinions presented by Dr. Bhattacharya were well-supported and credible: (1) Children are unlikely to suffer serious side effects from COVID-19 despite the Delta variant; (2) the spread of COVID-19 from asymptomatic people is rare; and (3) children are inefficient transmitters of the SARS-CoV-2 virus.

28. Respondent's agency representative testified that properly worn and properly fitted masks can help prevent or reduce the spread of COVID-19. That testimony is accepted here and is binding on Respondent. In addition, wearing a mask in school is safe for children. But while masks in schools may lower the risk of transmission of COVID-19, and are safe for children to wear, it was not proven that masks provide any significant protection to children against COVID-19, given that children already have a 0.0% COVID-19 case fatality rate and are very unlikely to suffer serious COVID-19 side effects if they are infected.

29. As to whether the Emergency Rule Opt-Out provisions make it more likely that children will spread COVID-19 to others, that too was unproven. The Emergency Rule requires sick children to stay home. It is extremely rare for asymptomatic people to spread COVID-19 and children are otherwise inefficient transmitters of the SARS-CoV-2 virus. As such, it is axiomatic that forcing asymptomatic children to wear masks in schools provides no significant barrier to the spread of COVID-19.

30. This logical inference is supported by data comparing COVID-19 cases in Florida schools for the 2020–2021 school year. Dr. Bhattacharya cited a case study comparing COVID-19 case rates for school locations in Florida that: required masks for students and staff, required masks for staff only, or did not require masks for anyone. The study found no statistically significant differences in case rates among the three groups. Dr. Bhattacharya testified that "I think from the Florida experience of last year there's no correlation between masking requirements in schools and the spread of cases."

31. Dr. Gwynn is a strong advocate for masks in schools to reduce the transmission of COVID-19. Dr. Gwynn is an accomplished pediatrician and her commitment to her patients is not in dispute. Although Dr. Gwynn agreed that COVID-19 poses less of a threat to children than seasonal influenza, she testified that she would not sign a medical mask waiver form to opt-out a child from a mask mandate during the COVID-19 pandemic for any reason.

32. Dr. Aileen Marty is an accomplished infectious disease specialist. Dr. Marty testified that masks are one tool for reducing the transmission of COVID-19, which she stated is caused by a respiratory virus. Citing studies dating back to 1905, Dr. Marty testified that masks are a highly effective way of reducing transmission from a respiratory virus, and particularly one that is spread primarily by aerosol, as is the SARS-CoV-2 virus.

33. But neither Dr. Gwynn nor Dr. Marty cited any data comparing Florida school districts that require masks to those that do not to support their positions. Dr. Bhattacharya's testimony is supported by more relevant data—including the Florida case study and the COVID-19 Situation Report data—and is accepted over that of Dr. Gwynn and Dr. Marty where it conflicts.[1]

34. Finally, the Leon County School Board's recent adoption of similar mask and quarantine parental opt-out protocols is another indication that such protocols are safe.

35. For all of these reasons, Petitioners failed to prove that the Emergency Rule Opt-Out provisions facilitate the spread of COVID-19 in schools. On the contrary, the evidence admitted in this case established that the Emergency

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[1] The Center for Disease Control and Prevention ("CDC") guidance for COVID-19 in K-12 schools recommends universal masking of all students (aged 2 and older), regardless of vaccination status. This CDC guidance was not relied upon here because the scientific basis for the recommendation was not proven. For the same reason, the undersigned did not rely on recommendations from the European CDC (which recommends no masks for children under 12) or the World Health Organization (which recommends no masks for children 5 and under).

Rule Opt-Out provisions strike the right balance by ensuring that the protocols that govern the control of COVID-19 in schools go no further than what is required to keep children safe and in school.

The Quarantine Opt-Out provision is not vague.

36. Petitioners contend that the Quarantine Opt-Out provision of the Emergency Rule is vague because it does not define "sick," "symptomatic," or "asymptomatic" and fails to set forth a procedure for school districts to follow to determine whether a child fits under one of those categories. Petitioners also allege that the Quarantine Opt-Out requirements fail to address the potential conflict of opinions between a parent and a teacher, or other school official as to whether a child is sick or asymptomatic. The Emergency Rule is not vague for these reasons because the language used in the Quarantine Opt-Out provision has a plain and ordinary meaning and persons of common intelligence can understand it.

37. Although evidence to prove this point is not required, it bears mention that many of the quarantine protocols adopted by School Board Petitioners that were offered as joint exhibits use the same terms, without defining them, and do not set forth any procedure to follow to make the determination as to whether a student is sick, symptomatic, or asymptomatic. *See* COVID-19 Symptomatic Action Tree for Students adopted by the School Board of Broward County (Joint Exhibit 35); The COVID-19 Symptomatic Decision Tree adopted by the Duval County School Board (Joint Exhibit 38); the Leon County Schools Exposure-Quarantine COVID-Protocols 9/27/21 (Joint Exhibit 40); the Miami-Dade Public Schools 2021-2022 High School Student Quarantine Procedures (Joint Exhibit 46); and Miami Dade Public Schools Site Response Protocols for Sick Students (COVID-19) Symptoms (Joint Exhibit 45).

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.56(1), (3) and (5), 120.569, and 120.57(1), Fla. Stat.

39. Petitioners initiated this proceeding pursuant to section 120.56 to challenge the validity of the Opt-Out provisions of the Emergency Rule. Pursuant to section 120.56(1)(a), "[a]ny person substantially affected by a rule ... may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." For challenges to existing rules, section 120.56(3)(a) provides:

> A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

40. Respondent asserts that Petitioners lack standing to go forward with this rule challenge under the public official standing doctrine. That argument was rejected by the undersigned for the reasons explained in detail in the Order Denying Respondent's Motion to Dismiss School Board Petitions for Lack of Jurisdiction entered on October 20, 2021. Otherwise, Respondent stipulates that Petitioners have standing to challenge the Emergency Rule.

41. An "invalid exercise of delegated legislative authority" is defined in section 120.52(8). Petitioners contend that the Emergency Rule Opt-Out provisions are an invalid exercise of delegated legislative authority as defined in section 120.52(8)(a)-(d), and the flush-left paragraph, which provide:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> * * *
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

<u>Respondent did not fail to follow the applicable rulemaking procedures</u>.

42. Petitioners contend that Respondent failed to follow the applicable rulemaking procedures because it adopted the Emergency Rule pursuant to the emergency rulemaking procedures found in section 120.54(4) when the facts do not warrant it. Section 120.54(4)(a)3. provides that "[t]he agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable." Petitioners contend that the necessity of using

emergency rulemaking procedures can also be considered in a challenge to the emergency rule pursuant to section 120.52(8)(a). The undersigned agrees.

43. “In order to utilize emergency rulemaking procedures, rather than employing standard rulemaking, an agency must express reasons at the time of promulgation of the rule for finding a genuine emergency.” *Fla. Ass’n of Homes & Servs. for Aging, Inc. v. Ag. for Health Care Admin.*, 252 So. 3d 313, 315 (Fla. 1st DCA 2018). Those reasons must be factually explicit and persuasive. *Fla. Health Care Ass’n v. Ag. for Health Care Admin.*, 734 So. 2d 1052, 1053 (Fla. 1st DCA 1998).

44. The preamble to the Emergency Rule sets out a facially adequate factual basis for emergency rulemaking. In addition, the evidence presented justifies emergency rulemaking.

45. COVID-19 is an immediate danger to the public health, safety, and welfare. Petitioners have adopted, and regularly revised, emergency protocols governing the control of COVID-19 in their respective school districts to respond to this public health emergency. Emergency rulemaking is necessary because Respondent is statutorily obligated to adopt statewide protocols to respond to the same emergency, and its COVID-19 protocols must also be informed by, and adapt to, changing COVID-19 case data. Respondent cannot do so without resorting to the emergency rulemaking procedures, and that process was fair under the circumstances.

46. Respondent is confined to the general measures which are necessary “to alleviate the emergency.” *Times Pub. Co. v. Fla. Dep't of Corr.*, 375 So. 2d 307, 310 (Fla. 1st DCA 1979). The evidence here is that Respondent has done that. For the reasons set forth in detail in the findings of fact above, Respondent’s Emergency Rule strikes the right balance by implementing protocols that are no more restrictive than required to keep children safe and learning in school.

47. For all of these reasons, Petitioners did not prove that Respondent failed to follow the applicable rulemaking procedures in adopting the Emergency Rule.

Respondent did not exceed its grant of rulemaking authority or enlarge, modify or contravene the law implemented.

48. An agency may adopt rules "only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the rule implements or interprets specific powers or duties[.]" *State, Bd. of Trustees of the Int. Imp. Trust Fund v. Day Cruise Ass'n*, 794 So. 2d 696, 700 (Fla. 1st DCA 2001). In considering an agency's statutory authority to adopt a rule, "[t]he question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*." *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

49. Petitioners contend that the Opt-Out provisions exceed the grant of rulemaking authority because these provisions are intended only to protect parental rights. Respondent stipulates that its rulemaking authority for the rule is limited to section 1003.22(3), the only statute cited as rulemaking authority and the law implemented by the Emergency Rule. Respondent does not cite or rely on the Parents' Bill of Rights or any executive order as authority for the Emergency Rule in this case. Indeed, it cannot do so. § 120.52(8)(b) and (c), Fla. Stat. (requiring Respondent to cite to the statute relied upon as the grant of rulemaking authority and the law implemented in the rule adopted).

50. Petitioners allege in their Proposed Final Order (pp. 51-52) that the Opt-Out provisions of the Emergency Rule enlarge, modify or contravene the law implemented because section 1003.22(3) "does not address masks, quarantine requirements, or parental rights relating to either."

51. Section 1003.22(3) requires Respondent to adopt a rule "governing ... the control of [COVID-19]." The Emergency Rule does that. The COVID-19

protocols adopted pursuant to section 1003.22(3) should be no more restrictive than necessary to keep children safe and learning in school. The fact that the Emergency Rule achieves this result—and at the same time involves parents in decisions involving their child's health and education—does not run counter to the broad rulemaking directive found in section 1003.22(3).

52. Petitioners failed to prove that the Opt-Out provisions of the Emergency Rule exceed Respondent's grant of rulemaking authority or enlarge, modify or contravene the statute implemented.

The Quarantine Opt-Out provisions are not vague.

53. Petitioners contend that the Quarantine Opt-Out provision is vague because it fails to define "sick," "symptomatic," or "asymptomatic," and fails to set forth a procedure for school districts to follow to determine whether a child fits under one of those categories. In addition, they allege that the Quarantine Opt-Out requirements fail to address the potential conflict of opinions between a parent and a teacher, or other school official as to whether a child is sick or asymptomatic.

54. An administrative rule is invalid under section 120.52(8)(d) if it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. *Bouters v. State,* 659 So. 2d 235, 238 (Fla.1995); *Sw. Fla. Water Mgmt. Dist. v. Charlotte Cnty.,* 774 So. 2d 903, 915 (Fla. 2d DCA 2001). Generally, where words or phrases are not defined, they must be given their common and ordinary meaning. *Sw. Fla. Water Mgmt. Dist.,* 774 So. 2d at 915. "[T]he plain and ordinary meaning of [a] word can be ascertained by reference to a dictionary." *Green v. State,* 604 So. 2d 471, 473 (Fla.1992).

55. The words "sick," "symptomatic," or "asymptomatic" have a common and ordinary meaning. In fact, many of the Petitioner School Boards have adopted quarantine protocols that apply these same terms without defining

them. Likewise, these school district protocols do not identify a procedure for how to determine whether a student is sick, symptomatic or asymptomatic.

56. Petitioners failed to prove that the Quarantine Opt-Out provisions of the Emergency Rule are vague, fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioners failed to prove that Emergency Rule 64DER21-15 is an invalid exercise of delegated legislative authority, and the Petition to Determine the Invalidity of Department of Health Emergency Rule 64DER21-15 is hereby DISMISSED.

DONE AND ORDERED this 5th day of November, 2021, in Tallahassee, Leon County, Florida.

BRIAN A. NEWMAN
Deputy Chief Judge
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Filed with the Clerk of the
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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.