IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

MICHELLE RHEA, THERESA BUTLER, GERALDINE CALLAGHAN, WENDY CHASTAIN, PAM EVERETT, ALEXA HASANIA, SCOTT HASTINGS, AMANDA HAZARD, MELINDA HOHMAN, BRANDY KINKADE, RHONDA NICKERSON, BRANDY PATERNOSTER, SUZANNE ROWLAND and GABRIELLE WEAVER,

Plaintiffs,

v. CASE NO: 2016-CA-1794

PAM STEWART, in her official Capacity as Commissioner of the FLORIDA DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION, SCHOOL BOARD OF ORANGE COUNTY, SCHOOL BOARD OF HERNANDO COUNTY, SCHOOL BOARD OF OSCEOLA COUNTY, SCHOOL BOARD OF SARASOTA COUNTY, SCHOOL BOARD OF BROWARD COUNTY, SCHOOL BOARD OF SEMINOLE COUNTY, and SCHOOL BOARD OF PASCO COUNTY,

Defendants.
_____/

ORDER DENYING VENUE MOTIONS, ORDER GRANTING IN PART AND DENYING IN PART TEMPORARY INJUNCTIVE RELIEF, AND ORDER SETTING EVIDENTIARY HEARING ON BOND AMOUNT AND CONDITIONS AND ORDER SETTING PRETRIAL CONFERENCE AND OTHER DEADLINES

THIS CAUSE came before the Court on August 22, 2016 for evidentiary hearing set regarding the Defendants' venue motions and the Plaintiffs' temporary injunction request.[1] All parties were represented by counsel.

SUMMARY OF RULING

Jurisdiction over the Person

1. The six County School Board Defendants initially contended the Court had no jurisdiction over them, as they had not been served. The Plaintiffs subsequently served the summonses and other papers and, as the County School Board Defendants acknowledged in the notice of removal they co-filed in the federal court, service was perfected. The County School Boards'

[1]At the initial (August 12, 2016) hearing, the County School Board Defendants contended that because they had not been served, the Court lacked jurisdiction over them. The Court directed the plaintiff to perfect service. The Notice of Removal filed on August 17 by all of the State and County Defendants reflected that all of them had been served; no Defendant contended at the August 22 hearing there was any further issue with service.

motions to dismiss for lack of jurisdiction are denied, as moot.

Venue

2. Leon County being the county in which the State Education Defendants have their headquarters, the six County School Board Defendants being indispensable parties to this action, and having agreed in the federal court to the appropriateness of a single case going forward in Tallahassee, venue is proper in Leon County.

The venue motions are denied, for the reasons set forth above and herein.

Injunctive Relief

Factual Background

3. Not wanting their children to take the mandatory Florida Standards Assessment [FSA] test, the Plaintiff Parents told their children to attend the required test, break the seal on the test materials, write their

names on the paper and not answer any questions; the children complied. The children's tests should have been scored as zero. The County School Board Defendants chose instead not to give a score for the children, as the State Education Defendants directed. A minimum of Level 2 on the FSA is statutorily required for promotion from grade 3 at the end of the school year. However a failure to achieve at least the higher, required Level 3 triggers the requirements for sending a notice of deficiency and implementing remediation. Sections 1002.20(11) and 1008.25(4)and(5), Florida Statutes (2015).

4. The legislatively described primary purpose for the statewide third grade standardized English language Arts/reading assessment is to identify reading deficiencies existing at the time of the late winter/early spring test so that the deficiencies can be remediated in time for the third grader move to grade 4 at the end of the school year some two or three months later. Despite the plaintiff children failing

to achieve the level 3 required, The Education Defendants ignored the statutes notice of deficiency process, and ignored their obligations regarding remediation and teacher compiled portfolios.

There is a substantial likelihood of at least some of the plaintiffs prevailing on the merits, there has been injury to the children [contributed to by all Education Defendants as well as the Plaintiff Parents] already and there will be further irreparable harm to the children if they are delayed further in accessing the appropriate grade level. It is in the public interest that the State Education Defendants and County School Board Defendants follow Florida's education laws intended to make sure children can read.

5. The public interest supports entry of injunctive relief in some instances and some of the Plaintiffs lack any meaningful remedy at law. For the reasons set forth in more detail herein, the Plaintiffs' request

for temporary injunctive relief is granted in part and denied in part.

Ruling Summary

6. The requests for temporary injunctive relief must be assessed on an individual basis, focusing on the individual County School Boards and the State Education Defendants and their conduct vis-à-vis the particular Plaintiff Parent(s) and Plaintiff Student(s). To the extent the Plaintiffs are complaining of the difference between a teacher-compiled portfolio consisting of non-test classwork and test-based standards assessment, the Plaintiffs should pursue their administrative remedies.

Orange County/Ms. Rhea

7. As to Defendant Orange County School Board, the evidence clearly and convincingly demonstrates that the Orange County School Board treated Ms. Rhea and her child B. R. differently [and arbitrarily and capriciously] by denying them the teacher compiled portfolio Ms. Rhea requested at the beginning of the

2015-2016 school year. The affidavit of Robyn Barnes [Composite Exhibit 58, sub-exhibit #13] reflects without contradiction that the Orange County School Board timely promoted Ms. Barnes' child to 4th grade based on the teacher-compiled portfolio created for the Barnes child. Teacher Rebekah Dooley testified to B.R.'s mastery of Grade 3 work and the injury to B.R. if she were required to repeat third grade. At a meeting of the Orange County School Board on June 14, 2016, Board Vice Chair Nancy Robinson acknowledged that the Orange County School Board had not handled properly Ms. Rhea's request for a teacher-compiled portfolio and good cause exemption for B.R.'s promotion: [Exhibit 58, sub-exhibit #14]. Vice Chair Robinson also acknowledged there were other youngsters in B.R.'s situation with no FSA score but with portfolios who were being promoted, admitting that B.R. was being treated differently not only from youngsters in other counties but within Orange County itself, clear equal protection violation. However, because the FSA testing

mandate does not apply to children who are home schooled or who are in private schools, and because B.R. is presently attending grade 4 in a private school to which the statewide testing and portfolio requirements do not apply, B.R.'s request for temporary injunctive relief is moot at this time and must be denied[2] for now.

Hernando County/Plaintiffs Butler, Everett, Hasania, Hazard, Hohman, Kinkade and Rowland

8. As to the Hernando County School Board, the evidence clearly demonstrates the Board's illegal refusal to provide any portfolio option. While County School Boards do have some discretion in their operation of the public school system in conjunction with State Education Defendants' standards, neither the State Education Defendants nor the County School Boards have the discretion to ignore Florida laws, such as their obligation to provide the portfolio option and to

[2]The request of Ms. Rhea and B.R. for declaratory relief is not presently before the Court and has not been fully briefed; there appear to be arguments that both sides could make if the Orange County School Board and Ms. Rhea are unable to get their disputes resolved. See, e.g., Godwin v. State of Florida, 593 So.2d 211 (Fla. 1992) and Montgomery v. Department of Health and Rehabilitative Services, 468 So.2d 1014 (Fla. 1st DCA 1985).

comply with the notice of deficiency process in Sections 1002.20(11) and 1008.25(4)and(5), Florida Statutes.

9. The evidence shows that the Hernando Plaintiff Parents and their children were adversely and improperly harmed by the Hernando County School Board and State Education Defendants' conduct. The evidence established that the School Board did not send any notices of deficiency, and offered no remediation, even though none of the students scored a Level 3 on the FSA. The Defendant County School Board summarizes the present status of the seven children as follows:

> S.H. has withdrawn to be homeschooled;
>
> N.B. failed the SAT-10 [an alternative assessment]twice and is currently in the 3rd grade, receiving tutoring twice weekly, is taking 4th grade classes for all courses other than Reading, and is set to take the SAT-10 test in October and if she passes will be promoted to the 4th grade;
>
> M.K., M.H. and H.E. did not take the FSA or the SAT-10 at all.

> Z.H. did not take the FSA or the SAT-10 and had a final grade of "D" in Reading; and
>
> A.R. did not take the FSA or SAT-10 at all and was a C-D student.

Defendant's, School Board of Hernando County, August 19 Response in opposition to Plaintiffs' Verified Emergency Motion for Temporary Injunction pursuant to this Court's order on August 12, 2016 p. 5, fn. 3.

10. Contrary to the Defendant School Board's contention, other evidence showed that the Hernando children did participate in the test, albeit minimally. [The statute does not define participation; the children were present on time, broke the seal on the materials and wrote their names, thus meeting their obligation to participate].

11. Defendant Hernando Superintendent Linda Pierce testified that one student is being home-schooled, one transferred to a different school, one withdrew and the School Board unenrolled 3 because they attended a magnet school [Chocachatti] and did not attend for five days. Superintendent Pierce also testified that in

Hernando, even if a child does not have a reading deficiency, but has not passed the FSA, the child will be held back. [This appears to violate Section 1008.25(5)(c)(6) the statutory provision prohibiting retention solely for FSA non-compliance].

12. As to S.H., her having withdrawn leaves moot at this time the request for injunctive relief, while it must be recognized all seven were denied the required portfolio option, and none was timely given the notice of deficiency and other timely remediation interventions.

13. Ms. Kinhade testified M.K. attended the Chocachetti Magnet School but is not attending school right now; Ms. Hohman testified she is keeping M.H. at home until this is over. M.H. was at the Chocachetti Magnet School with M.K. and H.E. The County School Board has reportedly "unenrolled" them from the magnet school for missing school for five days, after the parents were told they had 10 days to decide; that

issue of possible retaliation, arbitrary and capricious conduct is not presently before the Court in this case.

14. To the extent the Hernando Plaintiff Children harmed by the Defendants' unlawful acts are not presently enrolled in the Hernando public school, temporary injunctive relief would not be appropriate, due to the present temporal mootness of the issue. [The request for declaratory relief will be addressed at a later time].

15. To the extent the Hernando Plaintiff children are still in the Hernando Public school system, it is in the public interest for the State Education Defendants and County School Board officials to immediately start following the law. It is clear the Hernando Plaintiff students have been harmed. While there is some evidence that at least one of the students, Z.H., is presently pursuing alternate testing remedies that should have been made available last spring, Z.H. and the others were all deprived of a notice of deficiency and remediation, as well as their

statutory portfolio option. The evidence shows that third grader H.E. had been reading at the 4th and 5th grade level throughout the school year, and others of the Hernando Plaintiff Students were honor roll students.

16. The School Board Defendant sent no notice of deficiency to the Plaintiff Parents during the 2015-2016 school year, even though the notice was required when the children did not score Level 3 on the FSA in early March.

17. That the School Board violated the law is contrary to the public interest as well as that of the interest and rights of the students and their parents.

18. The School Board and State Education Defendants had no right to ignore the legislatively adopted portfolio option. No statute limits promotion to grade 4 solely to tests; the Legislature has made clear that the portfolio option is an alternate option that is still available to all of Florida's children. Section 1008.25(5), Florida Statutes.

19. Accordingly, the Hernando County School Board is ORDERED to immediately refrain from further actions contrary to the availability of the portfolio option, and is ORDERED to immediately provide the portfolio option, at minimum, to any parent who has requested one or who requests one going forward.

20. The Hernando County School Board is FURTHER ORDERED [when there is no reading deficiency of which the parents were given proper notice pursuant to sections 1002.20(11) and 1008.25(4)and(5)], to stop refusing to accept a student portfolio or report card based on classroom work throughout the course of the school year. [To the extent the Plaintiffs are challenging the appropriateness of a standards assessment-based portfolio as described in Rule 6A-1.094221 rather than a teacher compiled work during the year portfolio, they must first pursue and exhaust their administrative remedies under chapter 120].

21. The Hernando parties and State Education shall

agree if possible to the amount of bond deemed appropriate; if agreement has not been reached, the issue will be decided at an evidentiary hearing on Monday, August 29, 2016 at 3:00 p.m. in Courtroom 3G.

Osceola County/ Ms. Callaghan

22. Plaintiff Callaghan's child G.C. attended public school in Osceola County at the beginning of this case but is reportedly no longer enrolled in the Osceola County School. While G.C. was in third grade, she had passing grades and participated in the FSA. The Osceola School Board did not send any notice of deficiency when G.C. failed to achieve Level 3, and no remediation was offered. The withdrawal form attached to the Defendant School Board's Motion to Dismiss for mootness with the August 19, 2016 affidavit of Principal Libby Raymond shows G.C. will be attending private school.

23. The School Board Defendant correctly notes that

the statewide testing requirements do not apply to children who are not in the public system of education, Section 1001.21, Florida Statutes.

24. Plaintiff Callaghan does not disagree but describes the situation as temporary and has "every intention to reenroll her child" once the case is resolved. Plaintiffs Callaghan's Response in Opposition to Motion to Dismiss by School Board of Osceola County, p.1.

25. The issue of whether Ms. Callaghan and her child are entitled to declaratory relief is not presently before the Court. It is clear that the request for temporary injunctive relief must be, and is hereby, denied as moot.

Sarasota County/Ms. Chastain

26. The claims of Plaintiff Chastain and her child against Sarasota County having been dismissed following the Child's promotion to 4th grade shortly after the filing of the complaint, no ruling is made.

Broward County/Ms. Paternoster

27. Plaintiff Paternoster's twins attend school in Broward County, and Ms. Paternoster requested a teacher-compiled portfolio. The Broward County School Board did not send her any notice of deficiency during the school year, not even after the twins participated in the FSA and did not achieve the required Level 3 score. The day before school ended school officials notified her the twins would not be promoted although one was reading at grade level equivalent of 3.6 [3rd year 6th months] and other was reading at 4.4 grade equivalent level. [The STAR diagnostic test [composite Exhibit 2] used for the twins is one recognized during her testimony by State Education Dependents according to testimony Vice Chancellor for K-12 Standards and Instruction Mary Jane Tappen].

28. Plaintiff Paternoster's concerns arise from the fact that the Broward County School Board sent no notice of deficiency during the year, provided no

remediation services and did not provide the teacher compiled portfolio requested.

29. Instead, the Defendant School Board provided a portfolio based on standards tests, as described in Rule 6A-1.094221 and at the end of the year, without ever sending the required notice of deficiency in March, chose to retain the twins in grade 3 who had received passing grades throughout.

30. The evidence clearly indicates that Broward County School Board should have followed the law and complied with the notice of deficiency procedure during the school year if there were a deficiency for either child.

31. Further, given the legislative clarity in Section 1008.25(5), Florida Statutes allowing a good cause portfolio exception for those who do not have a Level 2 score on the FSA, it is easy to understand the frustration of parents whose children are retained based on test scores when report cards show mastery of Grade 3 work and other test scores - in this case - the

Star Diagnostic Test and the related Growth Records [Composite Exhibit 2]-show the children are performing above or near grade level.

32. The twins have clearly been harmed by the School Board's unlawful conduct. Because of Principal Heather Hedman-DeVaughn's affidavit regarding the level of twins' mastery of grade 3, however, the totality of the evidence does not clearly support temporary injunctive relief at this time. [The Plaintiff may pursue administrative proceedings regarding her preference for a teacher-compiled portfolio based on school work completed the year to one based on standards assessment testing, if she wishes, that failure to exhaust administrative remedies and the primary jurisdiction doctrine preclude this Court from granting relief on that ground]. The request for temporary injunctive relief as to Broward County is denied, for the reasons stated above and herein.

Seminole County/Ms. Nickerson and Ms. Weaver

33. The evidence shows the Seminole County School

Board provided no notice of deficiency to either Plaintiff Weaver regarding her child C.W. or to Plaintiff Nicherson regarding her child S.N. Early in the school year, both parents advised the Defendant School Board their children would be only minimally participating in the FSA and requested that teacher-compiled portfolios be prepared during the school year. Instead the School Board waited until well in the school year before beginning to compile the standards-assessment based portfolio described in Rule 6A-1.094221. Without jurisdiction, the County School Board did not send the notice of deficiency nor provide required remediation when the two students participated in the FSA and did not score Level 3.

34. The School Board told the parents at the end of the year they were retaining C.W. and S.N. for non-compliance with testing, even though S.N. has an "A" grade in reading and C.W. has not read at a 3rd grade level since first grade and is now reading well above fifth grade level. [C.W. demonstrated on County School

Board tests that C. W. is in the exceptionally gifted range, ahead of more than 86% of others in her class]. In other words, both parents contend, the children know the material but are being retained anyway. [Ms. Weaver did acknowledge that when she found out the School Board was compiling a standards based test portfolio instead of the teacher compiled portfolio with student work generated during the course of the year, she instructed the School Board to stop the compilation].

35. To the extent the Plaintiffs' real concern is the use of the standards assessment-test based portfolio option provided by Rule 6A-1.094221 [rather than the teacher-compiled portfolio that is focused on the children's work], the challenge must first be brought administratively pursuant to Chapter 120, and the request for temporary injunctive relief must be denied at this time.

Pasco County/Ms. Hastings

36. Plaintiff Hastings' child J.H. attended school

in Pasco County. The School Board did not follow the law and contrary to law, did not send the Notice of Deficiency or provide remediation when the child participated in the FSA but did not score Level 3. In its August 19, 2016 Motion to Dismiss, Defendant Pasco County School Board detailed the offers of services it had provided to J.H.'s parents at the end of the school year, offers which the parents declined.

37. The affidavit of Pasco County School Board Assistant Superintendent Vanessa Hilton [Exhibit 57 in evidence, and attached to the August 19 motion] details the efforts the School Board made to accommodate the Plaintiff Parents' requests and noted that J.H. was withdrawn from the Pasco County public school system in August.

38. Based upon the present apparent mootness, the plaintiff's request for injunctive relief must be denied, without addressing the issues (if any) remaining as to J.H.

STATE EDUCATION DEFENDANTS

39. The credible evidence clearly established that The State Education Defendants conveyed to various County School Boards, including Hernando, that it was acceptable to completely ignore the statutory portfolio option. The Hernando County School Board complied with and relied upon the improper information from the State Education Defendants, causing harm to the children and their parents. The State Education Defendants have also improperly ignored the obligation of the County School Board Defendants to follow the notice of deficiency and remediation processes in Section 1002.20(11) and 1008.25(4)and(5), and have allowed some County School Boards to retain students in grade 3 even when there is no deficiency. The State Education Defendants have ignored the fact that children who participate in statewide testing, even those who "minimally participate" have satisfied their statutory obligation to participate; notice of deficiency is required to be sent if they do not score the Level 3

required by Section 1008.25(4), so that any needed supplemental instruction can be timely provided. [Whether the Statewide Defendants decide that at least one question must have been answered for the Defendants to score the test as indicated by Witness Juan Copa is irrelevant. By being present, by breaking the seal and putting their names on the test packet, the students did participate in the test. The State Education Defendants must make sure County School Boards understand their obligation to give notice of the deficiency [failure to achieve the Level 3 score required by law], and to provide proper supplemental and other remediation, as required by law. Sections 1002.20(11) and 1008.25(4)and(5), Florida Statutes.

40. The State Education Defendants are hereby ORDERED to stop disseminating misinformation that there is no portfolio option available when children do not score level 2 on the statewide test. The Commissioner of Education and State Board of Education are also ORDERED to properly notify the County School Boards

that the statutory notice of deficiency and remediation processes must be followed for every student participating (even minimally) in the FSA who does not achieve a Level 3 score and must notify the County School Boards that the portfolio option must be offered and available to all grade 3 students, and must notify the County School Boards that grade 3 students with no reading deficiency should be promoted, not retained.

Background

41. The thirteen[3] plaintiffs are parents and next friends of fourteen children in six counties [Broward, Hernando, Orange, Osceola, Pasco and Seminole Counties]. The Defendants are Pam Stewart [Stewart] in her official capacity as Commissioner of the Florida Department of Education [DOE], the State Board of Education [State Board] and the School Boards of the

[3]The fourteenth original plaintiff [Wendy Chastain] and her child are from Sarasota County, where the child attended a public school. After filing of the lawsuit but before the August 12, 2016 hearing, the child was apparently promoted to fourth grade and that plaintiff voluntarily dismissed the claim against the Sarasota County School Board.

six Defendant counties [each referred to by the County name].

42. Initially, the plaintiffs sought declaratory and injunctive relief based on the five counts in the complaint for violation of Florida equal protection rights [count I], violation of Florida substantive due process rights [count II], violation of federal equal protection rights [count III], violation of 14th Amendment procedural due process rights [count IV], and requests for injunctive relief, apparently under Florida and federal law [count V].

43. After the initial hearing on August 12, 2016, the Court set August 22, 2016 for an evidentiary hearing on the venue motions, the request for temporary injunctive relief and all other pending matters.

44. On August 17, 2016, the Defendants removed the case to the federal court for the Northern District of Florida, citing federal question jurisdiction. The Plaintiffs thereafter voluntarily dismissed the federal

claims [counts III, IV and the federal portion of count V], and moved for remand. At a hearing on August 19, 2016, United States District Court Judge Mark Walker granted the motion for remand. The transcript of the hearing on the motion for remand is attached to the August 22, 2016 Plaintiff's consolidated Response In Opposition to School Board Defendants Motions' to Dismiss or Change Venue.

Preliminary Matters at the August 22 Hearing

Motions for Admission

45. The motions for admission pro hac vice by additional counsel Testani and Moore for the state education defendants [Stewart, DOE and State Board] were granted.

Venue

46. The six remaining County School Board Defendants raised the subject of their previously filed venue motions, asking for a ruling to be made promptly.

[The order setting the case specified the evidentiary hearing was for the venue motions, the plaintiff's request for temporary injunctive relief, and all other pending matters. The Court could have decided the temporary injunction request ex parte when motion was received earlier in August, but found it more appropriate for Defendants to be heard on the temporary injunction issues, especially given the protests of the Defendants at the August 12 hearing they had not had sufficient time to prepare and gather the necessary information, and had not - as of that time - even been served]. Given that testimony relating to the temporary injunction could be pertinent to one or more of the venue motions, the Court went forward with the hearing as scheduled.

47. The parties identified their positions regarding venue, with the County Defendants reasserting their home venue rights to be sued only in their home counties. The State Education Defendants suggested that the claims could be severed, with the claims pertinent

to each County School Board to be decided in the home county and the claims against the State Defendants going forward in Leon County where the State Defendants had a home venue privilege. The State Defendants did not agree to waiving their home venue privilege to be sued in Leon County in order to litigate instead in any or all of the counties where the County Defendants are located [Broward, Hernando, Orange, Osceola, Pasco and Seminole], leaving Leon County as the only county where jurisdiction and venue could be properly found to exist as to all of the Defendants. It must be noted the County and State Defendants agreed to venue in one forum [the federal court in Tallahassee] so that all matters could be decided in one case.

48. As noted by the Florida Supreme Court in Board of County Commissioners of Madison County v. Grice, 438 So.2d 392 (Fla. 1983) when approving an exception to the home rule venue privilege when governmental defendants are sued as co-defendants:

> The benefit of money saved by state agencies and subdivisions by not having to defend against lawsuits filed outside their home counties must now be weighed against the increased costs incurred in the operation the courts costs which are paid in substantial part by all tax payers. Therefore, the objective of minimizing public expenditures in the operation of the courts is not furthered when the home venue privilege results in multiple law suits. We therefore hold, as did the district court, that the home venue privilege for government entities is not absolute.
>
> We hold further that a trial court has discretion to dispense with the home venue privilege when a governmental body is sued as a joint tortfeasor. The exercise of this discretion must be guided by considerations of justice, fairness and convenience under the circumstances of the case. In its discretion the trial court may retain the entire case, sever and transfer the cause of action against the entity asserting the privilege if it is severable, or transfer the whole case.

Id at 394.-395. The Court notes reliance by some of the County School Board Defendants on Department of Management Services v. Fastrac Construction, Inc., 701 So.2d 1200 (Fla. 5th DCA 1997) and School Board of Osceola County, Florida v. James E. Rose Mechanical Contractor Inc., 604 So.2d 521 (Fla. 5th DCA 1992), but finds them distinguishable on two grounds. First, neither case involved multiple county co-defendants

with two state level defendants for whom venue is proper in this case only in Leon County. Second, the county defendants agreed to join in removal of the case to the federal court in Tallahassee and agreed that would be preferable to separate proceedings, an acknowledgement to U.S. District Court Judge Mark Walker that is significantly different from the facts in the DMA/Fastrac and James E. Rose Mechanical cases, supra.

Confidentiality

49. Seminole County School Board attorney Bush moved *ore tenus* for entry of an order finding that, by filing the suit, the plaintiffs waived any statutory confidentiality rights to student information to the extent needed for the case to go forward.

50. There being no objection, those confidentiality motions were granted, with the proviso the children would be referred to by initials rather than by their names. Additionally, counsel were reminded that, to the

extent needed to comply with the Court rules regarding confidential information, they should substitute redacted documents for those previously made a part of the case file.

Injunction Issues

51. As to the injunction issues, Plaintiffs Brandy Paternoster, Michelle Rhea, Brandy Kinkade, Gabrielle Weaver, Melinda Hohman and Pam Everett testified, along with Dr. Diana Greene, School Superintendent from Manatee County, School Superintendent Lori White from Sarasota County, Orange County Teacher Rebecca Dooley, Hernando County School Board Supervisor Assessment Linda Pierce, Citrus County Director of Research Accountability Amy Crowell, Deputy DOE Commissioner Juan Copa and DOE Vice Chancellor for K-12 Standards and Instruction Mary Jane Tappen. During the testimony of the thirteen witnesses, the parties moved more than 57 exhibits into evidence, and, prior to the end of the

hearing, offered further exhibits. Pertinent excerpts of testimony accompany this order.

The Pertinent Statutes

52. Florida law requires all third grade public school students to participate in standardized statewide testing of reading. See Section 1008.22(3) and 1008.25(4)(a), Florida Statutes. [Children who attend private school or who are home-schooled are not required to participate].

53. The State Board of Education is responsible for implementing and establishing the requirements for the statewide reading tests [Sections 1001.02 and 1001.03, 1008.22(3)], the duties of the Commission of Education are set forth in sections 1001.10 and 1001.11. The County School Boards are responsible for administering, scoring and following up on the reading tests. Sections 1001.31 and 1008.22 (4), Florida Statutes.

54. State law specifies that "each student must

participate in the statewide, standardized assessment program required by s.1008.22", Section 1008.25(4)(a); there is no definition of "must participate" in Chapter 1008.

55. The primary purpose of the statewide, standardized testing program is to provide student "academic achievement and learning gains data" to students, parents, teachers, school administration and district stuff, to "improve instructions", to "guide learning objectives", to assess data and to assess the cost benefits, in Section 1008.22(1) Florida Statutes. The test is generally administered in February or March of the traditional August to June school year.

56. Participation is required by federal as well as state law; participation in the test by fewer than 95% of the enrolled students may jeopardize federal funding. [Exhibit 35].

57. The legislatively identified purposes for the

testing do not include use of the late spring test as controlling promotion of a third grader to fourth grade at the end of the school year several months later.

58. The Legislature mandated that the statewide reading test MAY NOT be used as the sole determiner of whether a child will be retained. Section 1008.25(b)(6) Florida Statutes.

59. The Legislature has also specified that students may not be promoted solely "on age or other factors that constitute social promotion". Section 1008.25(6)(a).

60. The Legislature provided that children must achieve a Level 2 or higher score on the statewide test to be promoted to grade 4, Section 1008.25(5)(b) Florida Statutes,

61. Notwithstanding the lower Level 2 target, the Legislature made clear that when a third grader does not score at Level 3 or above on the statewide

assessment, the standardized English Language Arts [reading] assessment "must be evaluated to determine the nature of the student's difficulty, the areas of academic need, and strategies for providing academic supports to improve the student's performance". Section 1008.25(4).

62. The Legislature mandated the actions that state and county education officials must take when a reading deficiency is identified by the third grade student not achieving a Level 3 or above score on a statewide test, so that the student and parent can work with the school system and make sure any identified deficiencies can be remedied by the end of the second semester of grade 3. Section 1008.25(5)(c) Florida Statutes.

63. Pursuant to section 1008.25(5)(c) Florida Statutes, education officials are obligated to notify the parents, in writing, that the student has been "identified as having a substantial deficiency in reading", a description of the services the child is

currently receiving and of the proposed supplemental instructional services and supports to be provided to "remediate the identified area of reading deficiency", that the child may be retained if the deficiency is not remediated by the end of grade 3, unless the child "is exempt from mandatory retention for good cause", strategies for the parents to help the child with reading proficiency. Section 108.25(5)(c)(1 - 5).

64. Education officials are also required to notify parents about the criteria for a portfolio "as provided in subparagraph (6)(b)4 , the criteria and policies for midyear promotion [section 1008.25(5)(c)(7 and 8, and

> That the statewide, standardized English Language Arts assessment is <u>not the sole determiner</u> of promotion and that additional evaluation, portfolio reviews, and assessments are available to the child to assist parents and the school district in knowing when a child is reading at or above grade level and ready for grade promotion.

[Section 1008.25(c)(6), Florida Statutes][Emphasis supplied].

65. Given that the statewide, standardized reading

test is in the middle of the second semester, and not at the end of the year, it makes complete sense that it not be used as the sole determiner regarding whether the child will be promoted at the end of the year, but rather that it be used to identify children at risk of retention and in need of assistance maximize reading proficiency by the end of the school year.

66. A third grade student without a Level 2 on the FSA is not eligible for promotion, unless the student meets the separate criteria for a good cause exemption. Section 1008.25(6)(b).

67. Just as the Legislature provided for supplemental instruction for grade 3 students when a notice of deficiency is identified, the Legislature similarly provided for intensive reading assistance as needed when a child is promoted to grade 4 on a good cause exemption. A student

> promoted to grade 4 with a good cause exemption shall be provided intensive reading instruction and intervention that include

> specialized diagnostic information and specific reading strategies to meet the needs of each student so promoted.

Section 1008.25(6)(b) Florida Statutes.

68. The good cause exemptions pertinent to this case are in subsections 1008.25(6)(b)(3) and (4).

69. Subsection (3) relates to students who demonstrate an acceptable level of performance on "an alternative standardized reading or English Language arts assessment approved by the State Board of Education".

70. Subsection (4) relates to a "student who demonstrates through a student portfolio that he or she is performing at least at Level 2 on the statewide, standardized English Language Arts assessment".

71. Subsection 1008.25(6)(c) spells out how the good cause exemptions in 1008.25(6)(b)(3) and (4) are to be addressed, with the statute making clear that the portfolio documentation is to consist of:

1. Documentation shall be submitted from the student's teacher to the school principal that indicates that the promotion of the student is appropriate and is based upon the student's academic record. In order to minimize paperwork requirements, such documentation shall consist only of the existing progress monitoring plan, individual educational plan, if applicable, report card, or student portfolio.

2. The school principal shall review and discuss such recommendation with the teacher and make the determination as to whether the student should be promoted or retained. If the school principal determines that the student should be promoted, the school principal shall make such recommendation in writing to the district school superintendent. The district school superintendent shall accept or reject the school principal's recommendation in writing.

Subsections 1008.25(6)(c)1 and 2.

71. To make sure that retained students have their deficiencies addressed, the County School Districts are required to provide the retained students with intensive interventions in reading, section 1008.25(7), just as they are required to provide those with good cause promotions to grade 4 with intensive reading instruction and intervention as mandated in Section 1008.25(6)(b), Florida Statutes.

72. The County School District must notify parents of a child with a reading deficiency promptly pursuant to section 1001.20(11) [in addition to the notice in section 1008.25(5)] and must notify parents of a child retained in third grade of the information required by section 1008.25(7)(b)(2) and section 1002.20(14) and (15). A child may not be retained more than once in grade 3. Section 1008.25(6)(b)6.

Pertinent Rule

73. For issuance of a temporary injunction, the Plaintiffs have the burden of showing a likelihood of irreparable harm, unavailability of adequate remedy at law, substantial likelihood of success on the merits and that the public interest supports the injunction. Rule 1.610, Florida Rules of Civil Procedure.

Findings of Fact and Conclusions of Law

Based on the testimony, credibility and demeanor of the witnesses and the other evidence, and the Court being otherwise fully advised in the premises, the

Court makes the following findings of fact and conclusions of law:

1. The combined actions of the State Education Defendants and the County School Board Defendants make it imperative that the case be decided in one place. Leon County is the only place where venue is proper for the State Education defendants. The Florida Constitution provides for a uniform public school system, with the Education Commissioner, State Board of Education and Board of Education responsible for setting policy and establishing the statewide system and the 67 County School Boards constitutionally responsible for operating the school system in their respective counties. Section 1, Article IX of the Florida Constitution; section 1002.20(1), Florida Statutes. While this is not a case seeking damages in fact, it is clear that both the County School Board Defendants and the State Education Defendants are indispensable parties. The interests of justice, fairness and convenience can best be served by all

issues being heard in a single proceeding, in the one county where venue is proper as to the State Education Defendants. Leon County, especially where the County School Board Defendants joined in removing the case to federal court and told the federal Judge a single proceeding was preferable to a series multi-county severed proceedings.

2. The combined conduct of the County School Board Defendants and State Education Defendants have caused injury to the plaintiffs, injury which will continue as long as the children are not in the appropriate grade in the appropriate school.

3. The actions of the Orange County School Board were particularly blatant, arbitrary and capricious to B.R. and her parent, given the denial of the portfolio and promotion, while other Orange County youngsters were given portfolios and promotions provided to several other Orange County 3rd graders.

4. The evidence clearly established that all of the plaintiffs were harmed by the Defendants' failures to comply with the notice of deficiency and remediation provisions of sections 1002.20(11) and 1008.25(4)and(5), and by their manner of not providing proper portfolios.

5. To the extent the plaintiffs are no longer attending public school in their former school districts, temporary injunctive relief is improper.

6. To the extent the plaintiffs rejected alternate good cause options, temporary injunctive relief is improper.

7. To the extent Hernando County Plaintiffs are still participating in the system, injunctive relief is appropriate.

8. To the extent the Plaintiffs think the portfolio contents described in Rule 6A-1.094221 are inconsistent with the statutes, their failure to exhaust administrative remedies and the primary jurisdiction

doctine preclude the Court from considering those claims.

9. Students must participate in the statewide, standardized tests; the evidence shows they did all participate, and shows that none of them received a Level 3 score. [The decision of the Statewide Education Defendants to assign an "NR" and not score the test for those who participate minimally or to score the test if the student answers a single question (testimony of Juan Copa) is irrelevant]. The statutes require that the County School Board Defendants send a notice of deficiency and pursue any remediation necessary for students who participate and do not achieve a Level 3. Sections 1002.20(11) and 1008.25(4)and(5), Florida Statutes.

10. The undisputed evidence shows that none of the County School Defendants here complied by sending the notice of deficiency in March 216 when the children did not score a Level 3 on the early March FSA. [If their explanation is that there is no deficiency, then the

children may not be retained, by law, Section 1008.25(5)(c)6, as the statutes reflect the importance of what the children have learned. Students with no deficiency should not be retained.

11. The State Education Defendants are acting inconsistently with the law in turning a blind eye to the failure of County School Boards to comply with the notice of deficiency and remediation process for students who do not achieve the statutory triggering Level 3.

12. Not all County School Boards in Florida are culpable of the forum over substance conduct of the six County School Boards in this case. The evidence showed, for instance, that Citrus County and Calhoun County create portfolios for all students, from the very beginning of the school year. [Even the Defendant Orange County School Board handled the portfolio and promotion issue correctly for some of its third graders, while dropping the ball here for Ms. Rhea and her daughter.

Rulings

Based on the foregoing findings of fact, determinations of credibility of the witnesses and the conclusions of law, and the totality of the evidence in the case, the arguments of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED as follows:

1. The motions for dismissal based on the claimed lack of jurisdiction over the County School Boards are denied. The plaintiff served the County School Boards as directed by the Court at the August 12, 2016 hearing. No issue regarding defects in service having been raised either at the federal court level [to which the County School Board Defendants and State Education Defendants removed the case] or at the August 22, 2016 hearing, the motions regarding any claimed lack of jurisdiction over the person are without merit at this time, and are denied.

2. The motions of the County School Board Defendants for dismissal or change of venue based on allegedly improper venue and the County School Boards' claimed home venue privilege are denied. Board of County Commissioners of Madison County v. Grice, 438 So.2d 392 (Fla. 1983)(home venue privilege is not furthered when the result would be the "severance of lawsuits that would normally be tried in a single proceeding". Id. at 394. See, also, School Board of Osceola County v. State Board of Education, 903 So.2d 963 (Fla. 5th DCA 2005)(State Board of Education entitled to venue in its home county [Leon]; order changing venue from Osceola County to Leon County affirmed).

3. The requests for injunctive relief as to the Plaintiffs in Orange, Osceola, Broward, Seminole and Pasco are denied for the reasons stated above.

4. The requests for injunctive relief as to the Hernando County School Plaintiffs are granted as to the Hernando County School Board [paragraph 19 and 20 page

14] and the State Defendants [paragraph 40 page 24] to the extent and for the reasons set forth above.

5. The request for injunctive relief against the State Education Defendants is granted. The Education Commissioner and Florida State Board of Education shall properly notify County School Boards that the statutory Notice of Deficiency and remediation processes must be followed for every student participating in the FSA in any way who does not achieve at least a Level 3 score, must notify the County School Boards that the portfolio option must be offered, grade 3 students with no reading deficiency should not be retained, but should be promoted.

6. If the Hernando Plaintiffs and the Hernando County School Board and State Defendants do not agree to the conditions before them, the case will be heard on Monday, August 29, 2016 at 3:00 p.m. in Courtroom 3G. The Defendants shall file their answers to the pending complaint by September 26, 2016. By October 14, 2016 the parties shall file a pretrial stipulation

identifying any issues of disputed facts or law remaining to be tried. The case is set for pretrial conference on October 20, 2016 at 10:30 a.m.

ORDERED this 26th day of August, 2016 in Tallahassee, Leon County, Florida.

KAREN GIEVERS
Circuit Judge

Copies furnished to:

Andrea Flynn Mogensen, Esq.
Amogensen@sunshinelitigation.com
mbarfield@sunshinelitigation.com

Pam Stewart, Esq.
Commissioner@fldoe.org
c/o Matthew H. Mears, General Counsel
Matthew.Mears@fldoe.org

State Board of Education
c/o Matthew H. Mears, General Counsel
Matthew.Mears@fldoe.org

School Board of Orange County
c/o Diego Rodriguez, General Counsel
woody.rodriguez@oops.net

School Board of Hernando County
c/o Dennis Alfonso, General Counsel
eserve@McClainAlfonso.com

School Board of Osceola County

2016 CA 1794

c/o Suzanne D'Agresta, General Counsel
sdagresta@orlandolaw.net

School Board of Sarasota County
c/o Arthur Hardy, General Counsel
Ahardy@matthewseatmoore.com

School Board of Seminole County
c/o Serita Beamon, General Counsel
serita beamon@scps.k12.fl.us

School Board of Pasco County
c/o Dennis Alfonso, General Counsel
eserve@McClainAlfonso.com