

U.S. DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

Docket Number: 21-44-CD (Florida Department of Education)

The U.S. Department of Education’s Cease and Desist Complaint
Against the Florida Department of Education

COMPLAINT

1. The Florida Department of Education (FLDOE) has unlawfully—and explicitly—reduced the amount of state aid provided to Florida school districts based on their receipt of federal funds. It has done so as part of a broader effort to deter those districts from implementing practices recommended by the Centers for Disease Control and Prevention (CDC). But whatever its motivation, the reduction of state aid based on the receipt of federal funds is a plain violation of section 8522 of the Elementary and Secondary Education Act of 1965 (ESEA), which bars states from “tak[ing] into consideration payments under [the ESEA]” in determining “the amount of State aid.” This action seeks to remedy that violation.
2. Specifically, the U.S. Department of Education (Department) brings this action under section 456 of the General Education Provisions Act (GEPA), 20 U.S.C. § 1234e, requesting that the Office of Administrative Law Judges (OALJ) issue a cease and desist order to prevent the FLDOE from reducing Florida state education aid to local educational agencies (LEAs) in direct response to the federal Project to Support America’s Families and Educators (Project SAFE) program. Those LEAs include the School Board of Alachua County (Alachua) and the School Board of Broward County (Broward), which have received Project SAFE funds, and any other Florida LEA that may receive such funds in the future.

NOTICE

3. Pursuant to section 456(a)(2) of GEPA, 20 U.S.C. § 1234e(a)(2), the FLDOE is hereby notified of an administrative hearing regarding the cease and desist order described above to be held on December 10, 2021, to show cause why an order should not be entered by the OALJ requiring the FLDOE to cease and desist as described herein.

JURISDICTION

4. The OALJ has jurisdiction over this matter under section 456 of GEPA, 20 U.S.C. § 1234e, which provides in pertinent part:

§1234e. Cease and desist orders

(a) Issuance and contents of complaint - In accordance with section 1234c of this title, the Secretary may issue to a recipient under an applicable program a complaint which—

- (1) describes the factual and legal basis for the Secretary's belief that the recipient is failing to comply substantially with a requirement of law; and
- (2) contains a notice of a hearing to be held before the [OALJ] on a date at least 30 days after the service of the complaint.

(b) Appearance contesting order - The recipient upon which a complaint has been served shall have the right to appear before the [OALJ] on the date specified and to show cause why an order should not be entered by the Office requiring the recipient to cease and desist from the violation of law charged in the complaint.

(c) Report; issuance of cease and desist order - The testimony in any hearing held under this section shall be reduced to writing and filed with the [OALJ]. If upon that hearing the [OALJ] is of the opinion that the recipient is in violation of any requirement of law as charged in the complaint, the [OALJ] shall—

- (1) make a report in writing stating its findings of fact; and
- (2) issue to the recipient an order requiring the recipient to cease and desist from the practice, policy, or procedure which resulted in the violation.

5. The Department's regulations at 34 C.F.R. § 81.3(a)(3) also provide that the OALJ has jurisdiction to conduct cease and desist hearings concerning applicable programs.
6. Programs under the ESEA, 20 U.S.C. § 6301 et seq., are applicable programs under 34 C.F.R. § 81.2.

PARTIES

7. The Department is the complainant.
8. The FLDOE is the respondent. The FLDOE is a recipient of the Department's funds under a number of federal education programs, including under various programs authorized under the ESEA.

FACTS

9. The FLDOE receives federal funding from the Department through programs under the ESEA and must comply with the requirements applicable to those programs, including the applicable requirements in Part F of Title VIII of the ESEA, 20 U.S.C. § 7881 et seq.
10. The grant award notification (GAN) attached to each grant award made to the FLDOE under the ESEA contains language specifically stating that grantees will abide by the provisions in Title VIII of the ESEA as a condition of receiving the award. By accepting ESEA funds, the FLDOE has agreed to the terms and conditions applicable to those funds, including that it will abide by the provisions in Title VIII of the ESEA. (ED-Exhibit 1)
11. Section 8522 of the ESEA, which is part of Title VIII of the ESEA, provides in pertinent part:

A State may not take into consideration payments under [the ESEA] . . . in determining the eligibility of any local educational agency in that State for State aid, *or the amount of State aid*, with respect to free public education of children. (emphasis added).
12. Since March 2020, the Nation's students have experienced massive interruptions to in-person instruction as a result of the COVID-19 pandemic. The pandemic has negatively impacted many students' social, emotional, and mental well-being and academic achievement, and exacerbated pre-existing racial, socioeconomic, and other educational inequities.

13. Guidance issued by the CDC makes clear that K-12 schools can safely operate in person by implementing layered prevention strategies. Science-based strategies recommended by the CDC for preventing the spread of COVID-19 include universal and correct indoor masking. In particular, CDC’s “Guidance for COVID-19 Prevention in K-12 Schools,” which was most recently updated on August 5, 2021, provides that “[d]ue to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.”
14. Consistent with the recommendations of the CDC, both Alachua and Broward adopted universal masking policies to mitigate the spread of COVID-19 among students and staff and the community.
15. On July 30, 2021, Governor DeSantis issued a Governor’s Order 21-157 directing the Florida Department of Health and the FLDOE to take action to ensure safety protocols for controlling the spread of COVID-19 in schools that “protect parents’ rights to make decisions regarding masking of their children in relation to COVID-19.” The order further directed that the Florida Commissioner of Education shall, among other things, “withhold state funds from noncompliant school boards.”
16. As directed by the Governor, the Florida Department of Health promulgated an Emergency Rule, updated as rule 64DER21-15, which requires that public schools allow parents or legal guardians to opt their student out of wearing a face mask or covering “at the parent or guardian’s sole discretion.”
17. On August 17, 2021, the FLDOE issued probable cause memoranda alleging that both Alachua and Broward had violated the Florida Emergency Rule 64DER21-12 by requiring students to wear a face covering or mask, unless certain exceptions apply, such as a medical certification.

18. On August 20, 2021, consistent with the probable cause memoranda, the Florida State Board of Education (FSBOE) issued orders numbered 2021-4023 and 2021-4024 alleging that Alachua’s and Broward’s respective universal school masking policies do not comply with the Florida Department of Health Emergency Rule requiring that parents have the right to opt out of student mask wearing at their discretion, without a medical excuse. The orders directed the FLDOE to withhold the monthly salaries of members of the Alachua Board of Education and the Broward Board of Education until such time as Alachua and Broward come into compliance with the Emergency Rule.
19. The Department established Project SAFE (86 FR 52136) under the School Safety National Activities authority in Title IV of the ESEA (Section 4631(a)(1)(B) of the ESEA (20 U.S.C. § 7281(a)(1)(B)). Project SAFE provides federal resources to LEAs that have been financially penalized for adopting and implementing strategies to prevent the spread of COVID-19 consistent with CDC guidance to be used for activities to improve student safety and well-being.
20. Alachua applied for and received a Project SAFE award in the amount of \$147,719 and Broward applied for and received an award of \$420,958.
21. On October 4, 2021, the Florida Commissioner of Education sent a “probable cause” memorandum to the FSBOE asserting that Alachua (ED-Exhibit 2) and Broward (ED-Exhibit 3) continued to violate the Florida Department of Health Emergency Rule and recommending that the FSBOE order that the FLDOE sanction the LEAs by indefinitely withholding state funds in the amount of each Project SAFE award, in addition to ongoing withholding of the LEAs’ board member salaries.
22. On October 12, 2021, the Deputy Assistant Secretary for Policy and Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary of the Office of

Elementary and Secondary Education at the Department, sent an email (ED-Exhibit 6) to the FLDOE Commissioner of Education stating:

It has come to our attention that the Florida Department of Education (FLDOE) is seeking to increase its penalty for school districts that are working to protect the health and safety of their students by adopting CDC guidance for preventing the spread of COVID-19. Specifically, FLDOE's recent "probable cause" memoranda to State Board of Education members in advance of today's Board meeting requests approval for "withholding state funds in an amount equal to any federal grant funds" awarded to support school districts in their efforts to promote student safety and well-being.

23. The Department's email further alerted the FLDOE that its impending action raises legal concerns with regard to section 8522 of the ESEA, which states that:

A State shall not take into consideration payments under this Act (other than under Title VII) in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children."

24. On October 12, 2021, the FSBOE passed Orders Numbered DOE2021-4027 (ED-Exhibit 4) and DOE2021-4029 (ED-Exhibit 5) which would reduce the amount of state education aid that Alachua and Broward receive by the amount of each district's federal Project SAFE grant award. Paragraph 7 of those orders made explicit that the suspension would be based on the receipt of federal funds:

The [FLDOE] is also directed to withhold state funds, until the [LEA] demonstrates compliance with the law, in an amount equal to any federal Project SAFE Grant funds

25. This indefinite suspension of state funding in direct response to a federal award, which effectively reduces the amount of state aid available to the LEAs, negates the benefit of the federal Project SAFE grant award and violates section 8522 of the ESEA.

26. On October 13, 2021, the Florida Commissioner of Education sent a letter responding to the Department's October 12 email, asserting that the FLDOE's actions do not violate section 8522 of the ESEA. (ED-Exhibit 7)

27. On October 25, 2021, the Deputy Assistant Secretary for Policy and Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary of the Office of Elementary and Secondary Education, sent a letter (ED-Exhibit 8) to the Florida Commissioner of Education reiterating the Department’s position that the planned reduction of state funds violates Section 8522 of the ESEA, stating:

The U.S. Department of Education (Department) expects FLDOE to comply with all requirements applicable to its federal grant awards. If FLDOE moves forward with its planned reduction of state aid to Alachua and Broward, the Department is prepared to initiate enforcement action to stop these impermissible state actions.

28. On October 27, 2021, Alachua and Broward officials informed Department staff that on October 26, 2021, FLDOE withheld from each LEA monthly state education aid the amount of each LEA’s Project SAFE award.

CLAIM

29. The Project SAFE awards made to Alachua and Broward constitute “payments under the ESEA.”

30. The FSBOE and the FLDOE have “take[n] into consideration” these federal award payments—the Project SAFE awards to Alachua and Broward—in determining “the amount of state aid,” as evidenced by the fact that each LEA’s penalty is based on receipt of a Project SAFE award.

31. The FSBOE and FSDOE’s indefinite suspension of a portion of state aid constitutes a reduction of the state aid for which these LEAs had been determined to be eligible.

32. The FSBOE’s and the FLDOE’s decision to reduce state aid for Alachua and Broward is a determination of “the amount of State aid” these LEAs receive.

33. The FLDOE has, in this manner, violated section 8522 of the ESEA.

RELIEF

34. The Department requests that the OALJ:

- (a) Find that the FLDOE has violated section 8522 of the ESEA;
- (b) Order the FLDOE to cease and desist violating section 8522 of the ESEA by terminating the suspension of funds to Alachua and Broward related to Project SAFE; and to cease and desist any future reductions in state aid to these LEAs or to any other Florida LEA on the same basis; and
- (c) Grant the Department such other and further relief as may be appropriate.



Lisa Brown
General Counsel

Phil Rosenfelt
Deputy General Counsel for Program Service

Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110