



THE SCHOOL DISTRICT OF LEE COUNTY

2855 Colonial Boulevard, Fort Myers, FL 33966 | O: 239.337.8300 | F: 239.337.8378

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**Via First Class Mail, Facsimile 850-245-9667
and Email @ Richard.Corcoran@fldoe.org**

Mr. Richard A. Corcoran
Commissioner of Education
Florida Department of Education
325 W. Gaines Street
Tallahassee, FL 32399-0400

Dear Commissioner Corcoran:

We are in receipt of your correspondence dated September 3, 2021. We are grateful for your leadership as well as the leadership of Governor DeSantis, the State Surgeon General, the State Department of Health ("FLDOH"), the State Board of Education, and the Florida Department of Education ("FLDOE"). In such a challenging time, it is only through our work together as leaders in this great state that we are able to effectively and safely deliver educational services to our children.

It is our position that the School District of Lee County ("SDLC") is in compliance with Emergency Rule 64DER21-12 issued by the FLDOH as well as the Parents' Bill of Rights. Moreover, the SDLC is empowered to act to protect its students and staff by the Florida Constitution Article IX § 4, Florida Statutes § 1001.32, 1001.42 (8), 1001.43 (1), 1006.07, 1006.08 (1), 252.36 (1) (c), and 1014.03.

It is also important to note that our most recent SDLC mandatory face covering guidelines were only re-introduced after Judge John C. Cooper's verbal ruling on August 27, 2021 in the matter of McCarthy on behalf of Scott, et al. v. DeSantis, et al, 2021-CA-1382. His verbal ruling was adopted as if fully set forth in his written order issued on September 2, 2021. In that decision, the court found that Executive Order 21-175 was null, void, unconstitutional and unenforceable. Judge Cooper also ruled that per the Parents' Bill of Rights statute, school districts could enact policies regarding health care and education that are necessary and reasonable to achieve a compelling state interest so long as it is narrowly tailored.

Up until that decision, the SDLC fully respected both the intent and the explicit implementation suggested within Executive Order 21-175 as it is always our prevailing interest to observe both the spirit and the letter of the law. However, once Judge Cooper's ruling made it clear that the legal interpretation was now ambiguous and potentially unsettled, the sovereignty of all parties must be respected while this disputed legal interpretation is resolved appropriately through the Judiciary or the Legislature. This is particularly vital as we presently experience the most pronounced adverse health impact locally in Lee County through the entirety of the pandemic thus far.

Local Health Conditions

According to the Centers for Disease Control ("CDC"), Lee County had a 24.06% positivity rate and 522 new hospital admissions during the week the mask mandate went into effect (Saturday, August 28, 2021 – Friday, September 3, 2021).¹ Lee County is currently reflecting a high community transmission rate.

Lee County has shown a marked increase in the number of individuals ages 12-19 years old who are testing positive for COVID-19 since the start of the 2021-22 school year (FL DOH Report August 27th, 2021 through September 2nd, 2021) Further, Golisano Children's Hospital, our local children's hospital, has experienced an unprecedented surge in pediatric COVID-19 delta variant hospitalizations far exceeding any prior moment within the COVID-19 pandemic.

The SDLC also provides a dashboard available to the public on its website. The dashboard lists the number of positive cases at each school site for both staff and students. This data includes daily positive cases, as well as the number of cumulative positive cases since the beginning of the 2021-22 school year, which began on August 10, 2021. The dashboard indicates that at the time of this writing there have been 3,842 student COVID-19 cases as well as 529 staff COVID-19 cases throughout the District since the start of the school year.

This past week the SDLC received 2,866 reports of school exposures and reported positives. As a result of the aforementioned COVID-19 predominantly delta variant cases, the SDLC has had to shut down ninety-two (92) classrooms since the start of the 2021-22 school year (4 weeks). In comparison, seventy-six (76) classrooms were shut down due to COVID-19 within the SDLC during the entire 2020-21 school year. This yields over a 1089% increase in weekly classroom closures and a surge in COVID-19 positive cases and exposures never before experienced in the SDLC prior to this moment in time.

¹ <https://covid.cdc.gov/covid-data-tracker/#county-view>

Medical Recommendations to Mitigate the Spread of COVID-19

The FLDOH emergency Rule 64DER21-12 was instituted to provide public schools protocols to mitigate the highly contagious COVID-19 delta variant. Specifically, the rule was enacted because

“a recent increase in COVID-19 infections, largely due to the spread of the COVID-19 delta variant, coincides with the imminent start of the school year, it is imperative that state health and education authorities provide emergency guidance to school districts concerning the governance of COVID-19 protocols in schools.” FLDOH emergency Rule 64DER21-12

Clearly, the FLDOH recognized that the delta variant of COVID-19 was different in its health impact when compared to the common cold or flu. Indeed, the severity of the virus was so significant, that the FLDOH issued an emergency rule to provide mitigating protocols for public schools. The mitigating measures cited in the rule include masking, the use of quarantine, and cleaning measures.

Judge Cooper stated that *“the CDC...is considered the preeminent medical authority in this country about infectious diseases. It’s the gold standard.”* p.20:17-20 of transcript of verbal ruling dated August 27, 2021. Judge Cooper’s verbal ruling further states that the State of Florida has often adopted and relied upon CDC guidelines and recommendations, codifying some of those requirements in statute. Cooper verbal ruling p.20:21-23.

Indeed, Fl. Statute § 252.36 (1) (c) also looks to the CDC as it states

Legislature intends that, during an extended public health emergency, such as the COVID-19 pandemic, there should be a presumption that K-12 public schools, to the greatest extent possible, should remain open so long as the health and safety of students and school personnel can be maintained by specific public health mitigation strategies recommended by federal or state health agencies for educational settings.

Thus, the SDLC complied with statute and based its decision on the information provided by the CDC, FLDOH and local health officials regarding COVID-19. The face covering guidelines are in line with what the CDC recommends as mitigation practices in K-12 schools. The CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.²

² <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

Moreover, the American Academy of Pediatrics (AAP) recognized the importance of children being in school face to face, not only to reduce inequities, but also because families rely on schools to provide a safe, stimulating, and enriching space for children to learn. Prior to the CDC issuing their guidance, the AAP released universal school masking recommendations.³ The AAP recommended that students wear a face mask (unless medical or developmental conditions prohibit use) in order to mitigate the risk of contracting COVID-19. The AAP further states that school policies should be adjusted to align with new information about the pandemic, as well as taking a layered approach to protect staff and students, and monitor and implement policies and their effectiveness accordingly.

The SDLC received a petition from approximately 300 local physicians, including those from multiple pediatric groups in the area, pleading to implement a universal mask mandate within our school system. A pediatrician advised our staff in tears regarding the overwhelming and emotional toll that the virus is having on the local health care system. This includes children with mild cases to those who are now hospitalized. Some pediatricians have instructed parents not to come to their office because they are so overwhelmed.

Local health professionals, Dr. Stephanie Stovall, Pediatric Infectious Diseases Specialist & Interim Chief of Quality and Patient Safety at Golisano Children's Hospital, and Arielle Ghanem, Director of Communicable Diseases for the Florida Department of Health in Lee County, provided testimony during the August 16, 2021 School Board workshop regarding the COVID-19 spread in our community. The delta variant and how there has been an increase in the number of cases amongst children was also discussed with the Board. Dr. Stovall expressed the importance for everyone to wear face masks while indoors both during school and on busses.

At the time of the testimony, Golisano Children's hospital had a range of ten (10) to seventeen (17) children admitted per day since the week school started, compared to around two (2) to four (4) children per day the week prior. It was also stated, when asked by a Board member, that a mask mandate would make schools safer for both students and staff.

Lee Health issued a COVID-19 update on August 24, 2021, where Dr. Larry Antonucci, President and CEO of Lee Health Systems, the largest health care system in our area, stated that they are seeing an increase in the number of children with COVID-19. Dr. Antonucci stated that Golisano Children's hospital emergency department saw 265 patients the day prior, which is more than double what they would normally see, and of those patients 135 had COVID-19 symptoms. At the time, Golisano Children's Hospital

³ <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/cloth-face-coverings/>

had twelve (12) patients in the hospital with COVID-19. Prior to this surge there were rarely more than one (1) or two (2) children at Golisano Children's Hospital with COVID-19. Dr. Antonucci stated that patients were getting sicker and becoming sicker faster.

Lee Health issued an additional COVID-19 update on August 30, 2021, stating that the COVID-19 rate is three (3) times higher in Lee County than what they are seeing in the rest of the United States. The day prior to this update, Lee Health admitted ninety-two (92) COVID-19 patients, which is the highest number that Dr. Antonucci could recall during the pandemic. Lee Health was worried that they were seeing more children with the variant. At that time, Golisano Children's Hospital had fifteen (15) children in the hospital with COVID-19.

Finally, the most important mitigation measure as advised by the medical experts is vaccination. Unfortunately, there is no vaccine for children under the age of twelve (12). The other measure is social distancing which the SDLC tries to implement as best it is able, but faces challenges due to consequent staff shortages and the inability to offer a flexible hybrid model of instruction that was acceptable during the 20-21 school year as authorized by the FLDOE. Thus, the best mitigation measure (in addition to all other mitigation efforts implemented last year) are the face covering guidelines that were applied successfully during the 20-21 school year to limit secondary transmission of COVID-19 in the schools, which also substantially eliminated flu transmission during the same time period.

Board Policy 1.181

Last year, October of 2020, the Board enacted policy 1.181 to address the use of protective personal equipment when the SDLC is confronted with a health emergency, to include pandemics and infectious diseases. The policy states:

Where the District is confronted with a health emergency, including pandemic and infectious disease situations, which might require or warrant the wearing of protective gear to include masks, shields, glasses, hazmat suits or other coverings pursuant to guidelines, directives and/or advice issued by the Federal Centers for Disease Control, the State of Florida Department of Health and/or other local health officials, those guidelines and/or directives will be followed. The purpose of the protective gear, masks, shields, glasses, hazmat suits or other coverings is for medical and safety reasons only. Procedures or guidelines related to the use or implementation of protective gear on School Board Property will be established by the Superintendent and are incorporated by reference herein. The procedures or guidelines shall expire as soon as the Federal Centers for Disease Control, the State of Florida Department of Health, and/or other local health officials advise that the protective gear is no longer recommended and/or required. All individuals

entering School Board property shall abide by the guidelines established by the Superintendent.

Given the significant local positivity rate of COVID-19 in Lee County, the highest staffed bed capacity experienced by our largest local health provider (100% on August 30, 2021), the single largest increase in new COVID-19 patients in a single day with that same health provider (92 new patients on August 29, 2021), and the 1089% increase in weekly SDLC classroom closures due to COVID-19 positives and exposures within the month of August, the Superintendent announced on August 30, 2021, that per Board policy 1.181, the SDLC would move forward temporarily with face covering guidelines for 30 days to help mitigate this evident COVID-19 case surge. The face covering guidelines would take effect on September 1, 2021. The temporary guidelines require all students, staff and visitors to wear masks when indoors as was implemented during the 20-21 school year.

Parents are able to opt out of the requirements in multiple ways. Students and staff with disability-related or medical exemptions are able to follow an exemption process that is simple and quickly administered. Additionally, the SDLC is one of the only "School Choice" districts where parents are able to experience open enrollment throughout the school year. Aside from our annual weighted lottery process and the ability to enroll at any school within their zone, parents are able to enroll their students in a multitude of other public-school options to ensure a parent's unparalleled access to school choice: local charter schools (some of which at the time of this response do not require masks), Lee Virtual School, Florida Virtual School, Home School with Florida Virtual FLEX, Home School, and any private schools that will accept the HOPE scholarship.

FLDOH Emergency Rule 64DER21-12

The SDLC is in compliance with FLDOH rule 64DER21-12. Subsection 1 (d) of the rule states

(d) Students may 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-out the student from wearing a face covering or mask.

The rule does not define the mechanism for the parental opt out. If the intention of the FLDOH was not to allow SDLC to request medical notes for the opt out, that should have clearly been stated. If the FLDOH had a specific intent regarding how the opt out process was to occur, then it should have provided further guidance. The FLDOH did not clarify nor provide any guidance for section 1 (d). Given the simple reading of the rule, the SDLC is complying, as it has provided an opt out mechanism to parents in a multitude of ways.

Parents' Bill of Rights

The SDLC fully supports the Parent's Bill of Rights. We understand that parents have the right to direct their children's education and health care. We understand the preservation of individual liberty. However, there are times when governments have a compelling state interest to infringe upon a personal liberty in order to protect the individual and public, such as requiring helmets be worn by motorcyclists, passengers in vehicles wearing seat belts, the use of car seats, mandating that children have certain vaccines, not allowing smoking on airplanes, having standards for nursing homes, and even mandating compulsory education.

The SDLC is responsible for providing a safe learning environment for all students including our most vulnerable. Fla. Stat. § 1014.03 (Infringement on Parents Rights) states

The state, any of its political subdivisions, any other governmental entity, or any other institution may not infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that 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.

The SDLC's face covering guidelines are reasonable and necessary to achieve a compelling state interest which is to mitigate the spread of the delta variant of COVID-19. Moreover, the guidelines are narrowly tailored and there are no other less restrictive means. The fact that the SDLC's guidelines are for 30 days during the peak of transmission in our local community demonstrates our efforts to narrowly tailor the face covering requirement.

The face covering guidelines are in line with the CDC's recommendations, APA recommendations, FLDOH Rule, and the recommendations of our local health care providers, regarding K-12 schools. In addition, there is a robust body of law that supports the contention that minimizing the spread of a deadly infectious disease is a compelling state interest.

Responsibility for Health and Safety

The SDLC has an enormous responsibility to its students and staff to provide a safe learning environment. Moreover, it is empowered by the Florida Constitution Article IX § 4 and various statutes to take appropriate measures to protect students and staff.

Fla. Stat. § 1001.32 (2) explicitly states that School Boards

shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.

There is nothing in the constitution or general law, to include the Parents' Bill of Rights, that prohibits the SDLC from enacting face covering guidelines. On the contrary, SDLC complied with Fla. Stat. § 252.36 which mandates that schools remain open so long as the specific public health mitigation strategies, as recommended by federal or state health agencies, are followed.

Fla. Stat. § 1001.42 (8) (a) student welfare states

... 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.

Fla. Stat. § 1001.43 (1) student management states

The district school board may adopt programs and policies to ensure the safety and welfare of individuals, the student body, and school personnel

Fla. Stat. § 1006.07 states that

[t]he district school board shall provide for ... proper attention to health, safety, and other matters relating to the welfare of students

Fla. Stat. § 1006.08 (1) states that

[t]he district school superintendent shall recommend plans to the district school board ... for the proper attention to health, safety, and other matters which will best promote the welfare of students.

The SDLC has to provide for the proper attention for the health, safety and general welfare of our students. This authority has been applied on numerous occasions such as requiring our athletes to wear the appropriate protective gear while playing sports and following FHSAA guidelines. Given how contagious the delta variant is and how it may be transmitted amongst children, per statute, the SDLC has an obligation to find ways to protect all students in its care.

Further, as noted above, the SDLC has a statutory duty to follow the CDC guidelines for indoor masking per Fla. Stat. § 252.36 (1) (c) which mandates that in a health emergency schools should remain open so long as the health and safety of students and staff can be

maintained by specific public health mitigation strategies recommended by federal, including the CDC, or state health agencies.

The mitigation strategies are helping to keep classrooms and schools open. If the SDLC is not able to implement appropriate mitigation measures it will not be able to contain the spread. This exposes the SDLC to the possibility or necessity of shutting individual schools down as a result of operational safety concerns due to many staff members being ill/quarantined and lack of staffing coverage. As the state has not authorized an alternative virtual hybrid learning modality (as was permitted last year during the far less contagious strain of COVID-19), shutting schools down will inevitably add to the significant learning loss that students, overall, are experiencing.

Lawful Action

The SDLC was also careful to ensure that its actions were lawful. The facial covering guidelines were not instituted until after Judge Cooper's verbal ruling was issued on August 27, 2021. The Superintendent issued the guidelines on August 30th and they became effective on September 1, 2021.

Conclusion

Since the start of the pandemic we have had instructional and support staff be hospitalized and die of COVID-19 complications. Many staff are afraid and many have also quit their positions, including approximately 20 bus drivers, due to a lack of masking requirement.

We also have children hospitalized as a result of the delta variant. Many parents have voiced tremendous fear over the risks to their children who are unable to be vaccinated. We have received thousands of emails pleading for the safest learning environment possible to protect children with autoimmune conditions, those recovering from cancer, and those with medically compromised loved ones in the family unit.

Prior to the mandate and Judge Cooper's ruling, we required facemask with an opt out form for parents. An overwhelming majority, over 80%, of our parents opted in to the use of facial coverings by declining to send an opt out form.

These are difficult and trying times. The SDLC shares the concerns of our governmental leaders and recognize that we want the best for our students while respecting the rights of all of our parents. The decision made by the SDLC strikes that balance. The face covering guidelines are necessary, reasonable and narrowly tailored to address the health crisis in our local community. The guidelines are essential to keeping schools open and operational under exigent circumstances. Furthermore, the SDLC has every

intention of diminishing any restrictive mitigation strategies as the situational health metrics improve within Lee County and our schools.

Universal masking was the only reasonable mitigation strategy that had not yet been fully implemented in the SDLC in deference to the perceived intent and specific language in Executive Order 21-175. With the recent ruling illuminating the sovereignty of local school boards to address local health conditions, and with local conditions deteriorating to levels far worse than at any point prior in the pandemic within Lee County, this change in course was necessary.

The SDLC views 30 days of temporary inconvenience during this COVID-19 surge event measured against the possibility of protecting/saving one life to be judicious and further assists our community in containing the spread of a highly contagious and deadly virus. The wearing of masks is predominantly not for the mask wearer but to protect those around the mask wearer and contain the spread of the virus. As Judge Cooper noted

[b]ecause universal and correct use of mask can reduce COVID transmission and is a relatively low-cost and easily implemented strategy, findings in this report⁴ suggest universal and correct mask use is an important COVID-19 prevention strategy in schools as part of the multicomponent approach.” p.25:8-14 of transcript of verbal ruling.

The SDLC would be beleaguered if one child dies because we did not do all we could to implement the full complement of reasonable mitigation efforts as recommended by the overwhelming majority of the medical community. We would not serve the needs of our students and address the concerns of our parents if we continue to have to shut down classrooms or entire schools because of insufficient staffing to safely operate a school due to staff illness or quarantine.

The SDLC is the second largest employer in Lee County. Due to the high COVID-19 positivity rate in our local community and with hospitals at or near maximum capacity, we must implement this simple guidance as mitigation measure. The face covering guideline assists in providing a safe learning environment for our students and staff, as well as ensures that we do our part to slow down the spread of the deadly COVID-19 delta variant in our community. As the SDLC is responsible for over 90,000 students and 13,000 employees, that is our constitutional duty, statutory obligation and ultimate responsibility.

Respectfully,



Debbie Jordan, Chair
School Board of Lee County



Kenneth A. Savage, Ed.D
Superintendent

cc:
SDLC Board Members
School Board Attorney and General Counsel
Swanson, Bethany @ Bethany.Swanson@fldoe.org
Hall, Eric @ Eric.Hall@fldoe.org
Oliva, Jacob @ Jacob.Oliva@fldoe.org
Ochs, Jared @ Jared.Ochs@fldoe.org
Kamoutsas, Anastasios @ Anastasios.Kamoutsas@fldoe.org

