STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITRUS OAKS HOMEOWNERS ASSOCIATION, INC., AND JOY HUTCHISON, as parent, legal guardian and next friend of JAMIE PETROV, a minor and KRISTA PETROV, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 05-0160RU
ORANGE COUNTY SCHOOL BOARD,	)	
Respondent.	)	

AMENDED FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on March 16, 17, and 18, 2005, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue presented is whether a rule establishing high school attendance zones is an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8), Florida Statutes (2004).

PRELIMINARY STATEMENT

On January 21, 2005, Petitioners filed a petition with DOAH seeking a determination of the invalidity of a rule pursuant to Subsections 120.56(1) and (3), Florida Statutes (2004). The ALJ scheduled the administrative hearing for February 14, 2005, in Tallahassee, Florida. The parties waived the statutory requirement for a hearing within 30 days of the filing of the petition; requested a change of venue to Orlando, Florida; and requested a three-day hearing. After several agreed continuances, the ALJ scheduled the hearing for March 16 through 18, 2005, in Orlando, Florida.

At the hearing, Petitioners presented the testimony of seven witnesses, the deposition testimony of one expert witness, and submitted 34 exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted 14 exhibits for admission into evidence.[1]

The identity of the witnesses and exhibits and the rulings regarding each are reported in the four-volume Transcript of the hearing filed with DOAH on June 9, 2005. Pursuant to the

agreement of the parties, the time for filing proposed final orders (PFOs) was extended to June 28, 2005. Petitioners and Respondent timely filed their respective PFOs on June 23 and 27, 2005.

FINDINGS OF FACT

1. Respondent is the School Board of Orange County, Florida (School Board). The School Board is an educational unit and an agency defined in Subsections 120.52(1)(b)7. and (6), Florida Statutes (2004).

2. Respondent is the governing body of the Orange County School District (School District or District). In relevant part, Respondent has exclusive constitutional authority to "operate, control and supervise all free public schools" within the District pursuant to Article IX, Section 4(b) of the Florida Constitution (2004) (Florida Constitution).

3. On January 11, 2005, Respondent adopted a rule establishing attendance zones for four high schools in western Orange County, Florida (Orange County). The rule modifies previously existing attendance zones for Apopka High School (Apopka), Olympia High School (Olympia), and West Orange High School (West Orange); and establishes a new attendance zone for Ocoee High School (the relief school).

4. It is undisputed that the establishment and modification of school attendance zones involves rulemaking.

The parties agree that the adoption of the relevant school attendance zones satisfies the definition of a rule in Subsection 120.52(15), Florida Statutes (2004).

5. Petitioners challenge the rule as an invalid exercise of delegated legislative authority defined in Subsection 120.52(8), Florida Statutes (2004). In relevant part, Petitioners allege that Respondent violated Subsections 120.52(8)(a) and (e), Florida Statutes (2004), by materially failing to follow applicable rulemaking requirements and by adopting a rule in an arbitrary and capricious manner.

6. Before proceeding to the merits of the rule challenge, it is important from a jurisdictional and contextual perspective to note that this Final Order does not reach any matter that falls within the scope of Respondent's exercise of constitutional authority. For reasons discussed in the Conclusions of Law, Respondent has exclusive constitutional authority to operate, control, and supervise public schools within the District (local control). The Legislature has constitutional authority over matters of statewide concern.[2]

7. The Legislature cannot statutorily delegate authority that is constitutionally vested in Respondent.[3] For purposes of the rule challenge, the exercise of constitutional authority by Respondent is not the exercise of delegated legislative

authority within the meaning of Subsections 120.56(1) and (3), Florida Statutes (2004).

8. As a factual matter, the challenged rule involves local control of only those public schools within the District that are affected by the rule. The school attendance zones do not have application beyond the boundaries of the School District. The school attendance zones do not benefit or otherwise affect citizens of the state outside the District.[4]

9. The trier of fact has avoided findings concerning matters of local control, including the merits of the school attendance zones, the wisdom of the collective decision of the School Board, and the motives and intent of the individual members of the School Board. Jurisdiction to determine the invalidity of a rule involving matters of local control is the exclusive province of the courts.[5]

10. Legislative authority over matters of statewide concern includes the authority to ensure that local school attendance zones are drawn in a manner that complies with uniform requirements for fairness and procedural correctness. The Legislature delegated that authority to Respondent when it enacted Subsections 1001.41(6) and 1001.42(4)(a), Florida Statutes (2004). The trier of fact has made only those findings needed to determine whether the exercise of delegated

legislative authority is invalid within the meaning of Subsections 120.52(8) and 120.56(1), Florida Statutes (2004).

11. The challenged rule affects the substantial interests of Petitioners within the meaning of Subsections 120.56(1) and (3), Florida Statutes (2004). Petitioner, Citrus Oaks Homeowners Association, Inc. (Citrus Oaks), is a Florida nonprofit corporation, organized as a homeowners' association pursuant to Chapters 617 and 720, Florida Statutes (2004). The members of Citrus Oaks own residences in the Citrus Oaks subdivision.

12. A substantial number of the members of Citrus Oaks are substantially affected by the challenged rule. A substantial number of members have children who are students in a public school affected by the challenged rule. The challenged rule reassigns many of those students from the Olympia school zone to the West Orange school zone.

13. The subject matter of the rule is within the general scope of interest and activity of Citrus Oaks. The relief requested is of a type that is appropriate for Citrus Oaks to receive on behalf of its members.

14. Citrus Oaks has represented its members in previous litigation, although this is the first administrative proceeding for Citrus Oaks. More than a substantial majority of the

members of Citrus Oaks expressly authorized Citrus Oaks to undertake this proceeding for their benefit.

15. Petitioner, Joy Hutchison, is the mother of Jamie Petkov and Kirsta Petkov. Mrs. Hutchinson and her children reside in Citrus Oaks in a neighborhood identified in the record as Gotha, Florida. At the time of the administrative hearing, Jamie Petkov and Kirsta Petkov attended Gotha Middle School (Gotha).

16. Jamie Petkov and Kirsta Petkov would have attended Olympia in the absence of the challenged rule. The challenged rule changes the attendance zone of each student to West Orange.

17. The challenged rule splits feeder patterns intended to ensure that students in adjacent neighborhoods stay together through progressive grades. The challenged rule assigns some students from Gotha to the Olympia school zone and assigns other Gotha students to the West Orange school zone.

18. Differences in West Orange and Olympia do not affect the substantial interests of Petitioners. The two schools offer comparable, but not identical, educational programs. Each school is accredited by the Southern Association of Accreditation. Each is a comprehensive high school with a full range of academic opportunities for students and Advanced Placement (AP) classes for college credit. Each school offers

comparable student-teacher ratios, teachers with advanced degrees, and extracurricular activities.

19. West Orange and Olympia are not identical. Homebuyers generally prefer Olympia to West Orange. Area realtors emphasize location within the Olympia school zone as a marketing feature for homes. Prospective homebuyers generally request homes within the Olympia school zone. Approximately 100 students residing outside the Olympia attendance zone have falsified their domicile information in order to enroll in Olympia.

20. Disparities between West Orange and Olympia do not deny Petitioners a uniform system of education. A uniform system of education does not require uniformity among individual schools in physical plant, curricula, and educational programs.[6]

21. The rule development process that culminated in the challenged rule began sometime in March 2004. Three staff members in the District office of the Director of Pupil Assignment (the Director) were responsible for recommending school attendance zones to the Superintendent and his cabinet.

22. The Director and her staff pursued negotiated rulemaking within the meaning of Subsection 120.54(2)(d), Florida Statutes (2004). In March 2004, the staff began to establish relevant time lines. In April and May of the same year, staff met with principals of schools potentially subject

to rezoning. Staff requested each school principal to submit the names of three individuals to serve on a school rezoning committee to work with the staff. Each school rezoning committee was comprised of the "PTSA president, SAC chairperson, and another member."

23. Each school rezoning committee was a negotiating committee within the meaning of Subsection 120.54(2)(d), Florida Statutes (2004). Each school rezoning committee was a balanced committee of interested persons who drafted complex rules in anticipation of public opposition. Each committee worked in good faith to develop group consensus for a mutually acceptable proposed rule.

24. The Director and her staff provided packages to each school rezoning committee. The packages included information concerning time lines; rezoning criteria; maps; demographic information about neighborhoods; transfer policies; transportation; and school data such as demographics, enrollment, and original design capacity.

25. Each committee developed proposed attendance zones based on eight rezoning criteria prescribed in the packages. The eight rezoning criteria are identified in the record as: operate under the current desegregation order; consider future planning and growth of attendance zones; equally distribute population to balance facility use of affected schools; consider

reducing student transportation distances, when necessary; maximize the number of students walking to school; maximize the school feeder pattern structure; minimize the disruption of residential areas; and ensure demographic balance, when possible. Each committee was required to give overriding importance to the first three of the eight criteria.

26. The school rezoning committees produced approximately 11 initial proposals. The Director and her staff scrutinized various proposals and received citizen input during three public meetings on August 25 and October 5 and 25, 2004. Each public meeting was a rule development workshop within the meaning of Subsection 120.54(2)(c), Florida Statutes (2004).

27. Approximately 600 members of the public attended the first workshop conducted on August 25, 2004. Many members of the public spoke at the meeting or provided written input concerning the various proposals.

28. Staff and committee members considered the public input and scrutinized the proposals. Staff reduced the number of proposals to seven, identified in the record as options A through G, and conducted a second workshop on October 5, 2004.

29. Between 400 and 500 members of the public attended the second workshop. As the meeting "wore on," the Director concluded that no consensus on a single proposal was attainable at that time and adjourned the meeting.

30. After the second workshop on October 5, 2004, the staff developed one recommendation for rezoning and two best options identified in the record as the recommendation, option A, and option F. Staff presented the recommendation to the Superintendent at a cabinet meeting, but also included, for informational purposes, the two options.

31. Attendees at the cabinet meeting included "area superintendents," the chief financial officer, the chief facilities officer, the chief operations officer, and the deputy superintendent for curriculum instruction. The Superintendent and his staff vetted the recommendation before the recommendation was presented to the public as the "Staff Proposal" during a third workshop conducted on October 26, 2004.

32. Approximately 500 members of the public attended the third workshop. The Director presented the Staff Proposal and received public input.

33. The Staff Proposal reassigns 435 students from Apopka to the relief school; 136 students from Olympia to West Orange; and 2,315 students from West Orange to the relief school. The Staff Proposal does not rezone students in Citrus Oaks from Olympia to West Orange. There was no discussion at the third workshop of rezoning options other than the Staff Proposal.

34. It is undisputed that Respondent complied with applicable rulemaking procedures from the initiation of the

rulemaking process, through the third workshop conducted on October 25, 2004, when staff presented the Staff Proposal. The alleged violations of applicable rulemaking procedures occurred from October 26, 2004, through January 11, 2005. During that interval, Respondent amended the Staff Proposal, by increasing the number of reassignments from Olympia to West Orange to 285 students, and adopted the Staff Proposal plus the additional reassignments as the challenged rule.

35. The additional reassignments were added to the Staff Proposal in an attempt to provide greater relief from overcrowding at Olympia. From October 26 through November 29, 2004, Mrs. Karen Ardaman, a member of the School Board, conducted several non-public conferences with the Director and her staff. The non-public conferences were workshops conducted for the purpose of rule development within the meaning of Subsection 120.54(2)(c), Florida Statutes (2004) (private workshops). The private workshops did not involve negotiated rulemaking within the meaning of Subsection 120.54(2)(d), Florida Statutes (2004).

36. The private workshops were conducted between a member of the School Board and District staff for the official business of rule development. Mrs. Ardaman stated to the Director and her staff that the purpose of the private workshops was to "tweak" the Staff Proposal. Mrs. Ardaman expressed a specific

goal of rezoning at least 300 students from Olympia and an optimal goal of reducing Olympia enrollment to design capacity, if possible. The workshops were extensive and produced four "work-up" proposals identified in the record as Petitioner's Exhibits 20 through 23. One of the work-up proposals was adopted by Respondent as the challenged rule on January 11, 2005.[7]

37. Each private workshop included "what-if" questions from Mrs. Ardaman to staff members intended to scrutinize alternative school rezoning scenarios. Each scenario involved specific neighborhoods, the demographic breakdown for the neighborhood, the actual number of students, and the number of students to be reassigned.

38. One work-up extended the West Orange zone to an area north of State Road 50. Another work-up reduced the Apopka enrollment from 4,265 to 3,830, or approximately 650 students over design capacity of 3,187.

39. The private workshops included conversations regarding the use of permanent modular classrooms to relieve overcrowding at Olympia. Mrs. Ardaman requested staff to explore the possibility of adding permanent modular classrooms.

40. On November 30, 2004, the Superintendent published in an area newspaper of general circulation a Notice of School Board Meeting scheduled for December 6, 2004. In relevant part,

the notice stated that the purpose of the meeting is to discuss "West Orange Apopka Relief School Rezoning."

41. The public meeting conducted on December 6, 2004, was a rule development workshop within the meaning of Subsection 120.54(2), Florida Statutes (2004). The School Board considered the Staff Proposal and the Ardaman alternative that added 149 reassignments to the Staff Proposal (the alternative proposal).

42. The alternative proposal was circulated to the other members of the School Board. Two members left the workshop early. The remaining five members, including Mrs. Ardaman, reached consensus to advertise the alternative proposal as the proposed rule.

43. On December 11, 2004, the Superintendent published a Notice of Proposed Action on High School Attendance Zones in The Orlando Sentinel. The public notice advertised a public hearing scheduled for January 11, 2005, to adopt the proposed rule. That portion of the public notice entitled, "Summary of Proposal" states, in relevant part, that the proposed rule reassigns students residing in Citrus Oaks from Olympia to West Orange.

44. The meeting conducted on January 11, 2005, was a public hearing within the meaning of Subsection 120.54(3)(c)1., Florida Statutes (2004). Members of the School Board adopted

the proposed rule by a vote of four to three. Mrs. Ardaman voted with the majority.

45. The private rule development workshops between a school board member and District staff failed to follow applicable rulemaking procedures prescribed in Subsections 120.54(2)(a) and (c), Florida Statutes (2004). Respondent provided no public notice of the private workshops.

46. Respondent failed to follow applicable rulemaking procedures prescribed in Subsections 120.54(2)(a) and (c), Florida Statutes (2004), for the rule development workshop that Respondent conducted in public on December 6, 2004. The notice published on November 30, 2004, was less than 14 days before December 6, 2004. The published notice did not include an explanation of the purpose and effect of either the Staff Proposal or the alternative proposal. The published notice did not cite the specific legal authority for either proposal and did not include the preliminary text of each proposal.

47. Respondent failed to comply with other rulemaking procedures prescribed in Subsection 120.54(2)(c), Florida Statutes (2004). Respondent precluded public participation during the rule development workshop on December 6, 2004. Therefore, the persons responsible for preparing the respective proposals did not explain either proposal to the public and were

not available to answer questions from the public or to respond to public comments.

48. The failure to comply with applicable rulemaking procedures from October 26 through December 6, 2004 (the intervening period), is presumed to be material within the meaning of Subsection 120.52(8)(a), Florida Statutes (2004). § 120.56(1)(c), Fla. Stat. (2004). The burden of proof shifts to Respondent to rebut the presumption. Id. Respondent did not rebut the presumption with evidence that the fairness of the proceeding was not impaired or that the proceeding was procedurally correct.

49. Respondent did not show that it cured the materiality of the failure to comply with applicable rulemaking procedures during the intervening period (procedural errors) by satisfying other rulemaking requirements such as those in Subsection 120.54(3)(e), Florida Statutes (2004). After December 11, 2004, when Respondent published the notice of proposed agency action to adopt the proposed rule, Respondent did not show that it filed a certified copy of the proposed rule with the agency head, together with other relevant materials, for public inspection. For reasons stated hereinafter, the public hearing conducted on January 11, 2005, did not cure the materiality of prior procedural errors.

50. A preponderance of evidence shows the failure to comply with applicable rulemaking procedures during the intervening period was material within the meaning of Subsection 120.52(8)(a), Florida Statutes (2004). The procedural errors impaired the fairness and procedural correctness of the development and adoption of the alternative proposal.

51. In relevant part, the failure to provide public notice of the private workshops deprived members of the School Board and the public from equal participation, an opportunity to scrutinize various scenarios, and an opportunity for input and comment. The private workshops circumvented six months of prior negotiated rulemaking and public workshops between District staff, rezoning committees, the public, and the Superintendent and his cabinet; and reduced the public process to a shell into which non-public decisions were later poured.

52. The public notice advertised on November 30, 2004, was inadequate. The notice deprived interested members of the School Board and the public of prior notice that the scope of the workshop on December 6, 2004, would include a rezoning proposal not addressed in previous public workshops.

53. The procedural errors materially changed the Staff Proposal and materially affected some students not assigned to Olympia in the Staff Proposal. For example, the Staff Proposal decreases Olympia enrollment, through reassignment of students

to West Orange, by 136 students; or approximately four percent of the 3,337 students enrolled in Olympia on October 15, 2004; and approximately three percent of the 3,410 students projected to be enrolled in Olympia in the next school year (the 2005-2006 school year). The alternative proposal decreases Olympia enrollment by 285 students. That is more than twice the decrease in enrollment in the Staff Proposal. The alternative proposal decreases enrollment at Olympia by approximately eight percent of the 3,332 students enrolled in Olympia on November 15, 2004; and approximately eight percent of the projected enrollment of 3,410 for the following school year.

54. The procedural errors materially impact the original design capacities at Olympia and West Orange. The original design capacities at the respective schools are 2,781 and 3,195 students. The enrollment at Olympia on October 15, 2004, in the amount of 3,337 students, exceeded original design capacity by 556 students (overcrowding), or approximately 19.9 percent. The enrollment at West Orange on the same date, in the amount of 4,320 students, exceeded original design capacity by 1,035 students, or approximately 32.4 percent.

55. The Staff Proposal reduced overcrowding at Olympia to 420 students, or approximately 15.1 percent of original design capacity; and added 136 students to West Orange enrollment, or approximately 4.2 percent of original design capacity at West

Orange. Based on enrollment on October 15, 2004, the alternative proposal decreases overcrowding at Olympia to 271 students, or approximately 9.7 percent of original design capacity; and adds 285 students to the West Orange enrollment, or approximately 8.9 percent of original design capacity.[8]

56. The materiality of the procedural errors is exacerbated by the scheduled loss of the Ninth Grade Center at West Orange in the 2005-2006 school year. That event will reduce actual capacity at West Orange from the original design of 3,195 students to 1,993 students. This is a capacity loss of 1,202 students. The alternative proposal adds 285 students to West Orange enrollment next year, which is an increase of approximately 14.3 percent over actual capacity. The Staff Proposal adds 136 students to West Orange enrollment, which is an increase of approximately 6.8 percent over actual capacity.

57. The Staff Proposal and challenged rule leave West Orange with 2,236 and 2,385 students, respectively, or approximately 243 and 392 students over next year's actual capacity of 1,993 students. Overcrowding at West Orange from the Staff Proposal is approximately 12.19 percent of actual capacity next year, and overcrowding from the alternative proposal is approximately 19.66 percent of actual capacity.

58. The Staff Proposal reduces overcrowding at Olympia next year from 19.99 percent to 15.1 percent over capacity and

leaves overcrowding at West Orange over 12.19 percent. The alternative proposal reduces overcrowding next year at Olympia from 19.99 percent to approximately 9.7 percent and leaves overcrowding at West Orange at 19.66 percent over actual capacity.

59. The procedural errors facilitated an alternative proposal that departs materially from recommendations by the Olympia rezoning committee. The rezoning committee recommended no change at the school. In relevant part, the committee wrote:

> While we recognize that Olympia remains overcrowded, aggressive, proactive measures should be taken to address overcrowding of Olympia in other ways. Specifically those measures include:
>
> 1. Exploring the possibility of adding "permanent" modular structures; and
>
> 2. Increasing efforts to remove students who attend Olympia illegally claiming an address in our zone but who actually live out of zone.
>
> West Orange is left with room for the growth they expect.

Petitioner's Exhibit 14 (P-14).

60. The Orange County Commission, in a decision entered on July 14, 1998, prohibited "portable" classrooms on the Olympia campus in the original design of the school. The decision, however, does not expressly prohibit "permanent" modular

classroom structures. Sufficient property exists on the Olympia campus to accommodate permanent modular classroom structures.

61. Procedural errors that led to the alternative proposal materially affected students in Citrus Oaks who are reassigned to West Orange. The alternative proposal will interrupt feeder patterns at Gotha by reassigning some Gotha students to West Orange and allowing others to attend Olympia.

62. The preceding findings concerning variations between the Staff Proposal and the alternative proposal are made solely to weigh the materiality of the procedural errors that produced the alternative proposal. The findings do not examine the merits of any rezoning plan, the wisdom of the decision of the School Board, or the motives of an individual member of the Board.

63. Respondent maintains a stated agency policy that prohibits an individual member of the School Board from participating in any matter pending before the Board in which the member has a conflict of interest. In relevant part, the written policy provides:

> Board members are expected to avoid conflicts of interest involving any matter pending before the board. A conflict of interest is deemed to exist when the member is confronted with an issue in which the member has a personal . . . interest or . . . circumstance that could render the member unable to devote complete loyalty and singleness of purpose to the public

> interest. . . . The accountability to the whole district supersedes:
>
> * * *
>
> c. Conflicts based upon the personal interest of a board member who is a parent of a student in the district.

P-6, at 001945.

64. Mrs. Ardaman is a member of the School Board who is a parent of three students in the Olympia school zone. When District staff presented the Staff Proposal, one student was a senior at Olympia, another was a sophomore at Olympia, and the youngest was in the sixth grade at Gotha.

65. Mrs. Ardaman did not have a conflict of interest concerning the Staff Proposal, option A, or option F. None of those proposals reassigned any of the Ardaman children from Olympia to West Orange.

66. A deemed conflict of interest existed for Mrs. Ardaman during: the private workshops she conducted with District staff for the purpose of rule development; the public deliberations at the meeting conducted on December 6, 2004; and the vote on the alternative proposal that took place at the public hearing conducted on January 11, 2005. Courts have recognized that each concerned parent has an interest in his or her children, the educational program in which each is enrolled, the prevention of disruption in the educational progress of each child, and any

unwarranted disruption in the child's educational experience.[9] Mrs. Ardaman had a judicially recognized interest in developing and adopting an alternative proposal that minimized the foregoing impacts on her children.

67. Respondent's failure to follow its officially stated conflict of interest policy was material. Citrus Oaks sits on the northern boundary of Old Winter Garden Road (Winter Garden). The Ardaman children reside in a neighborhood to the south of Winter Garden. The alternative proposal reassigns Olympia students to West Orange from three neighborhoods north of Winter Garden, including students in Citrus Oaks. It reassigns Olympia students to West Orange from only one neighborhood south of Winter Garden.

68. The alternative proposal does not achieve the optimal goal of reducing Olympia enrollment to the original design capacity. The alternative proposal could have achieved that goal by increasing the number of reassignments to West Orange from the geographic area south of Winter Garden. The alternative proposal does not include that option.

69. During the non-public workshops, Mrs. Ardaman asked District staff to analyze numerous school rezoning scenarios based on reassignments from specific neighborhoods. Although the various scenarios included neighborhoods south of Winter Garden, Mrs. Ardaman did not ask staff to analyze a scenario

that would have reassigned students in her neighborhood from Olympia to West Orange.

70. Reassignment of Olympia students in the neighborhood in which Mrs. Ardaman resides would have interrupted feeder patterns for Gotha students. At the time, Mrs. Ardaman had a child in the sixth grade at Gotha. The challenged rule interrupts feeder patterns at Gotha for students residing in neighborhoods north of Winter Garden.

71. The preceding findings concerning a deemed conflict of interest are made solely to weigh the materiality of agency action that is inconsistent with officially stated policy. No finding is made that an actual conflict of interest existed in the mind of Mrs. Ardaman, or that an actual conflict of interest, if any, motivated any modification of the Staff Proposal. As stated in paragraph 9, the trier of fact has avoided findings concerning the motives and intent of the individual members of the School Board. Mrs. Ardaman was credible and persuasive as a witness. She was cooperative and forthcoming in providing her testimony.

72. Respondent exercised agency discretion in adopting the alternative proposal in a manner that was inconsistent with officially stated agency policy. Respondent permitted a member of the School Board with a judicially recognized personal interest, deemed by officially stated agency policy to be a

conflict of interest, to participate in a pending matter before the School Board.

73. The deviation from agency policy was material. The members of the School Board voted on January 11, 2005, to adopt the alternative proposal by a vote of four to three. Mrs. Ardaman cast the deciding vote. Without the vote of Mrs. Ardaman, the remaining tie vote would have been insufficient to adopt the alternative proposal.[10]

74. The deviation from agency policy was material for other reasons previously stated in the discussion of procedural errors and not repeated here. Respondent did not explain the deviation from officially stated agency policy.

75. The adoption of the challenged rule was neither arbitrary nor capricious within the meaning of Subsection 120.52(8)(e), Florida Statutes (2004). The agency action is supported by logic and essential facts. Respondent did not adopt the proposed rule without thought or reason, and the adopted rule is not irrational.

76. Between December 6, 2004, and January 11, 2005, the members of the School Board received data sheets and impact assessments for the alternative proposal. The members had already received the data supporting the Staff Proposal. The members had adequate time between December 6, 2004, and January 11, 2005, to evaluate the logic, essential facts, and

rationality of the additional reassignments in the alternative proposal.

77. The members of the School Board, including Mrs. Ardaman, were faced with a controversial issue and a difficult decision. Reasonable individuals arguably may have decided to draw the school attendance zones differently. However, it is not appropriate for the trier of fact to substitute his judgment for that of the members of the School Board or to examine the wisdom of the decision of the School Board.

78. Even though Respondent did not adopt the challenged rule in an arbitrary or capricious manner, the procedural errors and deviations from officially stated agency policy materially affected the alternative proposal. Each impaired the fairness of the alternative proposal and prevented the alternative proposal from being adopted in a manner that was procedurally correct.

79. The Staff Proposal is easily severable from the additional reassignments in the alternative proposal. Apart from the workshops that occurred from October 26 through December 6, 2004, Respondent followed applicable rulemaking requirements for the adoption of the Staff Proposal. Severance of the Staff Proposal from the alternative proposal leaves the Staff Proposal with no material change; the mere passage of time between the last public workshop on October 25, 2004, and the

public hearing on January 11, 2005; and adequate notice of a public hearing to adopt, in relevant part, the Staff Proposal. The majority vote to approve the Staff Proposal is valid because, as previously found, Mrs. Ardaman had no conflict of interest in the Staff Proposal.

CONCLUSIONS OF LAW

80. Respondent is part of the legislative branch of government rather than the judicial or executive branch. Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260 (Fla. 1973); Dunbar Electric Supply, Inc. v. School Board of Dade County, 690 So. 2d 1339 (Fla. 3d DCA 1997). However, Respondent is a constitutional entity that derives part of its authority from the constitution rather than from the Legislature.

81. The authority to operate, control, and supervise public schools within the District is "constitutionally reposed" in Respondent. Fla. Const., Art. IX, § 4(b) (2004); see Dunbar, 690 So. 2d at 1339 (school boards are constitutional entities). The authority to maintain a statewide uniform system of education is constitutionally vested in the Legislature. Fla. Const., Art. IX, § 1(a) (2004).

82. Multiple constitutional provisions addressing a similar subject must be read in pari materia in a manner that gives effect to each provision. Caribbean Conservation

Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission, 838 So. 2d 492, 501 (Fla. 2003). While Respondent has constitutional authority over local control of the schools within the District, the Legislature has authority to maintain a uniform system of statewide education. W.E.R. v. School Board of Polk County, 749 So. 2d 540, 542 (Fla. 2d DCA 2000); United Teachers of Dade FEA/United, AFT, Local 1974, AFL-CIO, et al. v. Dade County School Board, 472 So. 2d 1269, 1270 (Fla. 1st DCA 1985).

83. Judicial decisions employ either a territorial test or a functional test to distinguish statewide and local functions. The territorial test looks at whether the agency has legal authority to operate outside a single county. The functional test considers whether agency action serves a public purpose and benefits the citizens of the state generally. Compare Orlando-Orange County Expressway Authority v. Hubbard Construction Co., 682 So. 2d 566 (Fla. 5th DCA 1996)(territorial test showed expressway authority is state agency because it has authority to operate in more than one county) and Pepin v. Division of Bond Finance, 493 So. 2d 1013 (Fla. 1986)(functional test showed intra-county part of statewide system served a public purpose and benefited the citizens of the state) with Booker Creek Preservation, Inc. v. Pinellas Planning Council, 433 So. 2d 1306 (Fla. 2d DCA 1983)(territorial test showed planning council was

a unit of local government and not a state agency because council had authority within one county) and Rubinstein v. Sarasota County Public Hospital Board, 498 So. 2d 1012 (Fla. 2d DCA 1986)(territorial test showed hospital board is not a state agency because jurisdiction is confined to one county).

84. Under either of the foregoing tests, the establishment of school attendance zones within the District involves the exercise of local authority that is constitutionally reposed in Respondent. The school attendance zones at issue in this proceeding have no legal effect outside the District. The school attendance zones serve no public purpose and benefit no citizen outside the District.

85. The Legislature cannot delegate by statute authority that the constitution reposes in Respondent rather than the Legislature. Cf., NAACP, Inc. v. Florida Board of Regents, 863 So. 2d 294, 295 n. 1 (Fla. 2003)(preserving for disposition by the 1st DCA a suggestion that rule challenge was moot because challenged rule had been superseded by new rule adopted by new constitutional agency in the exercise of constitutional authority). Compare Caribbean, 838 So. 2d at 494 and 504 (portion of statute subjecting exercise of constitutional authority over species of "special concern" to provisions of Chapter 120, Florida Statutes (1999), is unconstitutional) with Wilkinson v. Florida Fish and Wildlife Conservation Commission,

853 So. 2d 1088, 1089 (Fla. 1st DCA 2003)(portion of statute subjecting exercise of legislative authority over "threatened and endangered" species to provisions of Chapter 120, Florida Statutes (1999), is constitutional). The Legislature cannot reallocate authority expressly delineated in the constitution. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 268-269 (Fla. 1991).

86. The exercise by Respondent of local control over the operation and supervision of schools within the School District is not the exercise of delegated legislative authority within the meaning of Subsections 120.52(8) and 120.56(1), Florida Statutes (2004). Cf. Dunbar, 690 So.2d at 1339(school boards are constitutional entities that are not subject to bid resolution procedures in Chapter 120, Florida Statutes (1995)). The exercise of such authority by Respondent is the exercise of constitutional authority. DOAH does not have subject matter jurisdiction, under Subsection 120.56(1), Florida Statutes (2004), to determine whether the challenged rule is an invalid exercise of constitutional authority over local control of public schools within the District.

87. The Legislature has constitutional authority to maintain a uniform system of statewide education. Fla. Const., Art. IX, § 1(a) (2004). That authority includes the authority to ensure that school boards exercise local control in a manner

that is uniformly fair and procedurally correct. See Canney, 278 So. 2d at 263 (Legislature may require school board to exercise authority pursuant to minimum standards of fairness that include individual rights and open, public meetings); School Board of Osceola County v. UCP of Central Florida, 2005 WL 924317 (Fla. 5th DCA April 22, 2005)(school board cannot deny application for charter school without good cause).

88. Authority to ensure that school boards exercise local control in a manner that is fair and procedurally correct is a quasi-judicial authority. Canney, 278 So. 2d at 263 (requirement for school board to exercise authority pursuant to minimum standards of fairness is quasi-judicial). The Legislature delegated to each school board, including Respondent, the quasi-judicial authority to ensure that local school attendance zones are established and modified pursuant to a statewide system that is uniformly fair and procedurally correct. §§ 1001.41(6) and 1001.42(4)(a), Fla. Stat. (2004). DOAH has subject matter jurisdiction to determine whether the exercise of this delegated legislative authority, during the development and adoption of the challenged rule, was invalid within the meaning of Subsection 120.52(8), Florida Statutes (2004). § 120.56(1), Fla. Stat. (2004).

89. Petitioners have standing to challenge the rule adopted by Respondent. The challenged rule affects the

substantial interests of Petitioners within the meaning of Subsections 120.56(1) and (3), Florida Statutes (2004).

90. Parents and students aggrieved by a rule establishing school attendance zones have standing to challenge the rule. Cortese v. School Board of Palm Beach County, 425 So. 2d 554, 555 (Fla. 4th DCA 1982); School Board of Leon County v. Ehrlich, 421 So. 2d 18, 19 (Fla. 1st DCA 1982); School Board of Broward County v. Gramith, 375 So. 2d 340 (Fla. 1st DCA 1979); School Board of Broward County v. Constant, 363 So. 2d 859, 861 (Fla. 4th DCA 1978). But see School Board of Orange County v. Blackford, 369 So. 2d 689 (Fla. 1st DCA 1979) and Hill v. School Board of Pinellas County, 954 F. Supp. 251 (M.D. Fla. 1997), aff'd 137 F.3d 1355 (11th Cir. 1998)(unpublished opinion)(both cases denying standing to students and parents challenging change in school attendance zones). Parties aggrieved by changes in school attendance zones have standing to challenge such rules in accordance with the Administrative Procedure Act. Constant, 363 So. 2d at 861.

91. Citrus Oaks has associational standing to challenge the existing rule. Plantation Residents' Association, Inc. v. School Board of Broward County, 424 So. 2d 879, 880 n. 2 (Fla. 1st DCA 1982). A substantial number of the members of Citrus Oaks are substantially affected by the challenged rule. The subject matter of the rule is within the association's general

scope of interest and activity. The relief requested is appropriate for the association to receive on behalf of its members. See NAACP, Inc., 863 So. 2d at 298 (setting forth the test for associational standing).

92. In Florida, unlike the federal system, the doctrine of standing has not been rigidly followed. Coalition for Adequacy of Fairness In School Funding, Inc. v. Chiles, 680 So. 2d 400, 403 (Fla. 1996). One of the purposes of the Administrative Procedure Act is to expand, rather than constrain, public participation in the administrative process. NAACP, Inc., 863 So. 2d at 298.

93. Petitioners have the burden of proof in this proceeding. § 120.56(3)(a), Fla. Stat. (2004). Petitioners must show by a preponderance of the evidence that the challenged rule is an invalid exercise of delegated legislative authority within the meaning of Subsections 120.52(8)(a) or (e), Florida Statues (2004). Id.

94. Respondent is an agency defined in Subsection 120.52(1)(b), Florida Statutes (2004). Respondent is an educational unit within the meaning of Subsection 120.52(1)(b)7., Florida Statutes (2004). Mitchell v. Leon County School Board, 591 So. 2d 1032 (Fla. 1st DCA 1991); Pelham v. Superintendent of the School Board of Wakulla County, 436 So. 2d 951 (Fla. 1st DCA 1983); Witgenstein v. School Board of Leon

County, 347 So. 2d 1069 (Fla. 1st DCA 1977); Canney v. Board of Public Instruction of Alachua County, 222 So. 2d 803 (Fla. 1st DCA 1969).

95. The adoption of school attendance zones constitutes rulemaking. Plantation, 424 So. 2d at 880 and n. 2; Polk v. School Board of Polk County, 373 So. 2d 960, 961 (Fla. 2d DCA 1979). It is undisputed that the challenged rule satisfies the statutory definition of a rule in Subsection 120.52(15), Florida Statutes (2004).

96. Agency rulemaking must comply with applicable rulemaking procedures prescribed in Section 120.54, Florida Statutes (2004). § 120.52(8)(a), Fla. Stat. (2004). For reasons discussed in the Findings of Fact, Petitioner met its burden of proving that Respondent materially failed to follow applicable rulemaking procedures for the alternative proposal.

97. In relevant part, successive non-public conferences between one board member and District staff were private rule development workshops within the meaning of Subsection 120.54(2), Florida Statutes (2004). The board member conferred with staff to conduct rule development. The workshops produced an alternative proposal that Respondent adopted on January 11, 2005, in an open, public hearing. Compare Blackford v. School Board of Orange County, 375 So. 2d 578, 581 (Fla. 5th DCA 1979) (successive private meetings among school board members and the

superintendent to develop a rezoning plan that was later adopted in an open, public hearing must be re-examined in public meetings) with Cortese, 425 So. 2d at 557, n. 9 (in which the court distinguished the holding in Blackford, inter alia, on factual grounds that no non-public meetings were evidenced in Cortese).

98. The public notice on November 30, 2004, advertising the public workshop scheduled for December 6, 2004, was a notice of rule development required in Subsections 120.54(2)(a) and (c), Florida Statutes (2004). The notice of rule development did not provide 14-days' notice and did not include: an explanation of the purpose and effect of either the Staff Proposal or the alternative proposal (the proposed rules). It did not provide the specific authority for the proposed rules, or a preliminary text of either proposed rule.

99. The failure of Respondent to follow applicable rulemaking procedures is presumed to be material. § 120.56(1)(c), Fla. Stat. (2004). The burden of proof shifts to Respondent to rebut the presumption. Id. Respondent did not rebut the presumption with evidence that the fairness of the alternative proposal was not impaired or that the agency action concerning the alternative proposal was procedurally correct.

100. The failure to follow applicable rulemaking procedures precluded other members of the School Board as well

as interested members of the public from participating in the private rule development workshops. The private workshops reduced approximately six months of prior public workshops and negotiated rulemaking to shells into which non-public decisions were later poured. Compare Cortese, 425 So. 2d at 557 (upholding a school board plan, inter alia, on grounds that public meetings were not shells into which non-public decisions were poured).

101. The notice of rule development published on November 30, 2004, did not provide prior notice that Respondent would consider a proposal other than the Staff Proposal presented to the public on October 25, 2005. While it is possible to develop data and scrutinize scenarios "on the fly," in the words of the Director, prior notice provides an advantage that allows time to develop data and scrutinize scenarios in advance of a workshop. Transcript, at 429, L 10-18.

102. Rulemaking involves the exercise of agency discretion. Cortese, 425 So. 2d at 558. The exercise of agency discretion by a school board to ensure the substantive correctness of school attendance zones is a quasi-legislative function. Plantation, 424 So. 2d at 880-881; Polk, 373 So. 2d at 962. The exercise of agency discretion by a school board to draw school attendance zones in a manner that is fair and procedurally correct is a quasi-judicial function. Cf. Canney,

278 So. 2d at 263 (requirement for school board to exercise authority to expel students pursuant to minimum standards of fairness is quasi-judicial).

103. Respondent must exercise agency discretion involving a quasi-judicial function in a manner that is consistent with officially stated agency policy. § 120.68(7)(e)3., Fla. Stat. (2004). Respondent must explain any deviation from officially stated agency policy. Id.[11]

104. The officially stated policy of Respondent prohibits a member of the School Board from participating in matters pending before the Board when a conflict of interest exits for the member. The policy deemed a conflict of interest to exist for one member of the School Board during the time the member engaged in private rule development workshops and voted to adopt the alternative proposal.

105. The Board member is a parent of three children who were students in the Olympia school zone during the time the member developed and voted to adopt an alternative proposal that reassigned additional students from Olympia to West Orange. Courts recognize that every concerned parent:

> . . . has an interest in their children and in the educational program in which their children are enrolled. They also have a natural interest that the educational progress of the child not be unnecessarily disrupted.

Balckford, 369 So. 2d at 691.

106. Respondent deviated from its officially stated policy by allowing a Board member with a deemed conflict of interest to participate in a matter pending before the Board. Respondent did not explain the deviation from its policy.

107. Respondent developed and adopted the portion of the challenged rule that changes the Staff Proposal in a manner that is unfair and procedurally incorrect. See Blackford, 375 So. 2d at 581 (requiring school board to re-examine in open public meetings a rule that was developed in private meetings). However, Respondent followed applicable rulemaking requirements for the portion of the challenged rule that implements the Staff Proposal. Compare Cortese, 425 So. 2d at 557 (upholding a school board plan, inter alia, on grounds that public meetings were not shells into which non-public decisions were poured).

108. The issue of whether an individual member of the School Board would have voted differently without the additional reassignments in the alternative proposal is solely a matter within the quasi-legislative function of the Board and is beyond the scope of this Final Order. The adoption of the portion of the challenged rule that implements the Staff Proposal is a valid exercise of quasi-judicial authority delegated by the Legislature.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Respondent developed and adopted the portion of the challenged rule that varies from the Staff Proposal in a manner that is an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8)(a), Florida Statutes (2004).

DONE AND ORDERED this 1st day of August, 2005, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of August, 2005.

ENDNOTES

[1]/ Five of Petitioner's 34 exhibits are numbered 30A-30E. The court reporter retained all of the exhibits for attachment to the Transcript. Petitioner's Exhibit 1 (a computer printout) and Respondent's Exhibits 11B and 12B (audio tapes) were not included with the Transcript. Respondent's Exhibit 13 is not included, but is identical to Petitioner's Exhibit 15.

[2]/ The issue of whether the establishment and modification of a school attendance zone is a local function or a statewide function is a mixed question of fact and law. Legal analysis is discussed in the Conclusions of Law, but a brief summary of the legal framework may elucidate the purpose of relevant findings. The Legislature has the predominant role to provide adequate funding, support, and maintenance of free public schools. Fla. Const., Art. IX, § 1 and 6 (2004). Statewide supervisory authority over public education resides in the Board of Education. Fla. Const., Art. IX, § 2 (2004). Local control over public schools in each school district is constitutionally reserved to each school board, including Respondent. Fla. Const., Art. IX, § 4 (2004). School boards have authority for local control while the Legislature has authority over matters of statewide concern. W.E.R. v. School Board of Polk County, 749 So. 2d 540, 542 (Fla. 2d DCA 2000); United Teachers of Dade FEA/United, AFT, Local 974 v. Dade County School Board, 472 So. 2d 1269, 1270 (Fla. 1st DCA 1985).

[3]/ Cf. Caribbean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission, 838 So. 2d 492, 494 and 504 (Fla. 2003)(holding, inter alia, statute is unconstitutional to the extent that the statute requires agency to comply with Chapter 120 in the exercise of authority over species "of special concern" granted to the agency by the state constitution). See also Dunbar Electric Supply, Inc. v. School Board of Dade County, 690 So. 2d 1339, 1340 (Fla. 3d DCA 1997)(bid protest procedures in Subsection 120.53(5), Florida Statutes (1995), do not apply to school boards, in relevant part, because school boards are constitutional agencies that are not part of the executive branch of government).

[4]/ Judicial decisions distinguish a state agency from a local agency on the basis of either a territorial or functional test. The territorial test determines whether an agency is local based on whether the agency operates outside the limits of one county. The functional test determines whether an agency is a state agency based on whether the agency serves a public purpose and benefits the citizens of Florida in general. Orlando-Orange County Expressway Authority v. Hubbard Construction Co., 682 So. 2d 566 (Fla. 5th DCA 1996); Rubinstein v. Sarasota County Public Hospital Board, 498 So. 2d 1012 (Fla. 2d DCA 1986); Pepin v. Division of Bond Finance, 493 So. 2d 1013 (Fla. 1986); Booker Creek Preservation, Inc. v. Pinellas Planning Council, 433 So. 2d 1306 (Fla. 2d DCA 1983).

[5]/ Caribbean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation, 838 So. 2d 492, 504 (Fla. 2003). See also Dunbar Electric Supply, Inc. v. School Board of Dade County, 690 So. 2d 1339 (Fla. 3d DCA 1997)(school boards are constitutional entities, rather than part of executive branch, and not covered by § 120.53(5), Fla. Stat. (1995), pertaining to resolution of bid protests).

[6]/ Coalition for Adequacy of Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 406 (Fla. 1996); St. Johns County v. Northeast Florida Builders Association, Inc., 583 So. 2d 635, 641 (Fla. 1991); School Board of Escambia County v. State, 353 So. 2d 834, 837 (Fla. 1977).

[7]/ Compare Blackford v. School Board of Orange County, 375 So. 2d 578 (Fla. 5th DCA 1979)(successive non-public meetings between school board members and superintendent required reconsideration of school rezoning in public meetings) with Cortese v. School Board of Palm Beach County, 425 So. 2d 554, 557 and n. 9 (Fla. 4th DCA 1982)(non-public meetings between board members and superintendent are workshops but no such meetings occurred in Cortese).

[8]/ The Staff Proposal and challenged rule transfer approximately 2,315 students from West Orange to the relief school. The transfer reduces projected enrollment at West Orange for the 2005-2006 school year from 4,415 to approximately 2,100 students, or approximately 65.7 percent of capacity. The reduction attributable to transfers to the relief school is offset by the number of students to be reassigned from Olympia. West Orange utilizes portable classrooms to accommodate overcrowding and anticipates significant growth in the West Orange zone in the future. Olympia does not anticipate significant growth in the future.

[9]/ The foregoing finding is adopted from language in Polk v. School Board of Polk County, 373 So. 2d 960, 961 (Fla. 2d DCA 1979) and School Board of Orange County v. Blackford, 369 So. 2d 689, 691 (Fla. 1st DCA 1979).

[10]/ Compare Cortese, 425 So. 2d at 557 (involving a vote of six to one) and Polk v. School Board of Polk County, 373 So. 2d at 962 (involving adoption by unanimous vote).

[11]/ The cited statute is a standard for judicial review but is instructive to agencies to avoid agency action that is subject to remand by a reviewing court.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Amended 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 the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a 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.