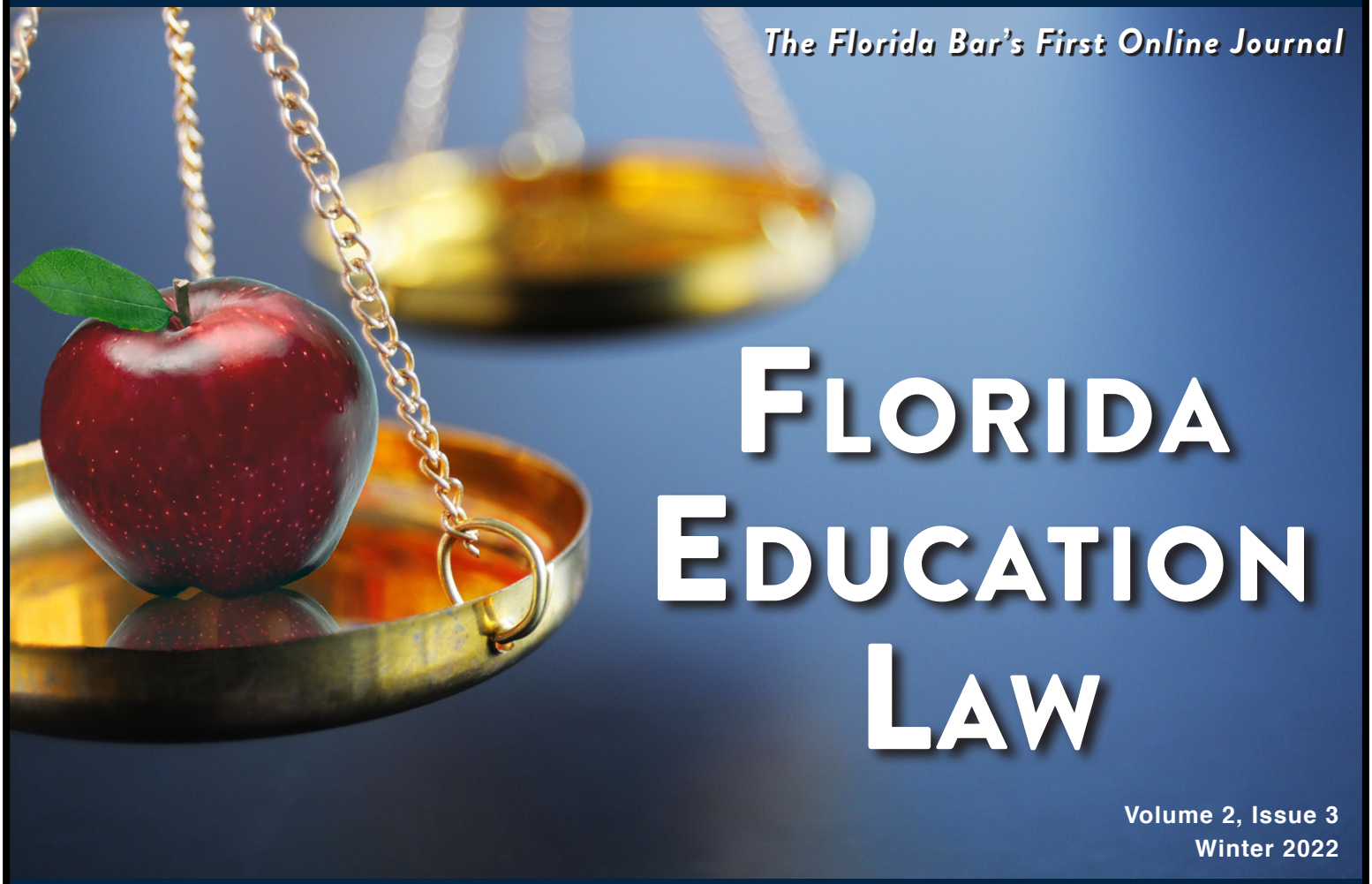
THE FLORIDA BAR EDUCATION LAW COMMITTEE



The Florida Bar's First Online Journal

FLORIDA EDUCATION LAW

Volume 2, Issue 3
Winter 2022

INSIDE:

Message from the Chair

by Nathan A. Adams, IV

When I last contributed a column to this publication it looked as if the pandemic was winding down. The Florida Bar and Education Law Committee planned to return to in-person meetings in furtherance of this year's theme, *Reconnecting and Rebuilding Bridges* across our profession. Omicron required us to delay these plans but not for long.

On March 4, the committee launches an exciting new chapter when we will co-sponsor an afternoon panel of the Stetson University National Conference on Higher Education Law & Policy to be held at the Wyndham Grand Clearwater Beech. The venue could not be nicer. Come for the day and hear our panelists opine on wide ranging subjects pertinent to grades 9 and up, from Title IX compliance to dual enrollment programs, or stay for the entire conference, Mar. 3-7. Register now for special pricing for hotel accommodations and the conference. Join us to renew old friendships and build new ones. You can reach out to Vice-Chair David D'Agata for more information.

Pending this return to an in-person meeting, we have kept a busy CLE schedule with free general and education certification credits including ethics credits. On Oct. 8, 2021, Gregg Morton, General Counsel of the Public Employees Relations Commission, presented on *Scope of Bargaining for Educational Institutions*. Then, counsel for management and labor presented alternative views on collective bargaining in a give-and-take format. Michael Mattimore, Managing Partner of the Tallahassee office of Allen, Norton & Blue, took the side of management. Don Slesnick of Slesnick & Case, LLP, took the side of labor in a wide ranging discussion on collective bargaining that ended with a discussion of COVID-19-related issues.

The committee also re-launched its *Lunch-n-Learn Series*. On Oct. 21, Blaze Bowers, Assistant Vice President, Academic & Student Support Services, Lincoln Memorial University, kicked it off with a presentation on *Vaccines, Mask Mandates & Florida Education Law*. On Nov. 16, Lauren Maddox of Holland & Knight presented in this same series on *Federal Education Policy, Regulation & Personnel in the Biden Era*. Look for more *Lunch-n-Learn* opportunities beginning at least by April.

On Jan 27, the committee sponsored an Education Review Workshop to help lawyers brush up on the practice of education law and to get ready for the education law certification exam. By expanding the number of board-certified education lawyers, we do our part to ensure an improved profession. Topics covered in the workshop this year (not covered last year) include Article IX of the Florida Constitution, qualified and sovereign immunity, student rights & discipline, whistleblowers, and ethics. By joining a workshop two years in a row, practitioners should be exposed to most of the core subject matter of the certification exam. Recordings of past years are available.

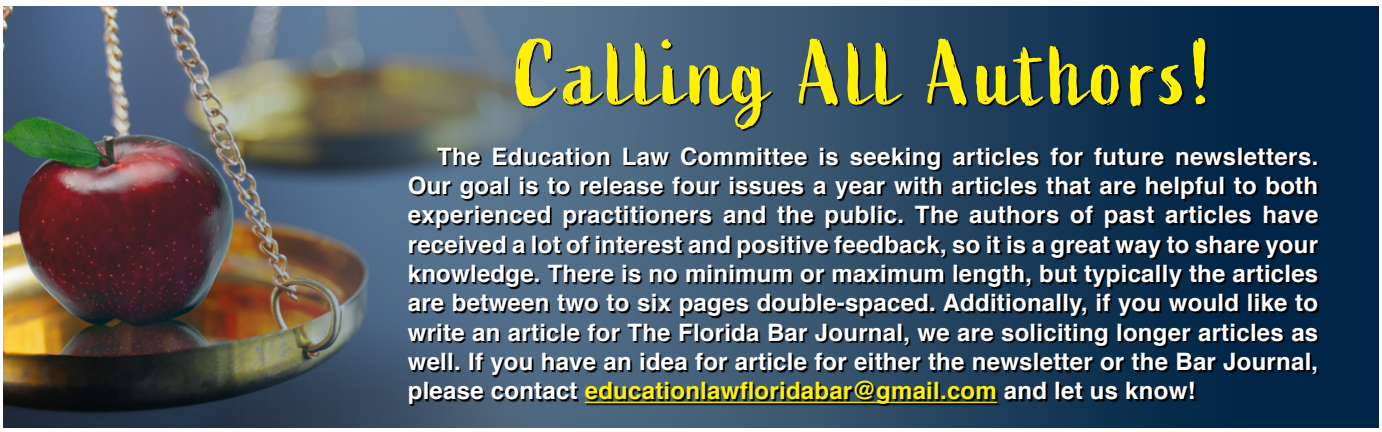
On June 24, 2022 (1 p.m.), we are scheduled to come together in person again for the Bar's Annual Convention in Orlando.

The committee sent an invitation to lawyers around the state to join our committee. We hope to see an uptick in membership due to Mary Lawson's diligent efforts in this area.

Meanwhile, Vice-Chair Lacey Hofmeyer is busy soliciting articles for the next issue of this publication. Please reach out to her with your ideas. Lacey, David, Mary, Gregg Morton and I are always eager to hear from you about how we can improve our committee and profession.

Endnotes:

1 Partner with Holland & Knight LLP and Florida Bar board certified education lawyer.



The Effects of Section 1012.2315 on K-12 Instructional Personnel Bargaining Units...and Maybe Others?

by Jonathan C. Squires[1]

On July 1, 2018, Florida Law Chapter 2018-6 became effective and made a series of changes to section 1012.2315, Florida Statutes.[2] The law brought changes to annual renewal for bargaining units representing K-12 instructional personnel, primarily in the form of new requirements on bargaining unit representatives.[3] The next day, the Florida Education Association and several other parties[4] filed suit against the three chairpersons of the Florida Public Employees Relations Commission seeking declaratory and injunctive relief.[5] The plaintiffs ultimately voluntarily dismissed their lawsuit on November 2, 2019 after the court denied their motion for summary judgment on count II of the complaint and the defendants moved for summary judgment on the remaining counts.

In order to understand the effect of the changes to section 1012.2315(4), some background about public employee representation may be helpful. Part II of Chapter 447, Florida Statutes, governs public employee representation.[6] This part establishes the Public Employees Relations Commission ("PERC") to oversee and regulate public sector unions. Of particular interest here is that these statutes govern how public sector unions are both initially organized and renew their certification of representation annually to allow continued representation.

Section 447.305(1) requires employee organizations[7] seeking to represent public workers in collective bargaining to register with PERC prior to requesting recognition by a public employer. This registration runs for one year and must be renewed annually by the employee organization.[8] After registration, an employee organization may request recognition of the proposed bargaining unit from the public employer.[9] Notably, if the public employer does not recognize the employee organization, the organization must file a petition for certification with PERC containing dated statements signed by at least thirty percent of the employees in the proposed unit.[10] This comes at cost to the employee organization, who must pay an equal part of the petition cost in addition to their own internal/logistical costs for organizing, gathering signatures, marketing, etc.[11]

The 2018 additions to section 1012.2315 specifically affect bargaining units for instructional personnel at Florida's district schools. The applicable changes have been added as paragraphs (b) and (c) to subsection (4). Paragraph b requires "school districts and bargaining units to negotiate a memorandum of understanding to address selection, placement, and expectations of instructional personnel." Paragraph (c)(1) adds new requirements for a certified bargaining agent for a unit of instructional personnel. Specifically, that agent must now include the following in its annual application for renewal of registration under 447.305(2): (i) the number of employees in the bargaining unit who are eligible for

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The Education Law Committee (ELC) is on Facebook, Twitter, and LinkedIN! These accounts give ELC members an additional way to stay in touch with each other between meetings and also give the ELC the ability to conduct more public outreach about the work and achievements of the ELC and its members. If you have articles, achievements, or updates you would like to share on the ELC's new social media accounts, please send them to educationlawfloridabar@gmail.com.

You can follow the ELC's accounts by searching for @FlaBarEdLaw on Twitter and Facebook. Members of the ELC who are on LinkedIN can send a message to educationlawfloridabar@gmail.com to be added to the ELC LinkedIN group.

EFFECTS OF SECTION 1012.2315, continued

representation by employee organization; (ii) the number of employees who are represented; and (iii) the number of represented employees who pay dues and do not pay dues.[12] Paragraph (c)(2) states that if the dues paying membership is less than fifty percent of the employees eligible for representation in the unit, the unit must petition for recertification within 1 month after the organization's application or have its certification revoked.[13] The effect of this revocation is that the employee organization must re-petition for certification (and presumably go through the cost and delay of another election).

As mentioned above, suit quickly followed the enactment of Chapter 2018-6, Laws of Florida. The plaintiffs' action contained four counts.[14] Count 1 argued that the new law was in violation of the "Single Subject" rule of Article III, Section 6 of the Florida Constitution.[15] Count 2 argued that the new law treated members of K-12 bargaining units differently than other classes of public employees in violation of equal protection under Article I, Section 2 of the Florida Constitution.[16] Count 3 claimed a violation of the right of public employees to exercise collective bargaining rights in violation of Article I, Section 6 of the Florida Constitution.[17] Count 4 alleged a violation of a non-union member's right to work under Article I, Section 6 of the Florida Constitution.[18]

Although the defendants answered through the Florida Attorney General's Office on September 4, 2018, no further action occurred until Plaintiffs filed a motion for summary judgment on only count 2 on March 21, 2019. The key issue plaintiffs raised in their motion was that the recertification requirement applies only to units for K-12 instructional personnel. This application allegedly affected the equal protection guarantee of Article I, Section 2 of the Florida Constitution, which "is essentially a direction that all persons similarly situated should be treated alike."[19] Plaintiffs argued that, as the right to engage in collective bargaining under Article I, Section 6 of the Florida Constitution is a fundamental right, restrictions on that right are subject to strict scrutiny. They then argued that the statute does not meet this test, as it is neither necessary to promote a compelling governmental interest nor narrowly tailored to advance that interest. [20]

In their July 25, 2019 opposition to plaintiff's motion, defendants pointed out that the information required by 1012.2315(4)(c)(1) and (2) are already known to union representatives and cannot realistically impose any undue burden upon them.[21] Additionally, the burdens are placed on the unions representing employees, rather than on any employees themselves. Accordingly, no employee rights were affected by the statute. Defendants also claimed that there could be no equal protection violation because neither teachers nor unions constitute suspect classifications under equal protection jurisprudence.[22]

The Defendants argued against an equal protection violation because "equal protection is not violated merely because some individuals are treated differently than others. Instead, it requires that persons similarly situated be treated similarly."[23] Defendants claimed that section 1012.2315(4) met this requirement. For instance, section 1012.2315(4)(a) restricts collective bargaining provisions from precluding incentives to high quality teachers and affects assigning those teachers to low-performing schools. Additionally, section 1012.2315(4)(b) imposed other requirements on the subject unions (*i.e.* the negotiation of a required memorandum of understanding) that Plaintiffs specifically did not challenge in their suit. Therefore, plaintiffs were not in fact arguing against any restrictions of their rights that applied uniquely to their membership, but only certain alleged restrictions. Defendants also pointed out that "the bulk of . . . Chapter 1012, Florida Statutes, concern public-school personnel issues, evidencing a clear and justifiable determination by the Legislature to treat those personnel – including public school teachers and other instructors – differently from other public employees."[24]

The court's order denying plaintiffs' motion for summary judgment cited heavily to the authority and argument in defendants' motion. The court led with the fact that subsections (a) and (b) of section 1012.2314(4) were not challenged by Plaintiffs, yet imposed restrictions on some bargaining rights.[25] Additionally, the court held, "The right to engage in collective bargaining under Article I, Section 6 belongs to the workers, not to labor unions or other bargaining representatives."[26] The court agreed that neither public school teachers nor labor unions qualify as a suspect class under equal protection jurisprudence; accordingly, the "rational basis" test is the test that properly applies, and there is a rational basis for the statute.[27]

The court's ruling (and plaintiffs' subsequent voluntary dismissal) has left open the potential for future legislation to potentially impact public employee representation. One proposed bill from the 2021 legislative session proposed expanding the "less than 50%" requirement of section 1012.2315(4)(c) to all employee organizations of public employers, except for those representing law enforcement officers, correctional officers, correctional probation officers, or firefighters."[28] Public employers would also have the right not to deduct dues and uniform assessments on behalf of bargaining units, as well as a right to challenge inaccuracies in a petition for renewal.[29] A separate bill filed in 2021 proposed, among other things, applying the same requirements of section 1012.2315(4)(c) to instructional personnel bargaining units at Florida College System and State University System institutions.[30] While neither of these bills ultimately became law, these types of restrictions may continue to emerge in future legislative discussions and drafts.

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EFFECTS OF SECTION 1012.2315, continued

Endnotes:

1 Associate General Counsel, Seminole State College of Florida. The author wishes to thank Anise Veldkamp McClellan, University of Florida J.D. candidate '22 for her assistance.

2 Ch. 2018-6, Laws of Florida.

3 1012.2315(4)(b)-(c) Fla. Stat. (2021).

4 Plaintiffs to the lawsuit consisted of the Florida Education Association, nine bargaining units (from Broward, Brevard, Polk, Lee, Charlotte, Hillsborough, Wakulla, Leon, and Manatee counties), and seventeen individuals.

5 Fla. 2d. Jud. Cir. Case no. 2018-CA-001446.

6 *See generally* §§ 447.201-447.609, Fla. Stat. (2021).

7 "Employee organizations" means "any labor organization, union, association, fraternal order, occupational or professional society, or group, however organized or constituted, which represents, or seeks to represent, any public employee or group of public employees concerning any matters relating to their employment relationship with a public employer." § 447.203(11), Fla. Stat. (2021).

8 § 447.305(2), Fla. Stat. (2021).

9 § 447.307, Fla. Stat. (2021).

10 § 447.307(2), Fla. Stat. (2021).

11 § 447.307(3)(a)(3), Fla. Stat. (2021). This MOU refers to instructional personnel assigned to a school under §1012.28(8), which broadly relates to powers given to a highly effective principal that is assigned to a school rated "D" or "F".

12 § 1012.2315(4)(c)(1)(a)-(b), Fla. Stat. (2021).

13 § 1012.2315(4)(c)(2), Fla. Stat. (2021).

14 *See* Fla. 2d. Jud. Cir. Case no. 2018-CA-001446, Complaint ¶¶ 20-44.

15 *Id.* at ¶¶ 20-24.

16 *Id.* at ¶¶ 25-31.

17 *Id.* at ¶¶ 32-37.

18 *Id.* at ¶¶ 37-44.

19 *D.M.T. v. T.M.H,* 129 So. 3d 320, 341 (Fla. 2013).

20 *See* Plaintiffs' Motion for Summary Judgment at pp. 9-11.

21 *See* Defendants' Memorandum in Opposition at p. 2

22 *See Id.* at pp. 13-15.

23 *Fraternal Order of Police, Miami Lodge No. 20 v. City of Miami,* 243 So. 3d 894, 899 (Fla. 2018).

24 *See* Defendants' Memorandum in Opposition at p. 19.

25 Order Denying Plaintiffs' Motion for Summary Judgment as to Count II at ¶ 2.

26 *Id.* at ¶ 9 (citing *Schermerhorn v. Local 1625 of the Retail Clerks Int'l Ass'n, AFL-CIO,* 141 So. 2d 269, 272-73 (Fla. 1962)).

27 Order Denying Plaintiffs' Motion for Summary Judgment as to Count II at ¶¶ 9-15.

28 *See generally* Florida House Bill 835 (2021).

29 *Id.*

30 *See generally* Florida Senate Bill 1014 (2021).

Navigating the Legal Maze of Mask and Vaccine Mandates in Florida Education Law

by Blaze M. Bowers, J.D.

Florida's education sector faces a new and daunting legal maze in vaccine and mask mandate law. Political forces, schools, institutions of higher education, parents, students—the countless stakeholders in education—are looking to members of Florida's legal community for guidance. Floridians worry about their health and safety, as well as their rights, liberties, and livelihoods, presenting a diverse and precarious intersection of rights and responsibilities. This is the status of vaccine and mask mandate law across Florida and the nation—an update geared toward equipping practitioners to informedly represent their clients through these unprecedented times.

I. The Status of Florida Mask and Vaccine Mandate Law

Florida Governor Ron DeSantis issued Executive Order 21-175[1] ("EO 21-175") on July 30, 2021—the epicenter of mask mandate litigation in Florida—effectively banning all Florida schools from implementing mandatory masking policies for schoolchildren by allowing parents and guardians to opt-out students for any reason. This order, titled "Ensuring Parents' Freedom to Choose — Masks in School," directed the Florida Department of Health ("FDOH") and Florida Department of Education ("FDOE") to take any action required to ensure that COVID-19 safety protocols did not "violate Floridians' constitutional freedoms... [and] parents' rights ... to make health care decisions for their minor children," and to "[p]rotect children with disabilities or health conditions who would be harmed by ... protocols such as face masking requirements."[2] The Governor and respective executive departments relied upon the authority of Florida's Parents' Bill of Rights[3] when issuing EO 21-175. Following this executive order, the FDOH issued an emergency rule requiring schools to permit parents and legal guardians to opt-out their students from mask requirements.[4] FDOE issued a rule allowing public-school students to transfer to private schools, with a publicly funded Hope Scholarship, should they experience "COVID-19 harassment" at a public school. The rule also empowers the Florida State Board of Education to withhold funds from noncompliant schools.[5]

Litigation soon followed the promulgation of these new

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rules. In a case that received national attention, Allison Scott and several other parents and guardians filed suit[6] on behalf of their minor schoolchildren against Governor DeSantis and the FDOE in Florida's Second Judicial Circuit, seeking to enjoin enforcement of EO 21-175. The parents argued that Governor DeSantis exceeded his legal authority in banning mask requirements. Florida Circuit Judge John Cooper agreed and held, among other things, that the Governor had no viable separation of powers or political question defenses to raise[7] and that reliance on the Parents' Bill of Rights as the authority for the executive order was unsupportable. The Governor argued that the first portions of the Parents' Bill of Rights, which forbids state infringement of parents' rights, supported his actions; however, Judge Cooper noted that later portions of the Bill defeated that argument and quoted the following portions of the Bill: "[no] government entity ... may ... infringe on the fundamental rights of a parent ... *without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailed and is not otherwise served by a less restrictive means*."[8] Judge Cooper concluded that the Parents' Bill of Rights expressly gave school boards authority to adopt policies they deemed necessary to protect their students and that the State's blanket ban exceeded constitutional limitations.[9] Ultimately, Judge Cooper invalidated the Governor's order and granted a permanent injunction that enjoined enforcement of the executive order and FDOE rules and prevented state defendants "from violating the Parents' Bill of Rights."[10] However, the parents failed to bring suit against the FDOH rule, so Judge Cooper did not invalidate it.

Governor DeSantis appealed to the First District Court of Appeals ("First DCA"), invoking a stay on enforcement of Judge Cooper's order during the appeals process. Judge Cooper reinstated his stay, however, and the State moved for the First DCA to reinstate it in order to prevent enforcement of Judge Cooper's order—the State ultimately succeeding.[11] Appellate litigation at the First DCA is ongoing in this case; at the time of this article's submission, filings had been made as recently as October 7, 2021. This First DCA decision will be critical in navigating mask mandate litigation. First, it will determine the constitutionality of the Governor's order and the FDOE's rules in all districts under the First DCA. Second, this decision could lay the groundwork for a Florida Supreme Court showdown over mask mandates. Under Florida law, should another District Court of Appeals face a similar legal question and hold contrary to the First DCA, the Florida Supreme court holds discretionary jurisdiction to resolve such a conflict.[12]

Although the FDOH rule is not being litigated in *Scott v. DeSantis*, parents are litigating it at the First DCA in *Dortch v. Alachua County School Board.*[13] Here, the parents petitioned for a writ of mandamus that would require the Alachua School Board and the Duval County School Board, which both refused to enforce the state rules, to abide by the FDOH's mask op-out rule. Litigation in this matter is ongoing as well. The parents argue that the Florida Constitution requires school boards to comply with state rules and laws.[14]

In yet another First DCA case, the FDOH petitioned for a writ of prohibition against several school boards, including Broward County's. The school districts in this case refused to enforce the FDOH's rule regarding opting-out of mask requirements and filed petitions with the FDOH to invalidate the emergency rule. These petitions—arguing that the FDOH rule was an invalid exercise of delegated legislative authority—were consolidated and assigned to an administrative law judge ("ALJ"). The FDOH filed a motion to dismiss these petitions under the "public official standing doctrine," which "makes clear that public entities and officers do not have standing to litigate the validity of rules they must follow. Therefore, the School Boards lack standing to bring suit ... and [FDOH] does not have subject matter jurisdiction over [these petitions]."[15] However, on September 22, Florida's new Surgeon General repealed the FDOH rule at issue, and ALJ Brian Newman dismissed the case.[16] The Surgeon General has issued new rules that reinstate the same opt-out requirements at issue in this case though. Floridians should expect litigation to resume in a new suit, as the issues at hand were unresolved.

Florida mask mandate litigation has also made its way to federal district court by way of federal question jurisdiction. In *Hayes v. DeSantis*[17], eleven parents of sixteen students from across eight school districts filed suit requesting a preliminary injunction due to various health concerns arising from a lack of universal mask mandates at school. The plaintiffs' complaint brought three separate claims: 1) a violation of the Americans with Disability Act ("ADA"), 2) a violation of Section 504 of the Rehabilitation Act, and 3) a violation of the Florida Equity Act.[18] The court determined that the plaintiffs were not likely to succeed, as they had not exhausted their administrative remedies under the Individuals with Disabilities Act ("IDEA"), as is required under the ADA and Section 504 in a Pre-K through 12th grade context.[19] The various other legal issues discussed in this case dealt with free access to public education, the individualized nature of IDEA processes, and how the exhaustion of administrative remedies would not be futile, therefore, they should be pursued prior to litigation. The plaintiffs were unable to prove an irreparable injury as would be required to grant a preliminary injunction.[20] Ultimately, the State prevailed with the motion for a preliminary injunction being denied.[21] This suit may yet continue—after the district court denied a motion for

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reconsideration of the above decision, the parents filed a notice of appeal on Monday, October 4, 2021.[22] This sets the stage for a potential Eleventh Circuit decision that would have significant consequences for all of Florida.

Federal litigation also addressed questions regarding mask mandates in Florida higher education. In *Zinman v. Nova Southeastern University*[23], a Nova law student sued Nova, South Florida Stadium, LLC, and various Florida county governments on the grounds that their mask mandates violated his personally held Jewish religious beliefs. The student argued that Judaism "prohibits idolatry" and obeying a mask mandate would be "tantamount to worshiping false idols..."[24] His amended complaint included claims, among others, that he suffered violations of First Amendment rights, substantive due process rights, and violations under 42 U.S.C. § 1983 ("section 1983"). The district court left nothing unsaid when addressing the plaintiff's complaint. The court noted that the pleading was "flawed," "light on relevant factual allegations," "heavy on rhetoric and hyperbole," and "[qualified] as a shotgun pleading ... replete with conclusory, vague, and immaterial facts..."[25] The court went on to indicate that a section 1983 suit presents serious issues where Nova and Stadium were concerned, as they are not state actors. Finally, in addition to addressing issues of jurisdiction relating to Article III standing, the district court handed a glaring victory to the defendants.[26] Florida practitioners will benefit from analyzing the court's discussion of the First Amendment, due process, standing, and section 1983, as such issues could rise to the Eleventh Circuit soon. This case also reveals the importance of well-drafted pleadings—a simple yet crucial point in mandate litigation.

Litigation surrounding vaccine mandates in education have not been as prevalent in Florida. The Federal Drug Administration ("FDA") has only approved COVID vaccinations for people twelve years of age and older[27], and Florida has not issued a vaccination mandate for public schools. However, an "educational institution" in Florida may not "require students or residents to provide any documentation certifying COVID-19 vaccination ... for attendance or enrollment..."[28] This law became effective on July 1, 2021, and is seen as an extension of Executive Order 21-81[29] which promulgated similar restriction in April 2021. An "educational institution" is a public or private school, as defined by Fla. Stat. § 768.38(2)(c). Florida practitioners will need to carefully navigate the differences between emerging vaccine mandate, vaccine documentation, and vaccine protocol law.

Education law practitioners should also be mindful of mask and vaccine litigation that extends beyond educational institutions. The progression of all mask and vaccine mandate lawsuits, spanning issues from state fire departments[30] and city employees[31] to private businesses inform legal analysis in the education sector.

II. The Status of Mask and Vaccine Mandate Law Beyond Florida

This stupefying legal maze becomes even more unnavigable when one looks beyond Florida—as federal and national developments add uncertainty to the already confounding maze of legal questions. *Jacobson v. Massachusetts*[32] provides a foundational reference when facing these complex interactions between state and federal law. Though decided over 100 years ago, this United States Supreme Court case provides possibly the most recent and persuasive Supreme Court jurisprudence relating to vaccine mandates in the United States and has been used in analyzing mask mandates as well. The *Jacobson* court decided whether a 1905 Massachusetts law permitting cities to mandate vaccinations violated a Fourteenth Amendment right to liberty.[33] The Supreme Court held that the law was permissible under the state's police power to protect public health and safety.[34] Of particular importance is the fact that, in Massachusetts, local health boards were able to determine when vaccines were mandatory, thus making the state law more narrowed and specific; neither unreasonable nor arbitrary.[35]

The *Jacobson* decision still plays a crucial role in 21st Century COVID-19 litigation. Across the country, several key cases inform our review of mask and vaccine case law and litigation—many of which cite to *Jacobson*. First, Florida attorneys will want to consider the case of *Dahl v. Board of Trustees of Western Michigan University*.[36] Four athletes from Western Michigan University's ("WMU") women's soccer team sued WMU—a state actor—after all athletes at the institution were required to receive a COVID-19 vaccine. A total of sixteen athletes would eventually join as plaintiffs. Non-athletes were not subject to this requirement at the time. The four athletes filed for religious exemptions due to "sincerely held religious beliefs" that were incompatible with vaccination. WMU denied all four requests. The athletes then sued, alleging violations of their rights to the free exercise of religion. The district court determined that the athletes established a likelihood of success on the merits of a Free Exercise claim because a law that discriminates on the basis of religion is illegal unless "justified by a compelling interest and is narrowly tailored to advance that interest."[37] Accordingly, emergency injunctive relief was granted for the athletes.[38] WMU appealed to the Sixth Circuit, but the appeals court affirmed the lower court's decision and upheld the grant of a preliminary injunction on October 7, 2021—finding that the First Amendment rights of the athletes were "likely violated" but that the decision was a "close call."[39] *Dahl* highlights key issues regarding religious liberties as they intersect with state powers to mandate vaccines in schools. While this court relied on some Sixth Circuit law,

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much of the law relied upon stems from United States Supreme Court authority that is equally as persuasive in the Eleventh Circuit and Florida courts.

Notable litigation continues to proceed across the nation. In Arkansas, a statewide mask mandate ban was invalidated in August by a state judge who held that the ban violated the Arkansas Constitution, as the ban discriminated between private and public school students, and infringed on the powers of executive branch, county officials, and the Arkansas Supreme Court.[40] Similar to Arkansas, an Arizona state judge invalidated a statewide mask mandate ban, holding that it violated the state constitution on rather unique grounds: because it was issued as part of budgetary legislation, which, the judge found, should have only been used on spending issues; not mask mandate bans.[41] A federal judge held a South Carolina mask mandate ban as illegal, finding that the ban prevented students with disabilities from accessing reasonable accommodations at school as required by disability laws—that is, a safe learning space that is a least restrictive environment. State leaders have threatened to appeal this decision up to the United States Supreme Court.[42] Also in South Carolina, earlier in September, the South Carolina Supreme Court struck down a public school district's mask mandate. The court unanimously held that the mandate was unconstitutional.[43] Additionally, Oklahoma is facing a court-ordered temporary suspension of its mask mandate ban until a hearing can be held.[44] Elsewhere, Iowa's[45] and Tennessee's[46] state mask mandate bans were temporarily invalidated in September by federal judges who held—similarly to the federal decision in South Carolina—that the bans violated the rights of students with disabilities. Meanwhile, Texas, Montana, and Utah—along with Florida—continue to enforce mask mandate bans. The United States Department of Education has announced an investigation into Iowa, Oklahoma, South Carolina, Tennessee, and Utah state mask bans to determine if these bans discriminate against students with disabilities.[47]

Then there is the United States Supreme Court, which has thus far, expressed a possible opinion without issuing any opinion at all. Of the COVID-19 cases, *Klaassen v. Trustees of Indiana University*[48] made its way to the Supreme Court first, where eight students filed suit against Indiana University because of its vaccine mandate. Interestingly, most of the plaintiff students had already been granted religious or medical exemptions, but they objected to the vaccination mandate still, refusing to accept masking requirements because of their refusal to get vaccinated. The federal trial judge issued a 101 page-long order denying the students' request for an injunction, in which he went to great lengths discussing the limits state actors operate within under the *Jacobson* case. The case was then appealed to the Seventh Circuit, which again denied the relief sought by the students, going as far as to say that their decision was even easier than the *Jacobson* case, due to broad and readily granted exemptions provided by Indiana University. Finally, the plaintiffs applied for injunctive relief with Justice Barrett of the United States Supreme Court, who oversees the Seventh Circuit, but she denied the students' request with no explanation.

Justice Sotomayor also denied a request for relief out of New York. In *Maniscalco v. New York City Department of Education,*[49] the city of New York issued an executive order that required all public school teachers to receive a vaccine or go on unpaid leave. Affected teachers sued in federal district court, arguing that their due process and equal protection rights as public school employees had been violated. The teachers failed to obtain relief and appealed to the Second Circuit. During appellate proceedings, the plaintiff teachers filed an emergency application for writ of injunction with Justice Sotomayor, who oversees such petitions from the Second Circuit. She denied the application a day later without asking for further arguments and without referring it to the full Court for consideration—a move some have interpreted as meaning that Justice Sotomayor found this to be an easy question of law. Though their emergency application failed, the teachers' case is still pending in the Second Circuit, so the issues raised could be addressed by the court in coming weeks.

The Supreme Court's refusal to take up these two cases may reveal a legal certainty amidst this dizzying maze—that *Jacobson* weighs heavily in favor of state action that mandates masks or vaccines. We will learn more about appeals courts' interpretations of *Jacobson* and mandates as more cases move toward appellate proceedings, and perhaps the Supreme Court will be inclined to take up a future case.

III. Other Legal Considerations in Navigating Florida Education and Mandate Law

While litigation unfolds at home and across the country, what other legal issues should Florida jurists be mindful of as they navigate the deepest levels of the COVID-19 legal labyrinth? Pressing issues include federal regulations, preemption, Title VII of the Civil Rights Act ("Title VII"), and the Religious Freedom Restoration Act[50] ("RFRA").

Impending and unprecedented regulations[51] from the Department of Labor's Occupational Safety and Hazard Administration ("OSHA") present a truly difficult legal reality. President Biden, in an address on September 9, 2021, announced that OSHA would issue an emergency temporary standard ("ETS") that will require all employers in the United States with 100 or more employees to implement vaccination mandates or weekly testing requirements. This ETS will expand upon President Biden's June 21

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ETS that applied only to the healthcare sector. This federal regulation, imposed on private businesses, will affect over 1,300 private colleges and universities[52] as well as some primary and secondary schools. This ETS raises many unanswered questions: will this requirement affect remote workers, will it affect private contractors, and how will it interact with existing state laws? The emergency rule has yet to be published, so we will have more details soon. In addition to OSHA's emergency rule, President Biden has also issued an executive order[53] requiring all employees of federal government contractors to be vaccinated with no option for weekly testing. This order will affect universities that house federal research facilities or other federal contractors. Twenty-four Attorneys General, including Florida Attorney General Ashley Moody, wrote a letter to President Biden on September 26 expressing concern over the impending ETS and threatened to file suit should it be implemented.[54] Tennessee, Texas, Ohio, and South Carolina's Attorneys General were among the other twenty-three signatories.

Practitioners should beware of preemption issues as well, as conflicts between federal and state laws will only cause greater confusion in navigating COVID-19. Federal law will preempt—displace or overrule—state law when the two come into conflict under the Supremacy Clause of the United States Constitution.[55] The principles of preemption apply the same to various types of law, whether court-made, legislative, or regulatory. Preemption will also play out on state and local levels in differing ways, depending on whether preemption is outright, express, or implied.[56] We are already seeing preemption challenges form—including but not limited to conflicts between courts, OSHA emergency rules, other federal and state regulations, executive orders, and local ordinances.

Still, the maze becomes more disorienting as schools must comply with Title VII too, highlighting the delicate balance between state police powers and personal liberties. Vaccine and mask mandates cannot violate individuals' rights against discrimination on the bases of race, religion, sex[57], and national origin. Of particular concern in mandate litigation are religious rights. As described in several cases above—and as is sure to be litigated countless more times across the country—applications for religious exemptions are central to many mandate lawsuits. Religious rights are nuanced, as concerns vary from Protestant and Muslim students to Jewish and Catholic students—not to mention school employees. For example, some Catholic students have concerns relating to the use of vaccines, alleging that fetal cell lines grown from aborted fetal cells were used in the research and development of COVID vaccines—invoking religious dilemmas surrounding abortion.[58] Plaintiff's attorneys, as demonstrated in *Zinman v. Nova Southeastern University*, must draft well-pleaded complaints that are fact-intensive and avoid platitudinal and hyperbolic language that does not effectively demonstrate specific factual violations of sincerely held beliefs. In the end, religious beliefs are important, just as school safety and policies are. Florida practitioners' jobs are to represent clients competently and zealously, while keeping all possible strategic angles in mind.

The Religious Freedom Restoration Act further complicates this compliance maze. As explained, schools—specifically state schools—must avoid discriminating on the grounds of religion under the First Amendment's Free Exercise Clause and Title VII. RFRA further strengthens religious right violation claims by raising the bar that schools must meet when making decisions that violate free exercise rights. RFRA mandates strict scrutiny be applied whenever courts determine whether free exercise rights have been violated. RFRA also stipulates that religiously neutral laws may violate free exercise rights. Schools must tread more carefully than ever in their treatment of students and employees claiming religious exemptions, especially in light of recent Supreme Court decisions affecting RFRA, Title VII, exemptions, and religious beliefs, like *Bostock*[59] and *Our Lady of Guadalupe*.[60]

Florida education faces a challenging future as it navigates COVID-19. The labyrinth described is a maze that becomes more confusing and overwhelming with each turn—with each law, regulation, and case decision that is handed down across the nation. Attorneys must strategically navigate the Florida courts, draft fact-heavy and well-planned pleadings, and consider law beyond Florida that may potentially impact litigation—keeping appellate strategies in mind throughout pre-trial and trial phases of all suits. Education law practitioners in the Sunshine State have a difficult task ahead but will undoubtedly serve the public well.

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Endnotes:

1 *See* Exec. Order 21-175 (July 30, 2021), https://www.flgov.com/wp-content/uploads/2021 /07/Executive-Order-21-175.pdf.

2 *Id.* at 3-4.

continued, next page

MASK AND VACCINE MANDATES IN FLORIDA, continued

3 *See* Fla. Stat. § 1014.04 (previously referred to as HB No. 241), https://casetext.com/statute/florida-statutes/title-xlviii-k-20-education-code/chapter-1014-parents-bill-of-rights/section-101404-parental-rights.

4 *See* Emergency Rule 64DER21-12(1)(d), Fla. Admin. Reg., Vol. 47/153 (Aug. 9, 2021).

5 *See* Emergency R. 6AER21-02(1), Fla. Admin. Reg. Vol. 47/153 (Aug. 9, 2021), https://www.flrules.org/gateway/ruleNo.asp?id=6AER21-02.

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8 *Id.* at 17 (emphasis added).

9 *Id.* at 18-23.

10 *Id.* at 24.

11 *See DeSantis v. Scott*, First District Court of Appeals, Case no. 1D21-2685 (2021).

12 *See* Florida Rules of Appellate Procedure 9.030(a)(2)(iv).

13 *See Dortch v. Alachua County School Board,* First District Court of Appeals, Case no. 1D21-2994 (2021).

14 *See* Art. IX, §§ 1, 2, Fla. Const.

15 *See* Petition for Writ of Prohibition, *Florida Department of Health v. The School Board of Broward County, Florida, et. al.,* First District Court of Appeals, Case no. 1D21-2854, https://edca.1dca.org/DcaDocs/2021/2854/2021-2854_Petition_85292_Petition20Prohibition.pdf.

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19 *Id.* at 22.

20 *Id.* 42-43.

21 *Id.* at 56.

22 *See* https://www.pacermonitor.com/public/case/41298521/HAYES_et_al_v_GOVERNOR_RONALD_DION_DESANTIS_et_al

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25 *Id.* at 22.

26 *Id.* at 65-66.

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28 *See* Fla. Stat. § 381.00316

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34 *Id.*

35 *Id.* at 27.

36 *See Dahl v. Bd. of Trs. of W. Mich. Univ.*, No. 1:21-cv-757, 2021 U.S. Dist. LEXIS 167041 (W.D. Mich. Aug. 31, 2021).

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Public Employees Relations Commission Rules Teacher Evaluation Systems are a Mandatory Subject of Bargaining

by Alyssa S. Lathrop, Tallahassee

The Public Employees Relations Commission recently had occasion to address, for the first time, whether school boards are required to bargain with teacher unions over teacher evaluation systems in Florida.[1] The Orange County Classroom Teachers Association, Inc. (Union) – the certified bargaining agent for a unit of instructional personnel – filed an unfair labor practice charge with the Commission, alleging that the School Board of Orange County violated section 447.501(1)(a) and (c), Florida Statutes, by unilaterally imposing teacher evaluation procedures that changed terms and conditions of employment and refusing to bargain.

A three-day evidentiary hearing was held before the Commission-appointed hearing officer. The hearing officer subsequently issued a recommended order finding that the charge was untimely filed and that the board was entitled to attorney's fees and costs. The Union filed exceptions to the recommended order. The Commission granted the Union's exceptions on the issue of timeliness and remanded the case to the hearing officer to make supplemental findings of fact, analysis, and recommendations.

On remand, the hearing officer issued a supplemental recommended order finding that the charge was timely filed. He further concluded that the School Board violated section 447.501(1)(a) and (c), Florida Statutes, by refusing to bargain collectively – specifically, by failing to respond to a demand for impact bargaining by the Union – and by unilaterally imposing a teacher evaluation system. As part of his analysis, the hearing officer concluded that teacher evaluation systems are a mandatory subject of bargaining. The hearing officer recommended that the Union be awarded fees for the failure to bargain portion of the charge, but not the unilateral change portion.

The School Board filed forty-eight exceptions to the supplemental recommended order. The School Board also requested oral argument, which was held before the Commission via the Zoom platform on August 19, 2021.

In its final order, the Commission largely denied the School Board's exceptions to the hearing officer's findings of fact because the findings were supported by competent, substantial evidence and the Commission is not at liberty to weigh the evidence differently than the hearing officer. The Commission also rejected the School Board's arguments that the hearing officer should not have made certain factual findings about the parties' bargaining history prior to 2018 as they were outside the scope of the charge. The Commission stated that those findings were not included to establish an independent unfair labor practice violation allegation, but rather to provide background to the allegations in the charge.

With respect to the School Board's exceptions to the hearing officer's legal conclusions, the Commission first addressed the unilateral change allegation. The Commission observed that the crux of the case was whether a teacher evaluation system is a management right or a mandatory subject of bargaining – an issue of first impression for the Commission. The Commission rejected the School Board's reliance on a prior 2004 case, in which the hearing officer concluded that a performance pay plan for teachers was a mandatory subject of bargaining, because the hearing officer's recommended order in that case was never adopted by the Commission.[2] Additionally, that case involved a different statute, evaluation system, and issue. The Commission also rejected the School Board's argument that section 1012.34, Florida Statutes, makes evaluation procedures the province of the superintendent, not collective bargaining, because the statute is silent on the matter.

The Commission determined that it must apply the *City of Miami*[3] balancing test enunciated by the Florida Supreme Court, because the teacher evaluation system had elements indicative of both a mandatory subject of bargaining and a management right. The Commission rejected the School Board's argument that teacher evaluation systems are a management right because it is the mechanism by which the School Board sets requirements for levels of service. The Commission stated that "in this case the teacher evaluation system goes well beyond simply setting levels of service." The Commission agreed with the hearing officer that complex teacher evaluation systems are distinguishable from the subjects in prior decisions that were determined to be management rights. These subjects included furloughing employees, transferring temporarily law enforcement deputies to a detention center due to inmate suicides, overcrowding, and understaffing, instituting drug testing of law enforcement officers allegedly seen illegally using or buying drugs, laying off employees, and setting school class sizes and minimum staffing levels. The Commission reasoned that, unlike in cases dealing with furloughing or drug testing police

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officers under reasonable suspicion of illegal drug use, teacher evaluation systems are not an issue that cannot wait for bargaining. The Commission noted that the hearing officer found that the parties had, in fact, previously bargained over the teacher evaluation system.

The Commission "recognize[d] the management right to set levels of service or to assign tasks to employees within the basic scope of employment." However, the Commission stated that "such rights cannot subsume mandatory subjects of bargaining." The Commission concluded that to hold that the teacher evaluation system in the case was a management right "would essentially eviscerate the Union's ability to negotiate mandatory subjects of bargaining." Accordingly, the Commission determined that teacher evaluation systems that essentially determine hours, wages, and terms and conditions are a mandatory subject of bargaining under the *City of Miami* balancing test. The Commission noted that the requirement to bargain with a union prior to adopting a teacher evaluation system is the requirement to meet at reasonable times and to negotiate in good faith with the intent of reaching a common accord, but there is no requirement that either party make a concession or be compelled to agree to a proposal.[4] The Commission additionally emphasized that there was no dispute that any evaluation system adopted must conform to and comply with the applicable requirements.[5]

The Commission rejected the School Board's argument that it did not commit an unfair labor practice because it had not implemented the teacher evaluation system it imposed. The Commission stated that this argument asked it to weigh the evidence differently than the hearing officer. The Commission further stated that while subsequent actions – such as a decision to rescind the imposition of, to not ultimately implement, or to not fully implement a new evaluation system – may affect the remedy, they cannot expunge or cure the unfair labor practice violation. The Commission also rejected the School Board's argument that the Union had waived its right to bargain over the evaluation system.

Next, the Commission addressed the failure to impact bargain portion of the charge. The Commission agreed with the School Board that impact bargaining becomes an issue only when a topic is a management right, not when it is a mandatory subject of bargaining.[6] Accordingly, because the Commission had decided that teacher evaluation systems were a mandatory subject of bargaining, it granted the School Board's exceptions regarding the impact bargaining portion of the charge. The Commission also granted the School Board's exception to the award of attorney's fees for this portion of the charge. Ultimately, no attorney's fees and costs were awarded to either party.

Finally, the Commission rejected the School Board's contention that it should not be required to post a notice. The Commission explained that the posting of notices is required even in cases involving novel issues such as the one in this case.

The Commission's final order has been appealed to the Fifth District Court of Appeal, Case No. 5D21-2607, and the case is currently pending.

An earlier version of this article appeared in the PERC News, Vol. 21, Issue 3 (2021).

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Endnotes:

1 *See Orange County Classroom Teachers Association, Inc. v. School District of Orange County, Florida*, 48 FPER ¶ 169 (2021) (PERC Case No. CA-2018-050).

2 The school board relied upon the hearing officer's recommended order in *Gilchrist Employees/United v. School Board of Gilchrist County*, 30 FPER ¶ 71 (2004). In that case, the Commission remanded for the hearing officer to consider the issue of contractual waiver, expressly stating that it was not deciding whether criteria for determining whether a teacher was entitled to a performance-pay salary supplement were negotiable. *Id.* The Commission ultimately never reached the issue as the charging party subsequently withdrew the charge before the issuance of the final order. See Gilchrist Employees/United, Case No. CA-2003-024 (PERC Apr. 27, 2004) (unpublished decision).

3 *See Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 (Fla. 1992).

4 *Orange County Classroom Teachers Association,* 48 FPER ¶ 169 (citing § 447.203(14), (17), Fla. Stat.; § 447.309, Fla. Stat.).

5 Id. (specifying that these requirements include those contained in section 1012.34, Florida Statutes, and Florida Administrative Code Rule 6A-5.065).

6 *Id.* (citing *Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017)).