

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA EDUCATION ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-0813RU
	)	
FLORIDA STATE BOARD OF	)	
EDUCATION,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

This petition for a determination pursuant to Subsection 120.56(4)(a), Florida Statutes (2004), was assigned to Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings. As more fully explained below, the parties agreed that this case could be decided based upon stipulated facts and written briefs, rather than by convening a formal hearing.

APPEARANCES

For Petitioner:	Mark F. Kelly, Esquire Kelly & McKee, P.A. 1718 East 7th Avenue, Suite 301 Post Office Box 75638 Tampa, Florida 33675-0638
For Respondent:	Michael D. Kooi, Esquire Department of Education 1244 Turlington Building 325 West Gaines Street Tallahassee, Florida 32399-0400

### STATEMENT OF THE ISSUE

Petitioner, Florida Education Association ("FEA"), filed a Petition to Invalidate Administrative Action pursuant to Subsection 120.56(4)(a), Florida Statutes (2004), challenging the validity of a Technical Assistance Paper issued by the Florida State Board of Education, Department of Education, K-12 Student Achievement, Bureau of Student Assistance ("BOE"), alleging that it is an unpromulgated rule. The challenged Technical Assistance Paper dated March 2005, is titled "Modifications to the Consent Decree in the League of United Latin American Citizens et al. v. The State Board of Education, 1990."

### PRELIMINARY STATEMENT

This case was assigned to the undersigned on March 4, 2005. The case was originally set for final hearing on March 25, 2005. A joint request for abeyance was granted on March 25, 2005, to permit the parties to discuss settling the case or at least to enter into a stipulation of facts.

On May 2, 2005, the parties filed conflicting status reports. Petitioner stated that the parties had been unable to stipulate to any facts and requested that the matter be set for hearing. Respondent contended that there were no relevant facts in dispute and that the matter could be more easily decided

through the submission of briefs. The undersigned scheduled the matter for hearing on June 1, 2005.

At a telephonic hearing on May 24, 2005, the parties made an ore tenus motion to cancel the scheduled hearing, stipulate to the relevant facts, and submit briefs on the legal issues in question. The motion was granted, and the parties filed a joint briefing schedule on May 31, 2005.

Pursuant to the schedule, Petitioner filed its Initial Brief on June 20, 2005. Respondent filed its Response Brief on July 12, 2005. Pursuant to an unopposed request for extension of time, Petitioner filed its Reply Brief on July 29, 2005. The following Findings of Fact and Conclusions of Law are based on the parties' written submissions.

#### FINDINGS OF FACT

1. Petitioner, FEA, is an employee association representing over 100,000 Florida educators, including teachers certified to teach English for Speakers of Other Languages (ESOL), for collective bargaining, representation in administrative and legal proceedings, professional development, and political activity. FEA's standing to bring this challenge was stipulated.

2. Respondent, BOE, is an "agency" within the meaning of Subsection 120.52(1)(b), Florida Statutes (2004). BOE is generally responsible for oversight of public education in the

State of Florida and is specifically responsible for administering the legislative plan of professional certification of Florida's public school educators. §§ 1008.32 and 1012.56, Fla. Stat. (2004).

3. The BOE memorandum is challenged as an unpromulgated rule. While other documents containing the same information in different formats were circulated by individual school districts to educators, the parties agree that this Technical Assistance Paper fairly represents the substance of the issues in this dispute. It was stipulated that the Technical Assistance Paper has been made generally available to Florida educators. The content of the Technical Assistance Paper is not in question and is set forth below.

4. In 1990, the League of United Latin American Citizens and 14 other organizations and individuals (collectively referenced here as "LULAC") brought suit in the United States District Court for the Southern District of Florida against the BOE, as it was then constituted, and other state officers, claiming that the Department of Education's ESOL standards violated federal and state law. The federal laws allegedly violated included the Equal Educational Opportunity Act, 20 U.S.C. 1703(f), and Title VII of the Civil Rights Act of 1964. On August 14, 1990, Judge James Lawrence King entered a Consent Order approving a settlement agreement. The Consent

Order provided that the court would retain jurisdiction for the purpose of overseeing the implementation of the settlement agreement.

5. Section IV of the settlement agreement, titled "Personnel," set forth the standards for certification of personnel to teach ESOL students. Two means for obtaining ESOL certification were established. "ESOL Endorsement" is a rider that may be obtained by a teacher already certified in another subject by completing 300 hours or 15 semester hours in ESOL. "ESOL Subject Area Coverage" requires a bachelor's or master's degree in Teaching English for Speakers of Other Languages ("TESOL") and a passing score on the ESOL subject matter examination.

6. To implement Section IV of the settlement agreement, BOE amended its existing ESOL certification rule, Florida Administrative Code Rule 6A-4.0244, and adopted a new rule, Florida Administrative Code Rule 6A-4.0245. The rules provide:

6A-4.0244 Specialization Requirements for  
the Endorsement in English to Speakers of  
Other Languages -- Academic Class.

(1) Plan One.

(a) A bachelor's or higher degree with  
certification in another subject, and

(b) Fifteen (15) semester hours in  
English to speakers of other languages  
(ESOL) to include credit in each of the  
areas specified below:

1. Methods of teaching English to speakers of other languages (ESOL),
2. ESOL curriculum and materials development,
3. Cross-cultural communication and understanding,
4. Applied linguistics, and
5. Testing and evaluation of ESOL.

(2) Plan Two.

(a) The endorsement in English to speakers of other languages will be added to a valid temporary or professional certificate when an individual completes the following:

1. Holds a valid Florida educator's certificate with a coverage specified as appropriate in the 1989-90 Course Code Directory as adopted by reference in Rule 6A-1.09441, F.A.C., for teaching English to limited English proficient students.
2. Documents at least two (2) years of successful teaching of English to limited English proficient students using ESOL strategies. The successful teaching shall have been gained prior to July 1, 1990, and verified in writing by a Florida district school superintendent.

(b) The endorsement will be retained on the professional certificate when an individual completes three (3) semester hours of college credit or sixty (60) inservice points which are part of a district master plan for inservice education. The college credit or inservice points shall be completed for the first certificate renewal after July 1, 1990, and must be completed from the area(s) specified below.

1. Methods of teaching English to speakers of other languages (ESOL),
2. ESOL curriculum and materials development,
3. Cross-cultural communication and understanding,
4. Applied linguistics, and
5. Testing and evaluation of ESOL.

In the event the college credit or inservice points are not completed during the first renewal period, the endorsement will be deleted from the certificate.

6A-4.0245 Specialization Requirements for Certification in English for Speakers of Other Languages (Grades K-12)--Academic Class.

A bachelor's or higher degree with an undergraduate or graduate major in English to speakers of Other Languages shall satisfy the specialization requirements for certification in English to speakers of Other Languages (Grades K-12).

7. In 2002, the Florida Legislature enacted the "Florida K-20 Education Code," which included Section 1012.56, Florida Statutes (2004), setting forth revised educator certification requirements. See Chap. 2002-387, Laws of Florida, § 728.

Among those requirements were the following:

(4) MASTERY OF SUBJECT AREA KNOWLEDGE.-- Acceptable means of demonstrating mastery of subject area knowledge are:

(a) Achievement of passing scores on subject area examinations required by state board rule;

(b) Completion of the subject area specialization requirements specified in state board rule and verification of the attainment of the essential subject matter competencies by the district school superintendent of the employing school district or chief administrative officer of the employing state-supported or private school for a subject area for which a subject area examination has not been developed and required by state board rule;

(c) Completion of the subject area specialization requirements specified in state board rule for a subject coverage requiring a master's or higher degree and achievement of a passing score on the subject area examination specified in state board rule;

(d) A valid professional standard teaching certificate issued by another state; or

(e) A valid certificate issued by the National Board for Professional Teaching Standards or a national educator credentialing board approved by the State Board of Education.

\* \* \*

(12) STATE BOARD RULES.--The State Board of Education shall adopt rules pursuant to ss. 120.536 and 120.54, as necessary to implement this section.

(13) PRIOR APPLICATION.--Persons who apply for certification are governed by the law and rules in effect at the time of application for issuance of the initial certificate, provided that continuity of certificates is maintained.

8. BOE did not amend Florida Administrative Code Rules 6A-4.0244 and 6A-4.0245 to reflect the new statute's provisions.



9. In January 2003, the LULAC plaintiffs filed a motion for a temporary restraining order and order to show cause for a preliminary injunction. The plaintiffs alleged that pursuant to Subsection 1012.56(4)(a), Florida Statutes (2004), the Department of Education intended to permit teachers to become certified to teach basic ESOL courses based solely on an examination, without completion of the coursework required by the settlement agreement and, therefore, in violation of the August 14, 1990, Consent Order.

10. On September 2, 2003, the parties executed a "Stipulation Modifying Consent Decree," which provided, in relevant part:

On August 14, 1990, this lawsuit was settled and a Settlement Agreement was approved as an order of the Court. On January 17, 2003, Plaintiffs' [sic] moved to enforce the terms of the Consent Decree and on February 28, 2003, the Court ordered the parties to commence mediation immediately.

On April 25, 2003, the parties participated in mediation before former United States District Judge Edward B. David, in Miami, Florida. This is the first modification that the parties have sought of the original Consent Decree. The parties agree to modify the Consent Decree with respect to § IV (Personnel), as set forth herein.

1. Nothing herein is intended to diminish any option for endorsement or coverage set forth in the August 14, 1990, Decree. Rather, this stipulation sets forth an additional means by which a certified teacher may obtain ESOL subject area

coverage. It also establishes training and/or educational requirement [sic] for persons holding administrative and guidance counselor positions. All other requirements of § IV that are not inconsistent with this modification continue.

2. A certified teacher may obtain ESOL subject area coverage by virtue of passing a state approved ESOL certification examination. Any teacher who receives coverage in ESOL through this option shall be required to obtain 120 hours of in-service training or continuing education in ESOL-approved courses within a three (3) year period of the date of their receipt of ESOL certification. This requirement includes those who have already been certified under the proficiency test method. Any ESOL-approved in-service hours and course work taken prior to gaining ESOL certification may be counted toward the required 120 post-certification hours.

3. Defendants shall require that school administrators and guidance counselors be required to obtain sixty (60) [hours of] in-service training or continuing education in ESOL-approved courses within a three (3) year period of the effective date of this Stipulation. Any school administrators and guidance counselors hired after the effective date of this Stipulation shall have three (3) years from the date of being hired to meet this requirement. Any ESOL-approved in-service hours and course work taken prior to the effective date of this Stipulation or prior to hiring may be counted toward the required sixty (60) post-certification hours.

4. The Department shall inform all districts of this modification within thirty days of court approval. It shall further require all districts to develop reasonable procedures to assure that all affected personnel are making regular progress in

meeting its terms, which shall be reviewed in monitoring visits. No ESOL certificate shall be renewed for any teacher that obtained ESOL subject area coverage through the option described in ¶ 2 who has not completed the requisite training within three (3) years.

\* \* \*

8. This Stipulation shall become an addendum to § IV of the Consent Decree, and shall have the full force of the Consent Decree after approval by the Court. To the extent that anything herein is incompatible with the Decree, this Stipulation shall govern.

\* \* \*

11. The Defendants agree to commence rulemaking if necessary to effectuate the terms of the Stipulation within ninety (90) days of Court approval.

11. As the quoted text makes apparent, the stipulation appends a 120-hour in-service training or continuing examination requirement to the examination-only certification scheme authorized by Subsection 1012.56(4)(a), Florida Statutes (2004). Additionally, the stipulation appears to contradict the "grandfathering" provision of Subsection 1012.56(13), Florida Statutes (2004), by making the continuing education requirement applicable even to those teachers already certified under the examination-only method.

12. On September 9, 2003, United States District Judge Federico A. Moreno of the Southern District of Florida signed an

Order approving the Stipulation Modifying Consent Decree. The court again retained jurisdiction of the case to oversee the implementation of the Stipulation Modifying Consent Decree.

13. Pursuant to paragraph 4 of the Stipulation Modifying Consent Decree, BOE notified school districts of the new requirements for ESOL certification. This notification was accomplished by way of the disputed Technical Assistance Paper, which provides:

MODIFICATIONS TO THE CONSENT DECREE IN THE  
LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET  
AL. V. THE STATE BOARD OF EDUCATION, 1990

BACKGROUND

The Consent Decree in the League of United Latin American Citizens et al. v. the State Board of Education, 1990 (hereafter referred to as The Consent Decree), Section 1003.56, Florida Statutes and Rules 6A-6.0907, 6A-4.0244, 6A-4.0245, F.A.C. specified the English for Speakers of Other Languages (ESOL) training requirements for personnel assigned to teach limited English proficient students. Section IV, Personnel of the Consent Decree required that all administrators and school guidance counselors be trained in the terms of The Consent Decree.

Since 1992, there have been two methods for obtaining certification in ESOL: ESOL Subject Area Coverage and ESOL Endorsement. The ESOL Endorsement (ESOL-E), obtained by completing 300 hours/points (or 15 semester hours) in ESOL, is a rider that is added to certification in another certification subject coverage. The ESOL Subject Area Coverage (K-12 ESOL) requires a bachelor's or master's degree in Teaching English for

Speakers of Other Languages (TESOL) and a passing score on the ESOL Subject Area Test. In July 2002, as a result of legislative action and changes in State Board of Education Rule, alternative methods for obtaining certification were approved. Such methods include the option of adding a certificate coverage area by obtaining a passing score on a subject area test. This change meant that a teacher wishing to add ESOL Subject Area Coverage could take the ESOL Subject Area test and if he/she obtained a passing score, could apply for the subject area coverage in ESOL. This alternative method of obtaining certification applies to any subject area for which the Department administers a subject area test and that does not require a graduate degree.

In the fall of 2002, based on a complaint filed by a group of university professors and other District ESOL Coordinators, the attorneys for the plaintiffs filed an injunction alleging the option of adding the ESOL Subject Area Coverage, by a passing score on the ESOL Subject Area Test, did not meet the goals established by the Consent Decree for teacher training. The Modification to the Consent Decree in the League of United Latin American Citizens et al. v. the State Board of Education, et al., 1990 is the result of the court-ordered mediation. The Stipulation Modifying the Consent Decree (hereinafter referred to as the "Modification") was signed by Judge Moreno, U.S. District Court, Southern Division on September 9, 2003.

#### EFFECTS OF THE MODIFICATION AND IMPLEMENTATION TIMELINES

Requirements for Language Arts/English  
Teachers:

- Teachers assigned the primary responsibility for delivering language

arts/English instruction to students classified as limited English proficient (LEP), who elected to obtain the requisite ESOL certification by way of a passing score on the ESOL Subject Area test, thereby meeting the requirements for subject area coverage (K-12 ESOL), are required to obtain 120 hours/points or equivalent courses in ESOL in any approved ESOL course or in-service<sup>[1/]</sup> component.

- Teachers in this category must obtain the 120 hours or equivalent courses within three (3) years of the signing of the Modification or 3 years from the date of their receipt of ESOL certification.

Requirements for School Administrators:

- The Consent Decree originally required all administrators to obtain training in ESOL on the terms of the Consent Decree; however, no specific number of in-service points/hours was stipulated.
- The Modification requires all school administrators to obtain 60 in-service points/hours in ESOL in any approved ESOL course or in-service component.
- School administrators hired prior to the effective date of the Modification (September 9, 2003) must complete the required 60 in-service points within three (3) years.
- School administrators hired after the effective date of the Modification (September 9, 2003) must complete the required 60 in-service points within three (3) years of their hiring date or assignment as a school administrator.
- Any ESOL-approved in-service hours and course work taken prior to the effective date of the Modification or prior to

being hired as a school administrator may be counted toward the required 60 in-service points.

Requirements for School Guidance Counselors:

- As was the case with the requirements for administrators, the Consent Decree required guidance counselors to obtain training in ESOL; however, no specific number of in-service points/hours was stipulated.
- The Modification requires all school guidance counselors to obtain 60 in-service points/hours in ESOL in any approved ESOL course or in-service component.
- Guidance counselors hired prior to the effective date of the Modification (September 9, 2003) must complete the required 60 in-service points within three (3) years.
- Guidance counselors hired after the effective date of the Modification (September 9, 2003) must complete the required 60 in-service points within three (3) years of their hiring date or assignment as a guidance counselor.
- Any ESOL-approved in-service hours and course work taken prior to the effective date of this Modification or prior to being hired as a school guidance counselor may be counted toward the required 60 in-service points.

The attached chart on The Requirements and Timelines for Completion of the ESOL Training Requirements [May be accessed by visiting the following website <http://www.firn.edu/doe/omsle/timeline.html>] describes the requirements and provides the deadlines for each category of instructional personnel.<sup>[2/]</sup>

It is important to note that 120 hours/points or 6 semester hours are required in order to retain the ESOL coverage on a Professional Certificate at the first certificate renewal subsequent to the three-year time frame for completion of the 120 hours or equivalent ESOL courses. The ESOL coverage shall not be added back to the Professional Certificate until the 120 points/courses are completed. Currently, Florida teaching certificates are issued for 5 years. ESOL training is considered as "in-field, in any field" and as such may be used to meet the certificate renewal requirement for any certification coverage. In-service points/hours in ESOL may be "banked" for subsequent certificate validity periods. [See Rule 6A-4.0051, which may be viewed at the following website: <http://www.firn.edu/doe/rules/final4.pdf>]

Other requirements:

Experts designated by the plaintiffs were provided secured access to the ESOL Subject Area Test and the opportunity to provide input to the Department of Education on recommended changes to the test, item specifications, and the skills and competencies to be tested.

In addition, the Department of Education agreed to perform a substantial review of the existing ESOL Subject Area Test and item specifications beginning with the 2004 school year and to be completed no later than July 1, 2006.

#### QUESTIONS AND ANSWERS

Question #1:

To whom do the requirements to obtain the additional 120 points/hours in ESOL apply?

Answer: As stipulated in the Modification, any primary language arts teacher of LEP students who obtained ESOL certification



solely by passing the K-12 ESOL Subject Area test is required to obtain the 120 points/hours in ESOL.

Question #2:

By when must a primary language arts teacher who has been granted ESOL Subject Area Coverage (K-12 ESOL) certification by obtaining a passing score on the subject area test obtain the required ESOL in-service training points/hours?

Answer: Three years from the effective date of the Modification (September 9, 2003) or the date of the teachers' receipt of ESOL Subject Area Certification, whichever occurs later.

Question #3:

After three years, what must be done in order to retain the K-12 ESOL Subject Area Certification on a Professional Certificate?

Answer: Documentation must be compiled to verify the completion of the required 120 points/hours of ESOL in-service training in order for the ESOL K-12 certification to be retained on the Professional Certificate when the certificate is renewed for the first time after the three-year time frame for the completion of the 120 points/hours in ESOL.

Question #4:

What courses satisfy the 120 points/hours required in ESOL?

Answer: Any courses listed in the District's approved ESOL Add-On Endorsement Plan and/or approved ESOL courses included in the District's Master In-service Plan.

Question #5:

May ESOL points/hours previously earned (prior to September 9, 2003) be used to satisfy this new requirement?

Answer: Yes, Modification states that any approved ESOL course taken prior to the settlement may be counted towards the 120 in-service points.

Question #6:

May teachers still obtain the required ESOL certification by completing the 300-hour ESOL Endorsement?

Answer: Yes. There are three methods for obtaining the appropriate ESOL certification: (1) completion of 300-hour ESOL Endorsement requirements; (2) a passing score on the K-12 ESOL Subject Area Test, plus 120 points/hours in approved ESOL courses within three years of adding the ESOL certification; or (3) a Bachelor's or Master's Degree in Teaching English for Speakers of Other Languages, plus a passing score on the K-12 ESOL Subject Area Test.

Question #7:

For a teacher who passes the test, completes the 120 hours, and then is up for renewal will the teacher renew the certification with ESOL or generic points?

Answer: The 120 ESOL in-service points/hours could be "banked" if the teacher already has the required in-service points to renew his/her certificate; or the ESOL in-service points may be used to renew the certificate. If the teacher used the 120 points/hours to renew the prior certificate; then the points may not be used again for renewal.

Question #8:

For teachers who have previously banked ESOL points/hours, may those points/hours be used to meet the new 120 points/hour requirement for those who have just passed the ESOL Subject Area test?

Answer: Yes, the Modification states that ESOL in-service points/hours taken prior to September 9, 2003 may be used toward meeting

the new requirement. There is no prohibition from using ESOL in-service points, which have been banked. In addition, the "banked" ESOL in-service points/hours may be used towards the renewal of the subsequent certificate.

Question #9:

If a teacher passed the ESOL Subject Area test in 2003 and is due to recertify in 2004 or 2005, will they have to get the 120 hours in ESOL before recertifying?

Answer: No, not in this example, the Modification requires 120 in-service/points or courses within three years, whether or not the three years coincide with the teacher's certificate renewal period.

Question #10:

Can the 300-hour ESOL Endorsement or the 120 hours/points in ESOL satisfy the requirements for renewal of other certification subject coverages, as well as ESOL certification?

Answer: ESOL in-service points/hours or the equivalent college credit may be used to renew any certification coverage due to the fact that ESOL courses or in-service points/hours count as "in-field, in any field."

Question #11:

If a teacher does not take the 120 hours within the 3 years, but his/her certificate is valid for 5 years, will he/she still be certified for the 5 years and just not eligible to retain ESOL on his/her certificate when the certificate is renewed?

Answer: Yes, the Modification prohibits the renewing of a teacher's certificate in ESOL if the teacher of primary language arts of LEP students does not complete the required ESOL training within the three years.

Question #12:

For teachers who have taken (and passed) the certification test and received a stipend from the school district, will these teachers still be eligible for a stipend for the additional 120 hours in ESOL? Do teachers have to pay the certification fee to add the K-12 ESOL Subject Area coverage?

Answer: The payment of stipends to teachers for completion of required in-service points/hours is a local decision, based on the District's bargaining agreement. Yes, the certification fee and application are required to add the ESOL coverage.

Question #13:

Is there a "Grandfathering Clause" to benefit those teachers who took the initiative to get certified and obtained K-12 ESOL Subject Area coverage prior to September 9, 2003?

Answer: There are no "grandfathering" provisions in the 2003 Modification to the Consent Decree.

Question #14:

Do the new requirements apply to teachers, administrators, and guidance counselors in charter schools?

Answer: Yes, the new requirements as stipulated in the Modification apply to teachers, administrators, and guidance counselors in charter schools. These requirements apply to all teachers who currently hold a valid Florida Teaching Certificate and are assigned to teach primary language arts instruction to students classified as limited English proficient. Any administrator or guidance counselor in a charter school, who already has a valid certificate, must also complete the 60 points/hours in ESOL as required by the Modification.

Question #15:

What is the definition of "school administrator"? To whom does this requirement apply?

Answer: Any employee who has been hired by the school district or charter school as an administrator. That is, any employee whose job classification requires certification in an administrative class certificate, such as the principal and the assistant principal.

14. Appended to the conclusion of the Technical Assistance Paper was the following descriptive statement:

TECHNICAL ASSISTANCE (TA) PAPERS are produced periodically by the Bureau of Student Assistance to present discussion of current topics. The TA Papers may be used for in-service sessions, technical assistance visits, parent organization meetings, or interdisciplinary discussion groups. Topics are identified by state steering committees, district personnel, and individuals, program staff or program compliance monitoring.

15. BOE has specific rulemaking authority over educator certification pursuant to Subsection 1012.56(12), Florida Statutes (2004), and has specific rulemaking authority over certification renewal pursuant to the provisions of Section 1012.585, Florida Statutes (2004).

16. Subsection 120.52(15), Florida Statutes (2004), defines "rule" to mean, in relevant part:

[E]ach 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.

17. FEA contends that the Technical Assistance Paper is a "rule" within the meaning of Subsection 120.52(15), Florida Statutes (2004), because it purports to prescribe new, statewide standards and criteria for maintaining ESOL certification, which affects the professional standing and employment opportunities of FEA's members. FEA contends that, despite its meeting the definition of a rule, the Technical Assistance Paper was not promulgated in accordance with Subsection 120.54(1), Florida Statutes (2004). Further, FEA contends that, insofar as the Technical Assistance Paper purports to prescribe certification criteria at variance with those set forth in Section 1012.56, Florida Statutes (2004), it is an invalid exercise of delegated legislative authority and violates Subsection 120.56(1), Florida Statutes (2004).

18. FEA argues that the challenged Technical Assistance Paper clearly meets the quoted definition: it implements and prescribes law or policy, and it imposes requirements not specifically required by statute or by any existing rule. FEA accurately cites established case law holding that an agency statement or policy is a rule "if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of

law." Jenkins v. State, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003); Department of Revenue v. Vanjara Enterprises, Inc., 675 So. 2d 252, 254-255 (Fla. 5th DCA 1996). FEA concludes that the Technical Assistance Paper affects the substantial rights of ESOL teachers in Florida, because of its impact upon their ability to maintain their certification.

19. BOE counters that the Technical Assistance Paper does not meet the definition of a "rule" because it is merely an informational document explaining the terms of the new Consent Order provisions. The Technical Assistance Paper does not "implement, interpret or prescribe" law or policy and, of itself, compels no compliance. It merely describes the terms of the Stipulation Modifying Consent Decree approved by order of the federal court. The provisions of the Federal Consent Order are enforceable with or without the promulgation of a rule by BOE. Even if the Technical Assistance Paper ceased to exist, the requirements of the Federal Consent Order would be the same.

20. A side-by-side reading of the Stipulation Modifying Consent Decree and the Technical Assistance Paper confirms BOE's contention. While the Technical Assistance Paper provides detailed explanations in a format more likely to be useful to educational professionals than the language of the stipulation, nothing in the Technical Assistance Paper imposes any

requirement not already set forth by the modified Federal Consent Order.

21. FEA raises additional issues relating to the central problem raised by the above findings: BOE has entered into a stipulation leading to a Federal Consent Order that is at variance with the governing Florida Statutes and BOE's own rules. FEA is not a party to the Federal Consent Order, and thus contends that it is not subject to the decree's provisions. FEA argues that because the Consent Order cannot compel compliance by non-parties, the Technical Assistance Paper does prescribe law or policy and does compel compliance at least as to FEA. Further, it compels compliance with terms that are at variance with Section 1012.56, Florida Statutes (2004), and BOE's own rules.

22. BOE correctly notes that accepting FEA's arguments would require entry of a final order that, in effect, if not by its literal terms, limits the scope of or entirely negates the Federal Consent Order. Thus, the issues raised by FEA are beyond the scope of this proceeding and the jurisdiction of this tribunal. "A state administrative hearing is not the proper forum in which to enforce a consent order entered by a federal court. The proper forum for a determination of whether a federal consent order has been violated is the federal courts."



Miccosukee Tribe of Indians v. South Florida Water Management District, Case No. 96-3151 (DOAH November 19, 1996).

23. Conversely, a state administrative hearing is not the proper forum in which to challenge the scope and effect of a Federal Consent Order. FEA raises significant issues concerning the authority of BOE to settle a lawsuit in such a way as to achieve results that are apparently beyond the scope of BOE's delegated powers, and the effect of the Federal Consent Order on strangers to the lawsuit. However, an administrative action pursuant to Subsection 120.56(4)(a), Florida Statutes (2004), contesting the validity of a Technical Assistance Paper that merely explains the terms of the Federal Consent Order, does not provide the vehicle for resolution of these issues.

#### CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56(4), Fla. Stat. (2004).

25. Petitioner has the burden of proof in a rule challenge hearing under Subsection 120.56(4), Florida Statutes (2004), to establish that the challenged statement has the effect of a rule.

26. To reiterate, the term "rule" is defined in Subsection 120.52(15), Florida Statutes (2004) as:

[E]ach 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.

27. Subsection 120.56(4), Florida Statutes (2004), 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.

28. The Technical Assistance Paper in question does not impose any additional requirement or solicit information not already required by the Federal Consent Order.

29. Therefore, the Technical Assistance Paper is not a "rule" as defined by Subsection 120.52(15), Florida Statutes (2004). It is not self-executing. It does not create or adversely affect rights, and it does not have the direct and consistent effect of law. Florida Education Association v. Department of Education, Case No. 01-1724RU (DOAH July 25, 2001); Florida Public Employees Council 79, AFSCME v. Department of Labor, Case No. 98-4706RU (DOAH February 23, 1999); Lawrence v. Department of Health and Rehabilitative Services, Case

No. 95-5585RU (DOAH April 4, 1997), aff'd, 690 So. 2d 594 (Fla. 1st DCA 1997).

30. The Federal Consent Order and, therefore, the Technical Assistance Paper that explains the terms of the Federal Consent Order, establishes criteria for ESOL certification that vary from the terms of Subsection 1012.56(4), Florida Statutes (2004). A state administrative hearing is not the proper forum to challenge a Federal Consent Order.

ORDER

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

ORDERED that FEA has not established that BOE's Technical Assistance Paper is a rule within the meaning of Subsection 120.52(15), Florida Statutes (2004). Petitioner's challenge is hereby dismissed.

DONE AND ORDERED this 15th day of September, 2005, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of September, 2005.

ENDNOTES

<sup>1/</sup> As originally written, the Technical Assistance Paper arbitrarily alternates the term "in-service" with the term "inservice." For the sake of consistent usage, the term has been corrected to read "in-service" throughout the document.

<sup>2/</sup> The referenced timeline chart is simply a graphic representation of the information provided in the text of the Technical Assistance Paper and is not reproduced here.

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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 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.