

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA EDUCATION ASSOCIATION,)
)
 Petitioner,)
)
vs.) Case No. 01-1724RU
)
FLORIDA DEPARTMENT OF EDUCATION,)
)
 Respondent.)

)

FINAL ORDER

A final hearing was conducted in this case on the stipulated date of June 4, 2001, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Petitioner Florida Education Association (FEA) filed a Petition to require Respondent Department of Education (DOE) to initiate rule-making and has challenged the validity of two documents issued by DOE, alleging that they are unpromulgated rules. The challenged documents are a January 22, 2001, memorandum to District Management Information System Coordinators and District Assessment Coordinators and a March 23, 2001, memorandum to District School Superintendents, regarding "Responsible Instructor--Reading, Writing, and Mathematics."

PRELIMINARY STATEMENT

The Petition herein was filed on May 4, 2001.

DOE has, in fact, adopted several rules to implement Sections 229.555 and 229.57, Florida Statutes. Accordingly, at the commencement of final hearing, Petitioner moved, without opposition, to amend its Petition to delete a contrary allegation. The motion was granted.

Petitioner and Respondent had four joint exhibits admitted in evidence. Petitioner presented the oral testimony of Michael Monroe and Rob McMahon. Respondent presented the oral testimony of Garnet Lavan Dukes, Jr., and Thomas Fisher.

Respondent's unopposed motion for official recognition of Rules 6A-1.09401, 6A-1.0941, 6A-1.0942, 6A-1.09421, 6A-1.09422, 6A-1.09981, 6A-6.09091, 6A-10.042, 6A-1.0011, 6A-1.0014, and

6A-10.024, Florida Administrative Code, and The Environmental Trust v. State Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998), was granted.

A Transcript was filed on June 15, 2001. The parties' timely-filed Proposed Final Orders have been considered.

FINDINGS OF FACT

1. Petitioner FEA is an employee association representing over 100,000 Florida educators for collective bargaining, representation in administrative and legal proceedings, professional development, and political activity. Its standing to bring this challenge was stipulated.

2. Two DOE memoranda are challenged herein as unpromulgated rules. It was stipulated that the memoranda were, in fact, disseminated to the recipients indicated on them. Their content is not at issue and is recited in Findings of Fact 23-25, infra.

3. Petitioner's witnesses believe that teacher evaluations and compensation ultimately will be tied to student performance. A law is already in place providing for the award of bonuses to "outstanding" teachers, and efforts to implement evaluation of teachers based on student performance are underway in some school districts. Petitioner's witnesses have concluded that the challenged memoranda establish statewide criteria for identifying the "responsible instructor" for teacher (or educator) assessment, credit, and/or monetary rewards, and that the use of

the "responsible instructor's" social security numbers will be subject to abuse of confidentiality.

4. Petitioner's witnesses were unaware of rulemaking activities associated with amending Rule 6A-1.0014, Florida Administrative Code, in the year 2000 and were unfamiliar with the Rule itself. The Rule itself has not been challenged in this proceeding.

5. The Commissioner of Education is charged with maintaining an integrated information system for educational management. Section 229.555(2), Florida Statutes. This is called the Comprehensive Management Information System. The system must collect data from school districts to determine student, school, and district performance, and to support management decisions at the departmental, district, and school levels. The Commissioner of Education's responsibilities include providing operational definitions for the proposed system (Section 229.555(2)(a)2., Florida Statutes), determining information and data elements required for management decisions (Section 229.555(2)(a)3., Florida Statutes) and developing standardized terminology and procedures. (Section 229.555(2)(a)4., Florida Statutes).

6. Section 229.57, Florida Statutes, establishes the purpose, scope, and criteria of assessing student performance, and school and district accountability.

7. The State Board of Education is authorized to adopt rules to administer the provisions of both laws. Sections 229.555(3) and 229.57, Florida Statutes.

8. DOE's Bureau of Education, Information, and Accountability Services maintains the database established by Section 229.555, Florida Statutes.

9. DOE has promulgated administrative rules to implement Section 229.555, Florida Statutes, which rules have been officially recognized for this proceeding.

10. There is no DOE rule which, in and of itself, refers to "responsible instructor" or "responsible instructor data element." Those terms also are not specifically used anywhere in the Florida Statutes.

11. Section 229.57(11)(e)1., Florida Statutes, was amended, effective upon becoming law in June 1999 (see Section 7, Session Law 99-398), to read:

The statistical system shall use measures of student learning, such as the FCAT, to determine teacher, school and school district statistical distributions, which distributions:

1. Shall be determined using available data from the FCAT, and other data collection as deemed appropriate by the Department of Education, to measure the differences in student prior year achievement against the current year achievement or lack thereof, such that the "effects" of instruction to a student by a teacher, school, and school

district may be estimated on a per-student and constant basis.

12. DOE considered that amendment to be a legislative directive to DOE to measure the "effects" of instruction by a teacher, school, and district, using data from the Florida Comprehensive Assessment Test (FCAT) "and other data collection as deemed appropriate by the Department of Education."

13. Upon that basis, DOE set out to determine what method to use to collect the data. After considering various alternatives, DOE selected the "responsible instructor" approach.

14. DOE held workshops and solicited input to determine the appropriate method of implementing the requirements of Section 229.57(11)(e)1., Florida Statutes. Three methodologies were considered: Using existing Management Information System components which were not adequate to meet the new statutory language; doing laborious surveys on the day each FCAT was administered, which surveys would be accurate only for that single day; or using the responsible instructor element. Ultimately, the responsible instructor element was selected by Lavan Dukes and Thomas Fisher after talking to District Management Information System officials and testing officials and key staff members. Lavan Dukes is DOE's Bureau Chief for Education, Information, and Accountability Services. Thomas

Fisher is Administrator of DOE's Assessment and Evaluation Section.

15. The "responsible instructor element" was first applicable to the 2000-2001 school year.

16. The "responsible instructor element" was first included within the Comprehensive Management Information System in April 2000, effective July 2000. It provides a four-page form for reporting and the following instructions:

1. Submit only for Survey Period 2 for all students in grades 3-10 to identify teacher primarily responsible for instructing the student in reading, writing and mathematics.
2. Report Social Security Numbers for instructors in each of the categories, reading, writing and mathematics.
3. ELEMENTARY SELF-CONTAINED: Social Security Numbers of teachers of students in elementary self-contained classes may be reported in all three responsible instructor categories.
4. MIDDLE AND HIGH SCHOOL LANGUAGE ARTS: unless a student has separate reading and writing classes, the language arts teacher would be reported for both the reading and writing category.
5. KEY FIELDS: the key fields for this format are item numbers 1, 4, 5, 6, and 7. If a key field needs to be changed, the record must be deleted and resubmitted as an add. (Joint Exhibit 4)

17. As such, the "responsible instructor element" became part of a voluminous publication entitled 2000-2001 Automated

Student Information System, Volume 1 ("The Manual"). (Joint Exhibit 3).

18. Rule 6A-1.0014, Florida Administrative Code, prescribes data collection on an annual basis. The Rule was initially adopted in 1987. It has been amended 13 times between December 21, 1987, and October 17, 2000.

19. Among other things, Rule 6A-1.0014, Florida Administrative Code, now incorporates, by reference, 2000-2001 Automated Student Information System, Volume 1 ("The Manual"). The collection of the "responsible instructor element" is contained for the first time in that publication as an automated student reporting format.

20. Rule 6A-1.0014, Florida Administrative Code, cites as its legislative authority only Sections 228.093(3)(d), 229.555(2), 229.565.(3), and 229.781, Florida Statutes, and does not expressly purport to implement Section 229.57, Florida Statutes. Rule 6A-1.09422, pertaining to the creation, administration, and security of the FCAT, and Rule 6A-1.09981, involving implementation of Florida's system of school improvement and accountability do name Section 229.57, Florida Statutes.

21. The evidence further shows that after the data element was included in the Rule, revised in October 2000, DOE staff

conducted workshops around the state to explain and clarify changes in DOE's database requirements.

22. Only after receiving input at its instructional workshops did DOE circulate the two memoranda at issue herein.

23. On January 22, 2001, DOE promulgated a memorandum from Lavan Dukes and Thomas Fisher to District Management Information System Coordinators and District Assessment Coordinators throughout Florida. The memorandum's stated subject was "Responsible Instructor Data Element," and it states:

Previously, you were given instructions by the Department's Education Information and Accountability Services Bureau relative to a new data element called "Responsible Instructor-Reading, Writing and Mathematics." The inclusion of this data element is related to the Department of Education's efforts to build a value-added accountability system in accordance with Section 229.57, F.S.

We have received a number of inquiries concerning how districts should define and collect the requested data. This memorandum is being distributed to assist districts into [sic] submitting accurate and valid information about the "responsible instructor."

The intent of the data element is to link each individual student to the person(s) primarily responsible for providing instruction in reading, writing and mathematics. While the concept is clear, in practice there may be more than one instructor identified. [T]he [sic] student at the high school level may be taking two mathematics courses, or the student may not be enrolled at the moment in either an English or mathematics course. This means

that decisions about how to define and identify the "responsible instructor" must reside with the district and school staff. We are unable to provide a complete list of rules to follow since we cannot imagine all the permutations that may occur. We have received a number of specific questions that can be used to illustrate the principles that may be followed, and these are discussed in the attachment to this memorandum. Review of these examples should be of assistance to you in completing the data request.

We recognize that there are other situations that will arise that have not been addressed in the attachment. Hopefully you will be able to make your local decisions within the framework established in this memorandum. After you have completed the data collection activities and have had time to think about the process, please send a note to either of us with your suggestions for improvements in the future. Thanks for your assistance. (Emphasis supplied).

24. Attached to the foregoing memorandum was a document entitled "Questions and Answers About the Responsible Instructor Data Element":

1. Q: Should the district inspect the student's course/class schedule to determine who the responsible instructor is? Should this be tied to a particular date?

A: Each district must determine whether it will collect the data from original sources through the use of a paper form or if it will analyze existing computer files to extract the information. In either case, the data collection activity is associated with Survey 3. The "responsible instructor" will be either the person currently delivering the instruction or the person who most recently provided the instruction. The latter would be illustrated by a student who took a

mathematics course in the fall semester but was not registered in a mathematics course at the time of the Survey 3.

2. Q: In a block schedule school, a student might not currently be enrolled in either an English or mathematics course at the time of Survey 3. He/she may have taken such courses in a previous block. How should the data be returned?

A. See previous question. The task is to identify the teacher most recently delivering instruction to the student in the specified subject area. This may well be a teacher who taught English or mathematics in the previous round of the "block schedule."

3. Q: How should one respond if the student actually is enrolled in two English or math courses at the time of Survey 3?

A: The decision must be made at the local level as to whether there is a single person who is primarily responsible for instruction in reading, writing, or mathematics. One way to handle the situation would be for one teacher's name to be entered but to understand that this person's name represents the work of two teachers. This principle could be followed in situations where the student is in a team teaching classroom. If this approach is used, backup information must be retained at the local level to interpret any future data analyses that may be disseminated.

4. Q. If a student is not currently enrolled in a reading, writing or mathematics course how should the data element be defined?

A. It is difficult to imagine a situation in which a student would not be receiving instruction in these areas, but if it happens, the data element should be zero filled.

5. Q: Is the Department requesting one record per student?

A: Yes.

6. Q: Can the Department specify what course numbers to use from the MIS data fields?

A: No. This is a local decision related to how your data is organized and maintained.

7. Q: What course numbers would be used for reporting "reading and writing?"

A: In most instances the student will be receiving instruction in reading and writing through the English courses. At the elementary level, either a self-contained classroom or a team teaching situation would be encountered. The former would require identification of a single teacher whereas the latter would require a solution as described above in question number 3. A high school student could be taking English as well as a special course in Reading; however most students do not take a course titled "Reading." If a student is enrolled in two such courses, the decision of how to code it should be made at the local level.

8. Q: Should the district code the courses in which the student is enrolled at the time of Survey 3 or courses the student may have taken earlier in the school year?

A: The records should reflect the current courses except as discuss [sic] question number 1 above.

9. Q: How would the district code a student who is taking a course in the Adult Evening School to make up the credit in the regular school program?

A: No courses taken in the Adult Evening School should be coded.

10. Q: How should districts report ESE students?

A: Districts have a choice of either coding all students or coding only those students who are pursuing an instructional program leading to a regular high school diploma. If you code a student who does not actually take the FCAT there will be no match and no further analysis by the department for that student.

11. Q: Should we code students for attending Juvenile Detention Centers?

A: Yes.

12. Q: Should we code the responsible instructors for students attending Charter Schools?

A: Yes.

25. On March 23, 2001, DOE promulgated a memorandum to District School Superintendents from Betty Coxe, Deputy Commissioner for Educational Programs. That memorandum's stated subject was "Clarification of Memorandum dated January 22, 2001- Responsible Instructor-Reading, Writing and Mathematics." It reads:

The new data element "responsible instructor-reading, writing, and mathematics" that is being collected will never be used by the Florida Department of Education to evaluate individual teachers. This new data is being collect [sic] at the state level for two primary reasons: to provide information to the State which allows the determination of the success of teaching programs and to track

state-level educational trends. School districts have the sole responsibility of conducting teacher evaluations.

Florida has a number of teacher-related initiatives that clearly need this data for program evaluation purposes. These include, but are not limited to, programs associated with teacher preparation, alternative certification, and interstate licensure reciprocity. Information must be gathered on the relative success of these programs to guide state policy. Trends must be identified in order to promote a system of ongoing quality improvement.

Furthermore state law (F.S. 231.29) says that test scores are just one criteria [sic] used by school districts for evaluating teachers. Other criteria that districts should use are maintaining classroom discipline, knowledge of subject matter, ability to plan and deliver instruction, etc. In other words, there are various other criteria besides test scores that should be taken into account before school districts can evaluate teachers.

Please disseminate this information as widely as possible within your district. Your assistance is, as always, much appreciated.

26. The January 22, 2001, memorandum does not direct the school districts to submit the data element in any particular way and does not impose sanctions for any school district's failure to comply with its contents. It does contain the interesting language, for purposes of the case at bar, that DOE is "unable to provide a complete list of rules to follow since we cannot imagine all the permutations that may occur."

27. The document issued on March 23, 2001, does not provide any directives as to the method for designating the data element or impose any sanctions. At most, it suggests possible alternatives in reporting, with final decisions left up to the reporting agency.

28. Indeed, if any sanctions exist with regard to the two memoranda, the sanctions are imposed by existing rules or statutes. These memoranda were intended to advise districts as to possible optional methods of reporting the new data element. If they had not been generated, school districts still would be required to file the new data element. In either case, schools and school districts (not DOE) make the ultimate determination of how to report the data element.

29. Petitioner presented no evidence to demonstrate that the challenged memoranda impose any requirements or solicited any information not already specifically required by statute or rule.

30. The concerns of Petitioner's members related in Finding of Fact 3 are speculative. To the extent that educator assessment, credit, and/or money awards are at issue, they would be affected, if at all, by their respective district's decisions at a different level and in a function(s) subsequent to DOE data collection. These memoranda do not impinge on independent evaluations, etc., by school districts.

31. As to concerns over confidentiality of social security numbers, there was no evidence presented that the new data element does anything other than collect data on registered educators whose social security numbers are already known to the districts and DOE for retirement and certification purposes. No reason was demonstrated to suppose that a breach in the confidentiality of those social security numbers would occur as a result of the new data element or as a result of the challenged memoranda.

32. There was anecdotal testimony to the effect that teachers have been placed in improper competition with one another due to these memoranda (allegedly unpromulgated rules) and that, as a result of this competition, apparently based on some teachers' speculation as to what the respective school districts may ultimately do with the data collected, those teachers are teaching reading at the expense of other subjects and/or are emphasizing reading about science and other technical subjects while eliminating more worthy "hands-on" projects and laboratory experiments of greater benefit to their students. Similar anecdotal testimony suggested that all teachers are now teaching so that their students read objective textual as opposed to "fun" or subjective material and so that their students are able to answer the type of questions posed on the FCAT, instead of gaining a broader range of knowledge. While these side-

effects of certain teachers' perceptions of how their respective districts may use the data gathered and processed by DOE may demonstrate that the concept of accountability of teachers via the FCAT is either good or bad or valuable or not valuable, it fails to define the memoranda at issue as rules.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.56(4), Florida Statutes.

34. Petitioner has the burden of proof in a rule challenge hearing under Section 120.56(4), Florida Statutes, to establish that the challenged statement has the effect of a rule.

35. The term "rule" is defined in Section 120.52(15), Florida Statutes as:

. . . each agency statement of general applicability that implements, interprets or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

36. Section 120.56(4), Florida Statutes, in pertinent part, states:

(A)ny person substantially affected by an agency statement may seek an administrative determination that the statement violates Section 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state

with particularity facts sufficient to show that the statement constitutes a rule under Section 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by Section 120.54.

37. Section 229.555, Florida Statutes, provides in pertinent part that:

The system must be designed to collect, via electronic transfer, all student and school performance data required to ascertain the degree to which schools and school districts are meeting state performance standards, and must be capable of producing data for a comprehensive annual report on school and district performance. In addition, the system shall support, as feasible, the management decisions to be made in each division of the department and at the individual school and district levels.

The system shall be based on an overall conceptual design; the information needed for such decisions, including a fiscal student, program, personnel, facility, community, evaluation, and other relevant data; and the relationship between cost and effectiveness. The system shall be managed and administered by the commissioner and shall include a district subsystem component to be administered at the district level, with input from the reports-and-forms control management committees. (Emphasis provided)

38. To reiterate, Section 229.57(11)(e), Florida Statutes, provides in pertinent part that:

The statistical system shall use measures of student learning, such as the FCAT, to determine teacher, school and school district statistical distributions, which distributions:

1. Shall be determined using available data from the FCAT, and other data collection as deemed appropriate by the Department of Education, to measure the differences in student prior year achievement against the current year achievement or lack thereof, such that the "effects" of instruction to a student by a teacher, school, and school district may be estimated on a per-student and constant basis (Emphasis provided).

39. Rule 6A-1.0014, Florida Administrative Code, was promulgated to effectuate provisions of Sections 229.555 and 229.57, Florida Statutes. Absent a challenge to the Rule itself, the fact that it does not specifically name the latter statute is of no significance.

40. The "responsible instructor" data element is contained in a publication (The Manual) that is incorporated by reference into the Rule. The statute gave authority to DOE in June of 1999. The publication was amended, effective July 2000. The Rule incorporating the publication was amended in October 2000. There does not seem to be any "hidden agenda" or promulgation flaw at work here. Indeed, the Rule itself has never been challenged.

41. The inclusion of the "responsible instructor" data element in Rule 6A-1.0014, Florida Administrative Code, is not at issue in this proceeding. Petitioners have not challenged the Respondent's authority to promulgate that Rule or the applicability and effect of the Rule. The sole inquiry in the

instant case is whether the documents constitute unpromulgated rules.

42. Pursuant to Sections 229.555 and 229.57, Florida Statutes, and Rule 6A1-0014, Florida Administrative Code, school districts are required to provide the information under the category of "responsible instructor."

43. The two memoranda in question do not impose any additional requirement or solicit information not already required by statute and rule.

44. Therefore, the memoranda are not "rules" as defined by Section 120.52(15), Florida Statutes. They are not self-executing. They do not create or adversely affect rights, and they do not have the direct and consistent effect of law. Florida Public Employees Council 79, AFSCME v. Department of Labor, DOAH Case No. 98-4706RU (Final Order, February 23, 1999); Lawrence v. Department of Health and Rehabilitative Services, DOAH Case No. 95-5585RU (Final Order, April 4, 1997), aff'd, 690 So. 2d 594 (Fla. 1st DCA 1997). Nor do they alter or restrict any of the statutory or rule requirements related to the subject matter.

45. Each memorandum explains and clarifies the implementation of an existing rule.

46. The January 22, 2001, memorandum addresses possible methods of reporting the data element. By its very terms, it merely suggests non-binding options:

This means that decisions about how to define and identify the "responsible instructor" must reside with the district and school staff.

Review of these examples should be of assistance to you in completing the data request.

We recognize that there are other situations that will arise that have not been addressed in the attachment.

47. Although DOE did not assert it as a defense herein, the fact that the foregoing memorandum acknowledged that DOE is "unable to provide a complete list of rules to follow since we cannot imagine all the permutations that may occur," would be a defense in this proceeding if it were found that this document constituted an unpromulgated rule. See Section 120.56(4)(b), Florida Statutes.

48. The March 23, 2001, memorandum also merely explains the purpose of the data element collection and the methods by which school districts may evaluate teachers.

49. An agency's explanation of the applicability and implementation of a rule to a particular set of facts is not itself a rule. Otherwise, "the agency would be forced to adopt a rule for every possible variation on a theme, and private

entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue." The Environmental Trust v. State Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998).

50. Petitioner has not met its burden. Respondent is not required to promulgate the challenged statements as rules.

51. Petitioner's cited cases are not persuasive of a contrary ruling.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner has not established that Respondent's documents were rules within the meaning of Section 120.52(15), Florida Administrative Code. Petitioner's challenge is hereby dismissed.

DONE AND ORDERED this 25th day of July, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.